(Rev. 2/21/14)

Agenda E-19 (Summary)
Rules
March 2014

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 Bankruptcy Rule 1007(a)(1) and (2), 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. 5-6

2. Approve the proposed amendments to Criminal Rule 12, 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 . . . . . Addendum pp. 1-3

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

Agenda E-19
Rules
March 2014

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 met on January 9-10, 2014. All members attended except Deputy Attorney General James M. Cole and Judge Richard C. Wesley.

Representing the advisory rules committees were Judge Steven M. Colloton, Chair, and Professor Catherine T. Struve (by telephone), Reporter, of the Advisory Committee on Appellate Rules; Judge Eugene R. Wedoff, Chair, Professor S. Elizabeth Gibson (by telephone), Reporter, and Professor Troy A. McKenzie, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge David G. Campbell, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Reena Raggi, Chair, and Professor Sara Sun Beale (by telephone), Reporter, and Professor Nancy J. King (by telephone), Associate Reporter, of the Advisory Committee on Criminal Rules; Judge Sidney A. Fitzwater, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Daniel R. Coquillette, the Committee's Reporter; Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the Committee; Jonathan C. Rose, the Committee's Secretary and Chief of the Administrative

Office's Rules Committee Support Staff; Benjamin J. Robinson, Counsel and Deputy Chief of the Rules Committee Support Staff; Julie Wilson, Attorney on the Rules Committee Support Staff; Andrea L. Kuperman, Chief Counsel to the Rules Committees; Judge Jeremy D. Fogel, Director of the Federal Judicial Center; and George Everly, Supreme Court Fellow. Elizabeth J. Shapiro attended on behalf of the Department of Justice.

In addition, the Committee held a panel discussion on the political and professional context of rulemaking with the following panelists: Professor Daniel R. Coquillette; Judge Marilyn L. Huff, U.S. District Court for the Southern District of California; Peter G. McCabe, Esq.; Judge Lee H. Rosenthal, U.S. District Court for the Southern District of Texas; Judge Anthony J. Scirica, United States Court of Appeals for the Third Circuit; and Chief Judge Diane P. Wood, United States Court of Appeals for the Seventh Circuit.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no items for the Committee's action.

Informational Items

The advisory committee canceled its Fall 2013 meeting due to the lapse in appropriations in October 2013. Its next meeting is scheduled for April 28-29, 2014.

Currently, the advisory committee is involved with two projects that address possible amendments to Appellate Rule 4's treatment of the deadlines for filing notices of appeal. First, a circuit split has developed as to whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" filed under Appellate Rule 4(a)(4).

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007),[1] holds that statutory appeal deadlines are jurisdictional, but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." The statutory provision setting the deadlines for civil appeals — 28 U.S.C. § 2107 — does not mention such tolling motions.

A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. Under this interpretation, where a district court purports to extend the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. The question that arises is whether the motion counts as a "timely" one that, under Appellate Rule 4(a)(4), tolls the time to appeal. The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time, and pre-*Bowles* caselaw from the Second Circuit accords with this position. However, the Sixth Circuit has held to the contrary.

There is consensus within the advisory committee that the meaning of "timely" should be clarified. This provision tolls a jurisdictional appeal period, and its meaning should be clear and uniform across the circuits. In its consideration of the issue, the advisory committee is weighing whether to implement the majority approach or the minority approach.

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[1]In *Bowles*, the district court, pursuant to its authority under Appellate Rule 4(a)(6) and 28 U.S.C. § 2107(c), extended the 30-day time period for filing a civil notice of appeal. Instead of the 14-day extension permitted by Rule 4(a)(6) and § 2107(c), however, the court extended the time period by 17 days. 551 U.S. at 207. The Supreme Court held that the court of appeals lacked jurisdiction to entertain the appeal because it was filed outside the 14-day window allowed by statute. *Id.* at 213. The Court based its holding on the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 210.

The second Rule 4 project concerns the inmate-filing provision for notices of appeal in subdivision (c)(1). The study of the inmate-filing rule was initiated by a suggestion that the advisory committee consider clarifying whether the rule requires prepayment of postage, and has evolved into consideration of several amendments to the rule, including whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule. The advisory committee also has discussed the possibility of promulgating an official form that would walk an inmate through statements that would suffice to establish eligibility for the inmate-filing rule, as well as whether to amend the rule to make clear that the declaration mentioned in the rule suffices to show timely filing but is not required if timeliness can be shown by other evidence. In sum, the advisory committee continues to consider the issue and will continue its discussion at its Spring 2014 meeting.

