COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, DC
June 2-3, 2011

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 2–3, 2011

1. Opening remarks of the Chair

   A. Report on the March 2011 Judicial Conference session
   B. Transmission of Supreme Court-approved proposed rule amendments to Congress

2. **ACTION** – Approving minutes of the January 2011 Committee meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center

5. Report of the Civil Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendments to Rule 45
   B. Preservation and sanctions
   C. Pleading
   D. Forms
   E. Work following the 2010 Duke Conference
   F. Minutes and other informational items

6. Report of the Appellate Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendments to Appellate Rules 28 and 28.1 and Appellate Form 4
   B. Minutes and other informational items

7. Report of the Criminal Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 5, 15, 58, and new Rule 37
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 12 and 34
   C. Discovery issues, including work with the Federal Judicial Center on possible

additions to the Judge's Benchbook and a "Good Practices" guide for criminal discovery

D. Work with the Federal Judicial Center on warnings about immigration consequences of a guilty plea and restrictions imposed on sex offenders

E. Minutes and other informational items

8. Report of the Evidence Rules Committee

A. **ACTION** – Approving publishing for public comment an amendment to Rule 803(10) to comport with the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*

B. Minutes and other informational items

9. Report of the Bankruptcy Rules Committee

A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Bankruptcy Rules 3001(c), 7054, and 7056, and Official Forms 10, 10 (Attachment A), 10 (Supplement 1), 10 (Supplement 2), and 25A

B. **ACTION** – Approving and transmitting to the Judicial Conference, without publication, proposed amendments to Rules 1007(c), 2015(a), 3001(c), and Official Forms 1 and 9A–9I

C. **ACTION** – Approving for publication for public comment proposed amendments to Rules 1007(b), 3007(a), 5009(b), 9006, 9013, and 9014, and Official Forms 6C, 7, 22A, and 22C

D. The Forms Modernization Project

E. Revision of the Part VIII Rules

F. Minutes and other informational items

10. **ACTION** – Approving and transmitting to the Judicial Conference revised *Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees*

11. Long-range planning report

A. Response to Judge Breyer's request

B. Long-term projects for the Rules Committees

12. Next meeting: January 5–6, 2012, in Phoenix, Arizona

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

Chair:	**Reporter:**
Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Honorable Jeffrey S. Sutton United States Circuit Judge United States Court of Appeals 260 Joseph P. Kinneary U. S. Courthouse 85 Marconi Boulevard Columbus, OH 43215	Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Honorable Eugene R. Wedoff United States Bankruptcy Court Everett McKinley Dirksen U. S. Courthouse 219 South Dearborn Street Chicago, IL 60604	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380 Professer Troy A. McKenzie New York University School of Law 40 Washington Square South New York, NY 10012
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215 Professor Richard L. Marcus University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978
Honorable Richard C. Tallman United States Circuit Judge 902 William Kenzo Nakamura U.S. Courthouse 1010 Fifth Avenue Seattle, WA 98104-1195	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Road Box 90360 Durham, NC 27708-0360

	Professor Nancy J. King Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181
Honorable Sidney A. Fitzwater Chief Judge United States District Court Earle Cabell Federal Bldg. U. S. Courthouse 1100 Commerce Street, Room 1528 Dallas, TX 75242-1310	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice & Procedure Washington, DC 20544	**Chief Counsel:** Andrea Kuperman Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair:	**Reporter:**
Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Members:	
Honorable James M. Cole Deputy Attorney General (ex officio) U.S. Department of Justice 950 Pennsylvania Ave., N.W., Room 4111 Washington, DC 20530	Dean C. Colson, Esquire Colson & Hick 255 Alhambra Circle Penthouse Coral Gables, FL 33134
Douglas R. Cox, Esq. Gibson, Dunn & Crutcher LLP 1050 Connecticut Avenue, N.W. Washington, DC 20036-5306	Roy Englert, Esq. Robbins Russell Englert Orseck Untereiner & Sauber, LLP 801 K Street, NW - Suite 411-L Washington, DC 20006
Honorable Neil M. Gorsuch United States Court of Appeals Byron White United States Courthouse 1823 Stout Street, 4th Floor Denver, CO 80257-1823	Honorable Marilyn L. Huff United States District Court Edward J. Schwartz U. S. Courthouse Suite 5135 940 Front Street San Diego, CA 92101
Honorable Wallace Jefferson Supreme Court of Texas Supreme Court Building 201 W. 14th Street, Room 104 Austin, Texas 78701	Dean David F. Levi Duke Law School Science Drive and Towerview Road Room 2012 Durham, NC 27708
William J. Maledon, Esq. Osborn Maledon, P.A. 2929 North Central Avenue, Suite 2100 Phoenix, AZ 85012-2794	Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818

Honorable Patrick J. Schiltz United States District Court United States Courthouse 300 South Fourth Street – Suite 14E Minneapolis, MN 55415	Honorable James A. Teilborg United States District Court 523 Sandra Day O'Connor U. S. Courthouse 401 West Washington Street – Suite 523 Phoenix, AZ 85003-2146
Honorable Diane P. Wood United States Court of Appeals 2688 Everett McKinley Dirksen – U.S. Courthouse 219 South Dearborn Street Chicago, IL 60604	**Advisors and Consultants:** Professor Geoffrey C. Hazard, Jr. Hastings College of the Law 200 McAllister Street San Francisco, CA 94102
Professor R. Joseph Kimble Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933	Joseph F. Spaniol, Jr., Esq. 5602 Ontario Circle Bethesda, MD 20816-2461
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice & Procedure Washington, DC 20544	**Chief Counsel:** Andrea Kuperman Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600