The advisory committee is also working on projects concerning requirements for filings in the courts of appeals. First, the advisory committee is considering whether to address in a new rule amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. Matters that could be addressed by a proposed rule include length, timing, and other topics that Rule 29 addresses with respect to amicus filings at the merits-briefing stage. The advisory committee is considering several options, but first and foremost, it must consider the principal policy question of whether the federal rules should address this matter at all.

Second, as previously reported, the advisory committee is reviewing the treatment of length limits in the Appellate Rules. Currently, the Appellate Rules set length limits for briefs using a type-volume formula plus a safe harbor in the form of a shorter page limit. At the same

time, the length limits for rehearing petitions and some other papers are set in pages. Members have reported that these page limits invite manipulation of fonts and margins, and that such manipulation wastes time, disadvantages opponents, and makes filings harder to read.

The advisory committee is considering two options. One would replace the page limits with a type-volume-plus-safe-harbor provision modeled on the rules' length limits for briefs. The other option would retain the current page limits for papers prepared without the aid of a computer, but would set roughly equivalent type-volume limits for papers prepared on computers. The advisory committee's research on this issue has at the same time revealed evidence suggesting that the 1998 amendments to Rule 32(a)(7), adopting a type-volume limitation of 14,000 words for a principal brief to replace the former 50-page limit, caused an increase in the permitted length of a brief. Therefore, the advisory committee may also consider whether the word count should also be adjusted as part of the length-limit project.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rule 1007(a)(1) and (2), with a recommendation that they be approved and transmitted to the Judicial Conference. Because the amendments are technical and conforming in nature, prior publication for public comment is unnecessary.

Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F,

G, and H — reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. In order to make Rule 1007(a) consistent with the new form designations, the advisory committee voted unanimously at its Fall 2013 meeting to propose a conforming amendment to subdivisions (a)(1) and (a)(2) of that rule. The conforming amendments change references to Schedules E and F to Schedule E/F.

The schedules and other individual forms published in 2013 (other than the means-test forms) are proposed to take effect on December 1, 2015 — a year later than normal — in order to coincide with the effective date of the restyled non-individual forms. Given that the amendments to Rule 1007(a)(1) and (a)(2) are conforming in nature, the advisory committee recommended that the Committee approve the amendments without publication, thereby enabling them to go into effect at the same time as the forms.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendments to Bankruptcy Rule 1007(a)(1) and (2), 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.

The proposed amendments to the Federal Rules of Bankruptcy Procedure are set forth in Appendix A, with an excerpt from the advisory committee report.

Informational Items

On August 15, 2013, proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5005, 5009, 7001, 9006, 9009, and Official Forms 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 101, 101A, 101B, 104, 105, 106 Summary, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 113, 119, 121, 318, 423, and 427 were published for public comment.

The proposed amendments include a draft national chapter 13 plan form. As previously reported, a working group created by the advisory committee worked on this project for more than 2 years. The twin goals of the project have been to bring more uniformity to chapter 13 practice and to simplify the review of chapter 13 plans by debtors, courts, trustees, and creditors. The proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, as well as proposed Official Form 113, the national chapter 13 plan form, require use of the plan form and establish the authority needed to implement some of the form's provisions.

As anticipated, the proposed form and rule amendments have drawn a significant number of comments, including an omnibus submission from the National Association of Chapter Thirteen Trustees that combines comments from individual chapter 13 trustees around the country. The great majority of comments relate to the proposed official form rather than the rule amendments. In the main, the comments submitted thus far are detailed and constructive, and only a small number oppose adoption of the form or amended rules. The working group will consider all of the suggestions set out in the comments and will make recommendations for any changes in the form and rules at the advisory committee's Spring 2014 meeting. At that time, the advisory committee will determine the extent to which it will recommend final approval of the form and rules or propose changes that would require republication.

Also of note is the proposed amendment to Rule 5005(a), which governs the filing and transmittal of papers. The amendment would permit the use of electronic signatures of debtors and other individuals who are not registered users of CM/ECF without requiring the retention of the original document bearing a handwritten signature. This national rule would supersede the current array of local rules, many of which require the registered user (usually an attorney) who is filing documents electronically to preserve the originals of all filed documents bearing the

signature of a debtor or other non-registered user for a specified period of time. Under the proposed amendment to Rule 5005, new subdivision (a)(3) would allow scanned signatures of non-registered users to be treated the same as handwritten signatures — without requiring the retention of the hand-signed documents — if the scanned signature page bearing the individual's original signature is part of a single filing.