Committee on Rules of Practice and Procedure

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

Members	Position	District/Circuit	Start Date	End Date
Lee H. Rosenthal Chair	D	Texas (Southern)	2007	2011
James Cole*	DOJ	Washington, DC	----	Open
Dean C. Colson	ESQ	Florida	2009	2012
Douglas R. Cox	ESQ	Washington, DC	2005	2011
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2013
Neil M. Gorsuch	C	Tenth Circuit	2010	2013
Marilyn L. Huff	D	California (Southern)	2007	2013
Wallace B. Jefferson	CJUST	Texas	2010	2013
David F. Levi	ACAD	North Carolina	2009	2012
William J. Maledon	ESQ	Arizona	2005	2011
Reena Raggi	C	Second Circuit	2007	2013
Patrick J. Schiltz	D	Minnesota	2010	2013
James A. Teilborg	D	Arizona	2006	2012
Diane P. Wood	C	Seventh Circuit	2007	2011
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open
Principal Staff: Peter G. McCabe 202-502-1800				

* Ex-officio

LIAISON MEMBERS

Appellate:	
Dean C. Colson	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Arthur I. Harris	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Paul S. Diamond	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Rules Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice & Procedure Washington, DC 20544
Chief Counsel: Andrea Kuperman Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600
James N. Ishida Senior Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Jeffrey N. Barr Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
James H. Wannamaker III Senior Attorney Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544
Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the U. S. Courts Washington, DC 20544
Ms. Gale B. Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

Ms. Denise London Administrative Officer Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Lisa Webb Staff Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. LiAnn Shepard Program Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

FEDERAL JUDICIAL CENTER

Joe Cecil (Rules of Practice & Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Molly T. Johnson (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Emery G. Lee (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

TAB 1-A

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
March 15, 2011

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All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

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At its March 15, 2011 session, the Judicial Conference of the United States —

Elected to the Board of the Federal Judicial Center for a term of four years: Chief Judge James F. Holderman, Jr., United States District Court for the Northern District of Illinois, and Chief Judge Kathryn H. Vratil, United States District Court for the District of Kansas, to succeed Judge David O. Carter, United States District Court for the Central District of California, and Judge Philip M. Pro, United States District Court for the District of Nevada.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

With regard to bankruptcy judgeships:

a. Recommended to Congress that it (1) authorize 49 additional judgeships (48 permanent, one temporary); and (2) convert 28 temporary judgeships to permanent status and extend the lapse dates for two temporary judgeships; and

b. Amended its 2010 policy concerning conversion of existing temporary bankruptcy judgeships to permanent status by clarifying that a district should have an annual weighted caseload of at least 1,500 per judgeship to justify conversion, calculated by using the number of judgeships currently authorized to the district minus one.

Approved revised Guidelines for the Intercircuit Assignment of Bankruptcy Judges.

Authorized the designation of St. George as an additional place of holding court in the District of Utah, as requested by the Judicial Council of the Tenth Circuit.

COMMITTEE ON THE BUDGET

Approved a 5.2 percent annual budget cap, in lieu of the current 8.2 percent budget cap, for the Salaries and Expenses account for fiscal years 2013 through 2017.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Approved a revised district court records disposition schedule for criminal case files.

Approved a revised bankruptcy court records disposition schedule.

Endorsed the practice of scanning into CM/ECF older paper files stored at Federal Record Centers when they are requested for viewing, but agreed to require courts to restrict remote public access to those files and allow public access only at the clerk's office public terminal or counter.

Endorsed the scanning of open fugitive criminal case files into CM/ECF under the appropriate restriction levels.

Endorsed the scanning into CM/ECF of sealed paper case files and documents stored at the courts under the appropriate restriction level.

Approved a modification of the Electronic Public Access Fee Schedule to include the following sentence: "For individual researchers, courts must also find that the defined research project is intended for academic research purposes, and not for commercial purposes or internet redistribution."

Expanded the opinion pilot program to include up to 30 additional courts, to ensure that sufficient data is collected to evaluate the program.

[A recommendation regarding senior judge participation in en banc panels was withdrawn by the committee chair.]

COMMITTEE ON CRIMINAL LAW

Approved a new policy for probation and pretrial services offices governing the management of sex offenders.

COMMITTEE ON DEFENDER SERVICES

Approved the utilization of circuit Criminal Justice Act (CJA) case-budgeting attorney positions, the continued funding for the three current case-budgeting attorneys, and expansion in the number of positions. The case-budgeting attorney positions will be structured as circuit unit employees that are funded by the Defender Services account and will operate pursuant to a Memorandum of Understanding that will include an advisory role for the Administrative Office in the appointment, management, and oversight of the position, with the understanding that the circuit has the ultimate authority in the selection, retention, and management of the position. Expansion of the number of case-budgeting attorneys will occur incrementally, subject to the Committee's approval and the availability of funding.

Approved policy guidance pertaining to clemency representations furnished by panel attorneys.