On the recommendation of a CM/ECF subcommittee comprised of representatives from all of the rules committees to coordinate the work of the advisory committees as they address issues presented by changing technology (inter-committee CM/ECF subcomittee), the advisory committee voted to include within the published amendments alternative means of providing assurance that a scanned signature was actually part of the original document filed electronically. Under one option, the act of filing by a registered person would be deemed the person's certification that the scanned signature was part of the original document. The other option would require a certification by a notary public. The publication materials called attention to these options and specifically invited comment on them.

Finally, as previously reported, the forms modernization project, a multi-year endeavor of the advisory committee, has been working in conjunction with the Federal Judicial Center and the Administrative Office, to revise many of the official bankruptcy forms. The dual goals of the forms modernization project are to improve the official bankruptcy forms and to improve the interface between the forms and available technology. The advisory committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. A small number of the modernized forms became effective on December 1, 2013; others will become effective December 1, 2014; and the majority of the forms are expected to become effective on December 1, 2015.

At its Fall 2013 meeting, the advisory committee reviewed drafts of the revised forms for non-individual debtors, and the forms modernization project continues to revise the forms in response to comments and feedback provided by members of the advisory committee. It is anticipated that the advisory committee will vote to recommend the non-individual forms for publication at its upcoming Spring 2014 meeting and present them to the Committee in May 2014.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Civil Rules 6(d) and 82, with a request that they be published for comment at a suitable time. The Committee approved the advisory committee's recommendation.

Rule 6(d)

Rule 6(d) adds 3 days to the time allowed to respond after service by, among other things, "electronic means" under Rule 5(b)(2)(E). The Appellate, Bankruptcy, and Criminal Rules contain parallel provisions. The inter-committee CM/ECF subcommittee has determined that the 3-days provision should be eliminated for electronic service. The proposed amendment to Rule 6(d) does just that and the proposed committee note provides an in-depth explanation of the reasons for deleting the 3 added days.

The Committee tentatively approved the proposed amendment for publication with the understanding that the advisory committee may make slight changes to the committee note and add questions for public comment on eliminating the 3-day rule altogether or limiting it to service by mail. The Committee hopes that the proposal will be published in August 2014.

Rule 82

Civil Rule 82 addresses venue for admiralty and maritime claims. By way of background, it has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty or maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case could be brought either in the admiralty or maritime jurisdiction or as an action at law under the "saving to suitors" clause, 28 U.S.C. § 1333(1). Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not seem to modify the venue rules for admiralty or maritime actions. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

The proposed amendment to Rule 82 arises from legislation that added a new § 1390 to the venue statutes in Title 28 and repealed former § 1392 (local actions). The reference to § 1392 must therefore be deleted. The proposed amendment adds a reference to new § 1390 in order to carry forward the purpose of integrating Rule 9(h) with the venue statutes through Rule 82.

Informational Items

On August 15, 2013, proposed amendments to Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, 37, 84, and the Appendix of Forms were published for public comment. As expected, the proposed amendments have generated significant response. To date, the advisory committee has received over 400 comments, and has held 3 public hearings. The public hearings, which were

held in Washington, D.C., Phoenix, Arizona, and Dallas, Texas, were well attended by the public and the bar, and the advisory committee heard testimony from more than 120 witnesses.

As previously reported, the proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37 are aimed at reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding." The proposed amendments are grouped into three sets. The first set seeks to improve early and effective judicial case management. The second seeks to enhance the means of keeping discovery proportional to the action. The third set encourages cooperation.

The proposed new Rule 37(e) concerns the failure to preserve discoverable information. The objective of the proposal is to address the overbroad preservation many litigants and potential litigants feel they have to undertake to ensure they will not later face sanctions. The proposal introduces uniformity among the federal courts and focuses on sanctions rather than attempting to directly regulate the details of preservation.

Also published for public comment are proposed amendments that would abrogate Rule 84 and the Official Forms, and amend Rule 4(d)(1)(D) to append present Forms 5 and 6. As previously reported, the proposed amendments follow months of gathering information about how often forms are used and whether they provide meaningful help to litigants. After carefully studying the issue, the advisory committee determined that abrogation was the best course. Two forms required special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver of service of summons is not required, but is closely tied to Form 5. Accordingly, the advisory committee determined that Forms 5 and 6 should be preserved by amending Rule 4(d)(1)(D) to attach them to Rule 4.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no items for the Committee's action. The advisory committee canceled its Fall 2013 meeting due to the lapse in appropriations in October 2013. Its next meeting is scheduled for April 7-8, 2014.

Informational Items

The advisory committee continues to discuss a proposal submitted by the Department of Justice to amend Rule 4 to permit effective service of a summons on a foreign organization that has no agent or principal place of business within the United States. The Department recommends that Rule 4 be amended to (1) remove the requirement that a copy of the summons be sent to the organization's last known mailing address within the district or principal place of business within the United States, and (2) provide the means to serve a summons upon an organization located outside the United States. A subcommittee met by teleconference throughout the summer and early fall, and it approved a proposed amendment for discussion at the advisory committee's Fall 2013 meeting. Because of the cancellation of that meeting, discussion of the proposed amendment has been deferred to the advisory committee's upcoming Spring 2014 meeting.

The Department of Justice has submitted a proposal to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information. The proposed amendment is intended to address two increasingly common situations (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts. The purpose of the proposed amendment is to enable law enforcement officials to investigate and prosecute

botnets and crimes involving internet anonymizing technologies. Rule 41(b) does not directly address the circumstances that arise when officers seek to execute search warrants, via remote access, over modern communications networks such as the internet.

The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant to be executed by remote access for electronic storage media and electronically stored information, whether located within or outside the district. At present, Rule 41(b) authorizes search warrants for property located outside the judge's district in only four situations: (1) for property in the district that might be removed before execution of the warrant; (2) for tracking devices installed in the district, which may be monitored outside the district; (3) for investigations of domestic or international terrorism; and (4) for property located in a U.S. territory or a U.S. diplomatic or consular mission. The proposed amendment would add an additional exception to the territorial limitations for electronic storage media and electronically stored information. This proposal has been referred to a subcommittee, which has met once by teleconference and is expected to report at the advisory committee's Spring 2014 meeting.

The advisory committee is also considering several issues arising out of the work of the inter-committee CM/ECF subcommittee. For example, Criminal Rule 45(c) and Civil Rule 6(d) contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). As stated above, the inter-committee CM/ECF subcommittee has concluded that it is no longer necessary or desirable to provide additional time when service has been made by electronic means. With the Committee's approval of publication of the proposed amendment to Civil Rule 6(d), the advisory committee will move forward with a parallel amendment to Criminal Rule 45(c).

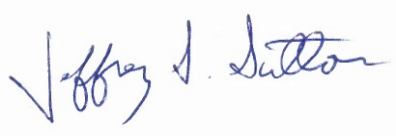
FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no items for the Committee's action. The advisory committee canceled its Fall 2013 meeting and symposium due to the lapse in appropriations in October 2013. Its next meeting is scheduled for April 4, 2014.

Informational Items

In conjunction with its Spring 2014 meeting, the advisory committee will host a symposium to consider the intersection of the Evidence Rules and emerging technologies.

Respectfully submitted,



Jeffrey S. Sutton, Chair

James M. Cole	David F. Levi
Dean C. Colson	Patrick J. Schiltz
Roy T. Englert, Jr.	Amy J. St. Eve
Gregory G. Garre	Larry D. Thompson
Neil M. Gorsuch	Richard C. Wesley
Susan P. Graber	Jack Zouhary
Wallace B. Jefferson	

Appendix A – Proposed Amendments to the Federal Rules of Bankruptcy Procedure

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

MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 12, 2013

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 24 and 25, 2013, at the University of St. Thomas School of Law in Minneapolis, Minnesota. The draft minutes of that meeting are set out in Appendix C to this report.

At the meeting the Advisory Committee discussed a number of suggestions for rule and form amendments that were submitted by bankruptcy judges, members of the bar, and court personnel. It also discussed several ongoing projects.

The Committee is presenting one action item at this time—a technical, conforming amendment to Rule 1007(a). Part II of this report discusses that amendment.