COMMITTEE ON FEDERAL-STATE JURISDICTION

Agreed to support an amendment to 28 U.S.C. § 297 to specify that, in addition to circuit and district judges who are currently authorized to provide temporary service to the courts of the freely associated compact states (the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau), magistrate judges and territorial judges may be assigned temporarily to provide such service**.**

Rescinded its position supporting the repeal of the Federal Employers' Liability Act and the Jones Act.

COMMITTEE ON THE JUDICIAL BRANCH

Agreed that if the judiciary seeks legislation to provide that the District Courts of the Territory of Guam and the Commonwealth of the Northern Mariana Islands shall be courts with judicial power derived from Article III, Section 1, of the Constitution of the United States, it would also seek legislation to provide that in the event the incumbent judges of those courts are confirmed as Article III judges, their service as judges in their respective territorial district courts would be included in computing, under 28 U.S.C. §§ 371 and 372, their aggregate years of judicial service.

Agreed to request and encourage circuit judicial councils to consider establishing "judicial wellness" committees that would be charged with accomplishing objectives substantially similar to the following: (1) promoting health and wellness among judges by creating programs (educational or otherwise), policies, and/or practices that provide a supportive environment for the maintenance and restoration of health and wellness; and (2) providing information to judges on judicial retirement issues, including disability retirement.

Rescinded its position endorsing legislation to authorize the payment of nonforeign cost-of-living allowances to federal judges serving outside the continental United States or in Alaska.

Approved an amendment to section 250.30.40 of the Travel Regulations for United States Justices and Judges to provide that, in lieu of claiming a per diem allowance for the locality where temporary duty is performed, a judge may claim the cost of lodging plus the maximum General Services Administration per diem allowance for meals and incidental expenses, currently $71, provided that the sum total does not exceed 150 percent of the authorized per diem allowance.

Approved an amendment to section 250.40.20 of the Travel Regulations for United States Justices and Judges to clarify that, when the government or a third party pays directly for a judge's lodging and/or meals, the judge should take an appropriate reduction in the judges' subsistence/per diem allowance.

Approved an amendment to section 240.10 of the Travel Regulations for United States Justices and Judges to authorize judges' travel attendants' reimbursement on an actual expense basis (in lieu of a per diem allowance) consistent with the provisions of section 420.30.40 of the Judiciary Staff Travel Regulations, *Guide to Judiciary Policy*, Vol. 19, Ch. 4.

COMMITTEE ON JUDICIAL RESOURCES

With regard to Article III judgeships, agreed to —

a. Transmit to Congress a request for the addition of eight permanent judgeships and one temporary judgeship in the courts of appeals, and for the district courts, the addition of 53 permanent judgeships and 18 temporary judgeships, plus the conversion to permanent status of eight existing temporary judgeships; and

b. Recommend to the President and the Senate not filling the next judgeship vacancy in the District of Massachusetts, based on the three-year low weighted caseload in that district.

With regard to additional law clerk positions, agreed to —

a. Establish a "court law clerk" position in the Judiciary Salary Plan (JSP) using the specified qualifications standard. Each position requires Conference authorization. Each court law clerk position appointment will not exceed JSP-13, step 1, and is temporary, not to exceed three years on court staff rolls;

b. Allocate ten court law clerk positions to the Eastern District of California and one court law clerk position to the Western District of New York, based on specified criteria, for a test period of three years; and

c. Request the Administrative Office to devise a set of statistical criteria by which to evaluate at the end of three years whether the addition of court law clerks enabled more expeditious case resolution in the Eastern District of California and the Western District of New York.

Affirmed that under the September 2007 Conference policy limiting the tenure of term law clerks to four years, courts are not permitted to switch term law clerks with career law clerks or with incumbents of other attorney positions.

Took the following actions with regard to temporary and term appointments in courts and federal public defender organizations:

a. Agreed to —

(1) Limit temporary appointments prospectively to two categories: (i) one year or less; and (ii) at least one year and one day;

(2) Limit to four years all temporary and term appointments, including temporary bankruptcy law clerks, temporary law clerks funded by the Temporary Emergency Fund, and term staff attorneys;

(3) Provide that extensions would be allowed to temporary or term appointments so long as the total period of service in that position does not exceed a maximum duration of four years; and

(4) Exclude from these requirements (i) positions that have statutory appointment limitations, e.g., federal public defenders; (ii) land commissioners due to the infrequent, intermittent nature of the work; and (iii) positions that have Conference policy appointment limitations, such as term law clerks; certain re-employed annuitants; temporary medical, maternity, and extended military leave replacements in chambers; and chambers staff temporarily retained after separation of a judge; and

b. Agreed to eliminate the temporary indefinite appointment type, converting all such appointments to temporary appointments not-to-exceed four years from the date of Conference approval of this action and, where appropriate, to allow courts and federal public defender organizations to designate such positions as permanent.

Clarified a policy adopted at its September 1998 session regarding the grade level of a principal secretary to a chief circuit judge (and included in that policy the principal secretary to the chief judge of the Court of International Trade position) to state that (a) the Judiciary Salary Plan (JSP) grade 12 may only be "carried" from the position of principal secretary to a chief circuit judge to the position of secretary to a federal judge in the chambers of that same chief circuit judge upon that judge stepping down from the chief judge position; and (b) the assistant or additional secretaries in chambers may not be switched with principal secretaries to attain the JSP-12 once the principal secretary

acquires the permanent JSP-12. This would not preclude a chief circuit judge from appointing an assistant or additional secretary to the principal secretary position if the principal secretary has separated from the chief circuit judge's chambers.

Approved (a) a staffing formula for probation and pretrial services offices for implementation beginning in fiscal year 2012; and (b) a case-weighting supplement to the staffing formula to determine future staffing requirements in probation and pretrial services offices.

Approved a staffing formula for the clerk's office of the Court of Federal Claims for implementation beginning in fiscal year 2012.

Approved application of the alternative dispute resolution robust staffing factor for two years for the Western District of New York and the District of Idaho pending completion of the alternative dispute resolution work measurement study and a working group's analysis and suggestions.

With regard to the Court Personnel System, approved the following relating to student trainees:

a. That a pay band be established in the Court Personnel System for student trainees who are employed on a temporary basis during vacation periods or on a part-time basis while in school;

b. That the qualification requirements for entry to the pay band be the conditions identified in the minimum age requirement for high school students, as outlined in the *Guide to Judiciary Policy*, Vol. 12, Ch. 5, § 520.30.20(c), Employment, High School Student;

c. That an individual may be appointed into an ungraded Court Personnel System student trainee position at a base salary anywhere from a rate equivalent to the federal minimum wage rate up to a rate equal to that of a classification level (CL)-21, step 1; and

d. That the appointing officer have the discretionary authority to adjust pay within the band.

Amended the maximum fees for realtime services so that all parties to a case who receive a realtime feed pay the same amount for the services that are received, and agreed that those fees will be based on the number of feeds provided by a certified realtime court reporter as follows:

- One feed, the ordering party pays $3.05 per page;
- Two to four feeds, each party receiving a feed pays $2.10 per page; or
- Five or more feeds, each party receiving a feed pays $1.50 per page.

COMMITTEE ON JUDICIAL SECURITY

Concerning judges information on the internet:

a. Agreed to endorse the Seventh Circuit librarian's program, procedure, and protocol as a national model program wherein circuit librarians would monitor traditional media and the internet, including blogs and accessible social media sites for mentions of federal judges (circuit, district, magistrate, and bankruptcy) from their circuits, including threats and/or inappropriate communications, and urge circuit librarians, judges, and circuit judicial councils to consider adopting and implementing the model program locally. Under this program —

   (1) Librarians and others who locate a threat or inappropriate communication should forward it immediately to the judge and the local United States Marshals Service (USMS) district office;

   (2) Judges may choose not to participate, or may prefer to have chambers staff conduct the searches; and

   (3) The librarians' role is one of data gathering only and the primary responsibility for threat response, evaluation, and investigation remains with the USMS;

b. With regard to domain name issues, agreed to encourage judges to consult with their librarians if the judges want routine searches performed to determine if their names have been registered as domain names. Librarians will also alert the judges to whom they are assigned if their routine monitoring of the internet for judicial mentions uncovers the potential misuse of a judge's name as a domain name; and

c. With regard to ensuring that threats are reported to the USMS, agreed to urge each circuit librarian to coordinate with individual judges and the local USMS district office to assist in implementing the USMS protocol for reporting information located by the librarians that contains sensitive personal information about a judge or a judge's family or that could be interpreted as threatening (Protocol for Judges and the U.S. Marshals Service, May 21, 2010)

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Amended the magistrate judge selection and appointment regulations to conform with a recent amendment to 28 U.S.C. § 631(a) by providing that senior judges with at least a 50 percent workload in the preceding calendar year may participate in the selection of new magistrate judges.

TAB 1-B

April 26, 2011

Honorable John A. Boehner
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 26, 2011

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 4 and 40.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2011, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

April 26, 2011

Honorable John A. Boehner
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 26, 2011

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, and 6003, and new Rules 1004.2 and 3002.1.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2011, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

April 26, 2011

Honorable John A. Boehner
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 26, 2011

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 1, 3, 4, 6, 9, 32, 40, 41, 43, and 49, and new Rule 4.1.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2011, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

April 26, 2011

Honorable John A. Boehner
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 26, 2011

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein the amendments to Evidence Rules 101-1103.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2011, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

TAB 2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 6-7, 2011
San Francisco, California
Draft Minutes

TABLE OF CONTENTS

ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Thursday and Friday, January 6 and 7, 2011. The following members were present:

Judge Lee H. Rosenthal, Chair
Douglas R. Cox, Esquire
Roy Englert, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace Jefferson
William J. Maledon, Esquire
Judge Reena Raggi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Diane P. Wood

Three members were unable to attend the meeting: Dean C. Colson, Esquire; Dean David F. Levi; and Deputy Attorney General James M. Cole. The Department of Justice was represented by Karen Temple Claggett, Esquire and S. Elizabeth Shapiro, Esquire.

Also participating in the meeting were the committee's consultants, Professors Geoffrey C. Hazard, Jr. and R. Joseph Kimble, and the following guests who participated in a panel discussion: Judge Barbara J. Rothstein; Judge Paul W. Grimm; Gregory P. Joseph, Esquire; Daniel C. Girard, Esquire; Thomas Y. Allman, Esquire: and John Barkett, Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Special counsel, Administrative Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Emery G. Lee	Research Division, Federal Judicial Center
Meghan A. Dunn	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal welcomed the new committee members – Judge Gorsuch, Judge Schiltz, and Mr. Englert – and summarized their extensive professional backgrounds and achievements.