* * * * *

II. Action Item—Rule 1007(a)(1) and (2) for Final Approval Without Publication

Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H—reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. In order to make Rule 1007(a) consistent with the new form designations, the Advisory Committee voted unanimously at the fall meeting to propose a conforming amendment to subdivision (a)(1) and (a)(2) of that rule. The text of the proposed amendment is included in Appendix A.

The schedules and other individual forms published in 2013 (other than the means test forms) are proposed to take effect on December 1, 2015—a year later than normal—in order to coincide with the effective date of the restyled non-individual forms. That timeline means that if the Standing Committee approves without publication the conforming amendments to Rule 1007(a)(1) and (a)(2) at this or the June 2014 meeting, the rule amendments will be able to go into effect at the same time as the forms.

The Advisory Committee recommends that conforming amendments to Rule 1007(a)(1) and (a)(2), which change references to Schedules E and F to Schedule E/F, be approved and forwarded to the Judicial Conference.

* * * * *

Appendix A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Final Approval and Transmittal to the Judicial Conference

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

(a) CORPORATE OWNERSHIP STATEMENT, LIST OF CREDITORS AND EQUITY SECURITY HOLDERS, AND OTHER LISTS.

(1) *Voluntary Case*. In a voluntary case, the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, ~~E, F~~ E/F, G, and H as prescribed by the Official Forms. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate.

(2) *Involuntary Case*. In an involuntary case, the debtor shall file, within seven days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, ~~E, F~~ E/F, G, and H as prescribed by the Official Forms.

* * * * *

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

COMMITTEE NOTE

In subdivisions (a)(1) and (a)(2), the references to Schedules are amended to reflect the new designations adopted as part of the Forms Modernization Project.

Because this amendment is made to conform to a change in the designation of the Official Forms that the rule refers to and is technical in nature, final approval is sought without publication.

Agenda E-19 (Addendum)
Rules
March 2014

ADDENDUM TO THE 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:

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Committee on Rules of Practice and Procedure asks the Judicial Conference to modify the rules package that it approved on September 17, 2013, specifically the amendment to Criminal Rule 12(c).

In 2006, the Department of Justice requested that the Advisory Committee on Criminal Rules consider amending Rule 12(b)(3)(B) to require defendants to raise before trial any objection that the indictment failed to state an offense. The rule currently in effect allows a motion raising failure to state an offense at any time, in part because such a failure was thought to be jurisdictional. The Supreme Court's decision in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002), which held that "failure to state an offense" is not a jurisdictional defect, undercuts this rationale.

The proposal evolved substantially between 2006 and publication in 2011, with the advisory committee ultimately deciding to address other features of Rule 12's treatment of pretrial motions in general. The proposed amendments were published for public comment in 2011.

The advisory committee received 47 pages of public comments. As a result of those comments, as well as its own further review, the advisory committee made revisions, none of which required republication. In the end, the revised proposed amendments to Rule 12 presented to the Judicial Conference and approved on September 17, 2013, effected the original request by the Justice Department, clarified other aspects of the rule, and took into account public comments received.

In September 2013, the proposed amendments to Rule 12 were transmitted to the Supreme Court as part of a larger rules package. In December, the Court identified four concerns with respect to the Criminal Rule 12 proposal, one related to the committee note, three related to subdivision (c)(3).

With regard to the committee note, the second sentence of the committee note for Rule 12(b)(3) says "reasonably available" rather than "then reasonably available," as the text of the rule says. The advisory committee unanimously agreed to change this part of the committee note to say "then reasonably available." The standing committee unanimously approved this change.

The Court asked three questions with respect to subdivision 12(c)(3): (1) to whom is prejudice relevant – the government, the defendant, both?; (2) how does one show prejudice pre-trial?; and (3) why use good cause alone as the test in subdivision (c)(3)(A) and prejudice alone as the test in subdivision (c)(3)(B), and does this anomaly create unintended consequences?

The advisory committee has answers to the first two questions: the prejudice is to the defendant, and lack of notice and failure of the grand jury to charge the defendant properly all could apply before a criminal trial.

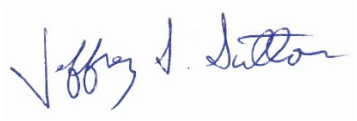
With regard to the third question, the advisory committee agrees that the anomaly of mentioning cause in subdivision (c)(3)(A) and prejudice in subdivision (c)(3)(B) does indeed

create an unintended implication. The absence of prejudice in (c)(3)(A) suggests it does not apply there, and the absence of good cause in (c)(3)(B) suggests it does not apply there. The advisory committee did not intend the first negative implication, but did intend the second. As a result, the advisory committee unanimously agreed to change the proposed amendment to subdivision (c)(3) to apply a good cause standard to *all* late-filed non-jurisdictional motions. The standing committee unanimously approved this change.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rule 12, 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.

The proposed amendments to Federal Rule of Criminal Procedure 12 are set forth in Appendix B. A document comparing the amendments proposed herein to the proposed amendments approved by the Conference on September 17, 2013, is included as Appendix C. The changes to the September 2013 proposed amendments are shaded.

Respectfully submitted,



Jeffrey S. Sutton, Chair

Appendix B – Proposed Amendments to Criminal Rule 12
Appendix C – Comparison of Proposed Amendments to Criminal Rule 12

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

(1) ***In General.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(2) ~~***Motions That May Be Made Before Trial.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.~~***Motions That May Be Made at Any Time***. A motion that the

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

court lacks jurisdiction may be made at any time while the case is pending.

(3) ***Motions That Must Be Made Before Trial***. The following defenses, objections, and requests must be raised by pretrial motion ~~before trial~~if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) ~~a motion alleging~~ a defect in instituting the prosecution~~;~~, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing;

(B) ~~a motion alleging~~ a defect in the indictment or information, including:

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

~~– but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;~~

(C) ~~a motion to~~ suppression of evidence;

(D) ~~a Rule 14 motion to sever~~severance of charges or defendants under Rule 14; and

(E) ~~a Rule 16 motion for~~ discovery under Rule 16.

(4) ***Notice of the Government's Intent to Use Evidence.***

(A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) ~~Motion Deadline.~~ Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) *Setting the Deadline.* The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial.

(2) *Extending or Resetting the Deadline.* At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) *Consequences of Not Making a Timely Motion Under Rule 12(b)(3).* If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) [Reserved]~~Waiver of a Defense, Objection, or Request.~~ ~~A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.~~

* * * * *

Committee Note

Rule 12(b)(1). The language formerly in (b)(2), which provided that "any defense, objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial, has been relocated here. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue."

No change in meaning is intended.

Rule 12(b)(2). As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "then reasonably available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. Just as in (b)(1), the more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims

are not overlooked. The Rule is not intended to and does not affect or supersede statutory provisions that establish the time to make specific motions, such as motions under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Rule 12(c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the present rule contains the language "or by any extension the court provides," which anticipates that a district court has broad discretion to extend, reset, or decline to extend or reset, the deadline for pretrial motions. New paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's mention of it to a more logical place – after the provision concerning

setting the deadline and before the provision concerning the consequences of not meeting the deadline. No change in meaning is intended.

New paragraph (c)(3) governs the review of untimely claims, previously addressed in Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(3).

New paragraph 12(c)(3) retains the existing standard for untimely claims. The party seeking relief must show "good cause" for failure to raise a claim by the deadline, a flexible standard that requires consideration of all interests in the particular case.

Rule 12(e). The effect of failure to raise issues by a pretrial motion has been relocated from (e) to (c)(3).

Changes Made After Publication and Comment

Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and relocated in (b)(1). The change begins the Rule's treatment of pretrial motions with an appropriate general statement and responds to concerns that the deletion might have been perceived as unintentionally restricting the district courts' authority to

rule on pretrial motions. The references to "double jeopardy" and "statute of limitations" were dropped from the nonexclusive list in (b)(3)(A) to permit further debate over the treatment of such claims. New paragraph (c)(2) was added to state explicitly the district court's authority to extend or reset the deadline for pretrial motions; this authority had been recognized implicitly in language being deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial. In subparagraph (c)(3), the current language "good cause" was retained for all claims and subparagraph (c)(3)(B) was omitted. Finally, the Committee Note was amended to reflect these post-publication changes and to state explicitly that the rule is not intended to change or supersede statutory deadlines under provisions such as the Jury Selection and Service Act.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

(1) ***In General.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(2) ~~***Motions That May Be Made Before Trial.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.~~***Motions That May Be Made at Any Time***. A motion that the

* New material is underlined; matter to be omitted is lined through. Shaded areas show changes made to language approved by the Judicial Conference on September 17, 2013, both additions and deletions.

court lacks jurisdiction may be made at any time while the case is pending.