She reported that John Rabiej would be leaving the Administrative Office shortly to become executive director of the Sedona Conference. She noted that the committee would honor him for his service at its next meeting in June. As a short-term measure, she said, Andrea Kuperman, her rules law clerk, would be detailed to the Administrative Office to serve as chief counsel to the committee. She also asked the committee to recognize the excellent work that Katherine David had performed as rules law clerk during Ms. Kuperman's maternity leave.

With great sadness, Judge Rosenthal reported that Judge David G. Trager, a former member of the Advisory Committee on Criminal Rules, had just passed away. She also noted that Joe Cecil of the Federal Judicial Center, who has conducted a great deal of excellent research for the committee over many years, had recently lost his son in a tragic accident. She extended the deepest sympathies of the committee to the Trager and Cecil families.

Judicial Conference Action

Judge Rosenthal reported that the Judicial Conference at its September 2010 session had approved all the rules amendments recommended by the committee.

The Conference also approved the proposed statutory amendment to 28 U.S.C. § 2107. That legislative change, she explained, was needed to buttress the proposed amendment to FED. R. APP. P. 4(a)(1) (time to appeal) that would clarify the time to appeal in civil cases when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States. The Supreme Court has held that time limits set forth in statutes are jurisdictional in nature. Therefore, the statute needs to be amended to complement the rule amendment. *Bowles v. Russell*, 551 U.S. 205 (2007). The statutory change, she noted, was essentially technical in nature. She reported that she and Mr. Rabiej had spoken to House and Senate judiciary committee staff about it and had received encouragement that it would likely be adopted.

Pleading Standards Legislation

Judge Rosenthal noted that two pieces of legislation had been introduced in 2009 that would regulate pleading standards in civil cases, and three Congressional hearings had been conducted on them. She suggested that it will be difficult for Congress to

achieve consensus on the specific language of a single bill. Nevertheless, the thrust of the various legislative efforts to date had been: (1) as an interim measure, to restore pleading standards to those in effect immediately before *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); and (2) as a longer-term measure, to allow the rules committees to work out the final standards under the Rules Enabling Act process.

She reported that it was unclear whether any of the bills will be successful in the new Congress. The committee's overarching interests, she said, are: (1) to avoid being drawn into the political fray; and (2) to preserve the integrity of the Rules Enabling Act process. She added that the committee and its staff will continue to monitor and document the extensive case law on pleading standards following *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009). The committee's summaries of the developing case law are posted on the judiciary's rules web site, www.uscourts.gov. In addition, she noted, the Federal Judicial Center would continue to study civil cases after *Twombly* and *Iqbal* to elicit meaningful insights on how the district courts are handling motions to dismiss.

Finally, she observed that two bills had been introduced in Congress that would alter the standards for pleading in specific types of civil litigation – in fashion-design cases and "anti-SLAPP" cases. She solicited the committee's views on whether the Administrative Office should prepare a standard response that could be used for all future legislation affecting pleading standards or should wait and comment individually on each bill as it is introduced. A participant urged the judiciary to be very cautious and avoid being drawn into the legislative debate in light of the politically charged atmosphere that had accompanied the private securities legislation.

Sunshine in Litigation Legislation

Judge Rosenthal noted that some sort of "sunshine in litigation" legislation continues to be introduced in every Congress. Among other things, she said, the bills would prevent a court from issuing a protective order if the information that would be protected by the order could be relevant to protecting public health or safety.

She noted that concern had arisen again in the wake of the BP oil spill when a bill was introduced specifying that court orders restricting the dissemination of broad categories of information would be void and unenforceable in any legal proceeding. The proposed legislation would effectively have made discovery unworkable. As a result, she and Judge Kravitz had written to Congress explaining why that particular provision was unnecessary and would be disruptive, and the sponsors later removed it from the bill.

Judge Rosenthal reported that she and Judge Kravitz had met with the staff of Representative Nadler, who had introduced the latest version of the sunshine legislation. She noted that his current bill, although a little narrower than earlier versions, still

presented difficult and unnecessary problems that would make civil litigation more expensive, burdensome, and time-consuming. It would also make it more difficult to protect important privacy interests.

Bankruptcy Rules

Judge Rosenthal explained that under the Rules Enabling Act, the Supreme Court must promulgate rule amendments and send them to Congress by May 1 of each year. The amendments then take effect by operation of law on December 1 of each year, unless Congress acts during the interim seven months to reject, modify, or defer them.

She reported that on the eve of the December 1, 2010, deadline, Congressional staff had raised an objection to the 2010 rule amendments – apparently in response to a last-minute attempt by opponents of a particular bankruptcy rule. She noted that the matter had eventually been resolved to the satisfaction of the staff, and the rules went into effect on December 1.

Nevertheless, she said, this sort of last-minute action could become a recurring tactic every year. She explained that the committee chairs, the reporters, and AO staff were continuing to work hard at all stages of the rules process to avert potential surprises by informing Congressional staff in advance about pending amendments and potentially controversial issues. Those ongoing, informal communications, she said, had proven to be enormously beneficial.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 14-15, 2010.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. McCabe reported that appropriations legislation had still not been enacted by Congress to provide funds to operate the federal government for the 2011 fiscal year. As a result, the federal judiciary was operating under a continuing resolution limiting its funding to 2010 levels. He noted, moreover, that a great deal of talk had been heard in the political arena about imposing cuts in spending across all parts of the federal government. As a result, he said, the future budget for the courts could be very constrained.

REPORT OF THE FEDERAL JUDICIAL CENTER

Judge Rothstein reported that the Federal Judicial Center had come away from the Duke conference with clear instructions to pursue additional case-management training

for judges, regardless of whatever rules changes might be adopted by the committee. She noted that the Center had designed a new program focused on case management, and it had already been oversubscribed.

She reported that about 30 years ago the Center had conducted a study to identify the most effective case-management procedures. Now it is in the process of designing a similar, updated study to assess which procedures work well and which do not. Center staff, moreover, will be updating the Center's case-management monographs and drafting new publications. For example, the Center, working in conjunction with the Judicial Panel on Multi-District Litigation, will prepare a new series of "how-to" monographs for judges and lawyers on handling specific categories of civil cases before the panel.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 3, 2010 (Agenda Item 6).

Amendments for Publication

FED. R. APP. P. 13, 14 and 24

Judge Sutton noted that Congress enacted 26 U.S.C. § 7482 in 1986. It authorizes discretionary interlocutory appeals from the Tax Court to the courts of appeals, similar to the provision in 28 U.S.C. § 1292(b) that governs interlocutory appeals from the district courts. The Federal Rules of Appellate Procedure, however, have never been amended to implement the 1986 statute.

He reported that the advisory committee's proposed amendments to Rule 13(a) (appeal from the Tax Court) and Rule 14 (applicability of other rules) had been developed in close consultation with the Tax Court and the Department of Justice. In addition, the advisory committee had consulted tax lawyers on the proposed rules.

Revised FED. R. APP. P. 13(a) would largely carry forth the provisions of existing Rule 13 and address an "appeal as of right" from the Tax Court. Proposed FED. R. APP. P. 13(b) would address an "appeal by permission" from the Tax Court by incorporating the provisions of FED. R. APP. P. 5 (appeal by permission).

The proposed revisions to FED. R. APP. P. 14 had been designed to complement Rule 13. They would delete the current reference to Tax Court "decisions" and specify that references to the district court and the district clerk in any applicable appellate rule,

other than FED. R. APP. P. 24(b), should be read as referring to the Tax Court and its clerk.

The amendments to FED. R. APP. P. 24(b) had been recommended by the Tax Court. They would correct the impression fostered by the current rule that the Tax Court is an executive branch agency, rather than a court.

The committee without objection by voice vote approved the proposed amendments for publication.

Information Items

Judge Sutton asked the members for feedback and guidance on two potential rule amendments that the advisory committee had under consideration.

FED. R. APP. P. 29(a)

Judge Sutton reported that Rule 29(a) currently allows the following entities to file an amicus-curiae brief in a court of appeals without the consent of the parties or prior leave of court: (1) the United States; (2) a federal officer or agency; and (3) a state, commonwealth, or territory, and the District of Columbia. The advisory committee, he explained, was considering a proposal that would extend that exemption to federally recognized Indian tribes.

He explained that the original public suggestion had been much broader in scope and would have redefined the term "state" in FED. R. APP. P. 1(b) (scope and definitions) to include Indian tribes throughout the appellate rules. The advisory committee, however, decided against that proposal and currently was only considering the proposal to permit tribes to file amicus briefs without leave of court.

He noted that the Federal Judicial Center had conducted an empirical study at the committee's request. It revealed that Indian tribes do in fact file a number of motions for permission to file amicus briefs, most of them in three federal circuits. The study further showed that the great majority of the motions for leave to file are granted by the courts. In reality, thus, Indian tribes already have the ability to file amicus briefs. The key issue, therefore, is not access to the courts but the fundamental dignity of the tribes.

Judge Sutton said that he had written to the chief judges of the three circuits having the most motions for leave to file and had asked them: (1) whether they favored changing the national rule to allow tribes to file amicus briefs without court permission; and (2) whether their circuits would consider modifying their own local rules to permit tribes to file without permission. He reported that the circuits had not shown much enthusiasm so far for either course of action.

Judge Sutton pointed out that the rules of the U.S. Supreme Court allow municipalities to file amicus briefs without permission, but not Indian tribes. He added that there is no clear history as to why that particular choice had been made when the Court adopted its rule in the 1930s.

He reported that the advisory committee was divided on the merits of the proposal, and it would appreciate hearing any views that the members of the Standing Committee may have to offer. He proceeded to summarize the arguments offered by opponents and proponents of the proposal.

Advisory committee members opposed to the change had stated that there is no problem that needs fixing because Indian tribes routinely are given leave to file amicus briefs now. As a matter of substance, moreover, tribes are essentially different from states. In addition, the Supreme Court's amicus rule recognizes states and municipalities, but not tribes. Although dignity is important, opponents concede, it is in reality another name for sovereignty – a matter of great political sensitivity that the rules committees should avoid.