(3) ***Motions That Must Be Made Before Trial***. The following defenses, objections, and requests must be raised by pretrial motion ~~before trial~~if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) ~~a motion alleging~~ a defect in instituting the prosecution~~;~~, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing;

(B) ~~a motion alleging~~ a defect in the indictment or information, including:

(i) joining two or more offenses in the same count (duplicity);

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(C) ~~a motion to~~ suppression of evidence;

(D) ~~a Rule 14 motion to sever~~severance of charges or defendants under Rule 14; and

(E) ~~a Rule 16 motion for~~ discovery under Rule 16.

(4) ***Notice of the Government's Intent to Use Evidence.***

(A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) ~~Motion Deadline.~~ Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) *Setting the Deadline.* The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial.

(2) *Extending or Resetting the Deadline.* At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) *Consequences of Not Making a Timely Motion Under Rule 12(b)(3).* If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.~~:~~

~~(A) the party shows good cause; or~~

~~(B) for a claim of failure to state an offense, the defendant shows prejudice.~~

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) [Reserved]~~Waiver of a Defense, Objection, or Request.~~ ~~A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.~~

* * * * *

Committee Note

Rule 12(b)(1). The language formerly in (b)(2), which provided that "any defense**,** objection, or request that the

court can determine without trial of the general issue" may be raised by motion before trial, has been relocated here. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

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Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "then reasonably available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. Just as in (b)(1), the more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked. The Rule is not intended to and does not affect or supersede statutory provisions that establish the time to make specific motions, such as motions under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

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As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the present rule contains the language "or by any extension the court provides," which

anticipates that a district court has broad discretion to extend, reset, or decline to extend or reset, the deadline for pretrial motions. New paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's mention of it to a more logical place – after the provision concerning setting the deadline and before the provision concerning the consequences of not meeting the deadline. No change in meaning is intended.

New paragraph (c)(3) governs the review of untimely claims, previously addressed in Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(3).

~~The standard for review of untimely claims under n~~New paragraph 12(c)(3) retains the existing standard for untimely claims~~depends on the nature of the defense, objection, or request~~. The ~~general standard for claims that must be raised before trial under Rule 12(b)(3) is stated in (c)(3)(A), which – like the present rule – requires that the~~ party seeking relief must show "good cause" for failure to raise a claim by the deadline, a flexible standard that requires consideration of all interests in the particular case. ~~The Supreme Court and lower federal courts have interpreted the "good cause" standard under Rule 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States*, 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co.*~~

~~*v. United States*, 371 U.S. 341, 363 (1963).~~

~~New subparagraph (c)(3)(B) provides a different standard for one specific claim: the failure of the charging document to state an offense. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power to bring a defendant to trial or to impose punishment, should be available without a showing of "good cause." Rather, review should be available whenever a defendant shows prejudice from the failure to state a claim. Accordingly, subparagraph (c)(3)(B) provides that the court can consider these claims if the party "shows prejudice." Unlike plain error review under Rule 52(b), the standard under Rule (12)(c)(3)(B) does not require a showing that the error was "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Nevertheless, it will not always be possible for a defendant to make the required showing of prejudice. For example, in some cases in which the charging document omitted an element of the offense, the defendant may have admitted the element as part of a guilty plea after having been afforded timely notice by other means.~~

Rule 12(e). The effect of failure to raise issues by a pretrial motion has been relocated from (e) to (c)(3).

Changes Made After Publication and Comment

Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and relocated in (b)(1). The change begins the Rule's treatment of pretrial motions with an appropriate general statement and responds to concerns that the deletion might have been perceived as

unintentionally restricting the district courts' authority to rule on pretrial motions. The references to "double jeopardy" and "statute of limitations" were dropped from the nonexclusive list in (b)(3)(A) to permit further debate over the treatment of such claims. New paragraph (c)(2) was added to state explicitly the district court's authority to extend or reset the deadline for pretrial motions; this authority had been recognized implicitly in language being deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial. In subparagraph (c)(3)~~(A)~~, the current language "good cause" was retained~~.~~ for all claims and ~~In~~ subparagraph (c)(3)(B)~~, the reference to "double jeopardy"~~ was omitted ~~to mirror the omission from (b)(3)(A), and the word "only" was deleted from the phrase "prejudice only" because it was superfluous~~. Finally, the Committee Note was amended to reflect these post-publication changes and to state explicitly that the rule is not intended to change or supersede statutory deadlines under provisions such as the Jury Selection and Service Act.