On the other hand, advisory committee members favoring the change had argued that dignity is a core value that should be recognized in the rule. Judge Sutton noted that the advisory committee had received a letter from several tribal groups strongly endorsing the proposed amendment. Proponents also argued that Indian tribes are exactly the same as states, at least for the purposes of Rule 29(a). If municipalities are allowed to file amicus briefs without permission in the Supreme Court, sovereign Indian tribes should have at least the same status. In fact, it would make sense to include both Indian tribes and municipalities in a revision of Rule 29(a). He also noted that the advisory committee had considered and rejected the possibility of adding foreign governments to the rule.

Judge Sutton pointed out that amicus briefs pose a risk because they may raise recusal problems for judges. With that in mind, he said, some courts currently specify that an amicus brief will not be allowed if it would result in the recusal of a judge. He suggested that if Rule 29(a) were to be amended, the revised rule could address the recusal prohibition directly or explicitly allow the courts of appeals to address it in their local rules.

The participants then expressed the same divergence of views that the members of the advisory committee had voiced. One member strongly supported the proposed amendment and pointed out that Indian tribes have a greater claim of sovereignty than municipalities because the latter are only creatures of the states. Moreover, tribes, as sovereign entities, have essentially the same important interests in third-party cases that states do.

A participant said that many commercial cases affect Indian tribes, and he suggested that the tribes normally can afford to write amicus briefs in these cases. He added that it is rare for a court to deny a tribe's request to file an amicus brief, although recusal problems arise from time to time.

Another participant cautioned that there is a real political risk in amending Rule 29. The rules committees may be used as a political stepping stone to achieve other political objectives involving sovereignty and tribal rights.

A member inquired as to why the advisory committee had decided to include Indian tribes only in Rule 29. Judge Sutton and Professor Struve responded that the committee had in fact reviewed all the appellate rules individually, and there were simply too many practical complications with adding tribes to the other rules.

A member encouraged the advisory committee to amend Rule 29 to include both tribes and municipalities. Among other things, he said, including cities in the rule would reduce any political fallout. In addition, if Rule 29 were amended, the Supreme Court would likely change its rule eventually to include tribes.

On the other hand, a member pointed to the lack of enthusiasm for the proposal on the part of the three circuits that have the most tribal cases. He emphasized that there is no real problem under the current rule because tribes as a practical matter have no problem in filing amicus briefs in meritorious cases. He expressed concern about the committee getting out ahead of the Supreme Court on a potentially controversial issue.

Ms. Claggett stated that the Department of Justice did not have an official view on the matter, but the Department encouraged the committee to keep the matter on its agenda.

Some participants suggested that it is not always clear what constitutes a tribe and who may speak for the tribe in litigation. In addition, a member cautioned that the amendment could lead to a slippery slope because other groups that Congress has "deemed" to be Indian tribes, such as Alaskan native villages and corporations, could ask to be included in the rule. Legislation had been introduced in Congress to recognize Native Hawaiians as a tribe. Judge Sutton explained that the advisory committee had deliberately limited the proposal to federally recognized tribes, and Professor Struve added that the process for federal recognition is a lengthy one.

A member suggested that the committee also needs to take account of the 2010 change in FED. R. APP. P. 29 that requires amicus briefs to disclose authorship and funding.

FED. R. APP. P. 28

Judge Sutton pointed out that Rule 28 (briefs) mandates the specific contents of a brief and the order in which the contents must be presented. Rule 28(a)(6), for example, states that a brief must contain "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Then Rule 28(a)(7) requires "a statement of facts relevant to the issues submitted for review." He suggested that it might make more sense to collapse (a)(6) and (a)(7) into a single statement, as the Supreme Court's rule does. That approach, he said, would allow lawyers to make their case and tell their story in a more natural way. Most lawyers, he said, would choose to follow a chronological approach.

Judge Sutton reported that there was strong support on the advisory committee in favor of reformulating the contents requirements. The committee was considering three options: (1) aligning Rule 28 more closely with the Supreme Court's rule; (2) leaving paragraphs (a)(6) and (a)(7) of Rule 28 in place, but reversing their order – placing the facts first and then the statement of the case; and (3) removing the words "course of proceedings" from Rule 28(a)(6). He added that the members of the advisory committee agree that there is a problem with Rule 28, but there is no consensus yet as to which particular option to pursue.

Several participants stated that, as a minimum, the phrase "course of the proceedings" should be eliminated from Rule 28(a)(6) because it induces lawyers to include unnecessary details about the proceedings below and causes briefs to be too long. Judges, they said, want briefs to focus on the dispositional ruling below. Chief Justice Jefferson quoted from the pertinent Texas state-court rule (Rule 38.1) that requires a concise statement of the case that "should seldom exceed one-half page, and . . . not discuss the facts." Several members praised that approach because it requires the lawyers to tell the court up front precisely and briefly what they want the court to do. Along the same lines, a member pointed out that some state courts specifically require an introduction to a brief.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of December 6, 2010 (Agenda Item 9). Judge Wedoff reported that the advisory committee had no action items to present.

Informational Items

FED. R. BANKR. P. 1007

Judge Wedoff explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 specifies that individual debtors in chapter 7 cases must file a statement that they have completed an approved course in personal financial management before they may receive a discharge. FED. R. BANKR. P. 1007(c) (time limits) had required a debtor to file the statement within 45 days after the first date set for the meeting of creditors under § 341 of the Code.

Some debtors, however, fail to file the required statement within 45 days. Therefore, the court has no choice under the statute but to close the case without a discharge. To alleviate that hardship, FED. R. BANKR. P. 5009(b) (notice of failure to file the Rule 1007(b)(7) statement) was amended, effective December 1, 2010. It now requires the bankruptcy clerk to notify individual debtors who have not filed the statement within 45 days to inform them that if they do not file the statement within an additional 15 days, their case will be closed without a discharge. As a conforming amendment, the time limit in Rule 1007(c) was increased from 45 days to 60 days.

Judge Wedoff reported that a complicating factor is that two versions of Rule 1007 were currently in place – FED. R. BANKR. P. 1007 and INTERIM RULE 1007-1. The latter, he said, was a special, temporary rule adopted by the bankruptcy courts as a local rule or standing order to deal temporarily with certain servicemen under the National Guard and Reservists Debt Relief Act of 2008. In that Act, Congress exempted certain members of the Guard and Reserves from the means testing required of other chapter 7 debtors. The statutory exemption, though, was made applicable only for cases filed during the three-year period from December 2008 to December 2011. Since the statutory provision would expire in less than a year, Judge Wedoff said that it made no sense to change the permanent, national rule. Therefore, the committee asked the courts to adopt the interim rule for servicemen as a local rule or standing order.

INTERIM BANKRUPTCY RULE 1007-1 also includes the requirement that debtors file the statement that they have completed a course in personal financial management. Therefore, when FED. R. BANKR. P. 1007 was amended on December 1, 2010, to extend the total time for debtors to file the statement from 45 days to 60 days, a corresponding

change had to be made in INTERIM BANKRUPTCY RULE 1007-1. So, on November 4, 2010, the chairs of the Standing Committee and the advisory committee sent a memorandum to the bankruptcy courts advising them to increase the interim rule's deadline for filing the statement from 45 days to 60 days, consistent with revised FED. R. BANKR. P. 1007.

Judge Wedoff pointed out that the December 2010 amendments to FED. R. BANKR. P. 1007 also had shortened from 14 days to 7 days the time for a debtor in an involuntary case to file a list of creditors' names and addresses. The debtor, however, only has to file the list of creditors after the court enters the order for relief.

FED. R. BANKR. P. 3001

Judge Wedoff reported that the proposed amendments to FED. R. BANKR. P. 3001 (proof of claim) published in August 2010 had been designed to address problems often arising with proofs of claims that involve credit-card debt, especially debt purchased by bulk buyers. He said that the documentation filed by some bulk creditors is often insufficient to support their claims because it fails to comply with Rule 3001's current requirement that a claim be accompanied by the original or a duplicate of the writing on which it is based.

He reported that the advisory committee had published a proposed revision to Rule 3001 in August 2009. It would have required a creditor holding a claim based on an open-end or revolving consumer-credit agreement to attach the last account statement sent to the debtor before the debtor filed the petition. At the public hearings, however, several institutional creditors stated that they were simply unable to produce a copy of the last statement.

In response, the advisory committee deleted the requirement that a copy of the last statement be attached. Instead, it republished a revised version of the rule in August 2010 that would instead require the holder of a claim to file five specific pieces of information with the proof of claim. He noted that a public hearing on the revised rule would be held in early February 2011.

FED. R. BANKR. P. 7054

Judge Wedoff reported that the proposed amendments to Rule 7054 (judgments and costs) would give a party more time to respond to a prevailing party's bill of costs.

FED. R. BANKR. P. 7056

Judge Wedoff explained that FED. R. BANKR. P.7056 (summary judgment) incorporates FED. R. CIV. P. 56 by reference. As amended effective December 1, 2009, FED. R. CIV. P. 56(c)(1)(A) specifies that a party may move for summary judgment at any time until 30 days after the close of all discovery, unless the court specifies another time.

Since bankruptcy matters tend to move quickly and hearings often occur shortly after the close of discovery, Judge Wedoff said that the advisory committee had decided that a shorter deadline was needed in bankruptcy. Therefore, it had published a proposed amendment to FED. R. BANKR. P. 7056 specifying that in bankruptcy adversary proceedings a summary-judgment motion must be made "at least 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought." As with FED. R. CIV. P. 56(c)(1), the deadline may be altered by local rule or court order.

OFFICIAL FORMS

Judge Wedoff reported that the advisory committee had published proposed amendments to OFFICIAL FORM 10 (proof of claim) and three new forms to be filed with proofs of claims for home-mortgage debts. The changes would implement pending amendments to FED. R. BANKR. P. 3001 and new FED. R. BANKR. P. 3002.1, both due to take effect on December 1, 2011. In summary, they will require the holder of a home-mortgage claim to: (1) provide additional details about the breakdown of the mortgage debt; (2) give notice of any changes in installment payment amounts; and (3) give notice of the assessment of any fees, expenses, and charges after the claim is filed.

He reported that OFFICIAL FORM 25A (model plan for reorganization of a small business under chapter 11) would be amended to change its effective-date provisions. The changes, he said, were technical in nature and would give more time to appeal an order confirming the plan.

Judge Wedoff reported that the advisory committee will consider two new form amendments at its next meeting in response to the Supreme Court's recent decisions in *Hamilton v. Lanning,* 130 S. Ct. 2464 (2010), and *Schwab v. Reilly,* 130 S. Ct. 2652 (2010).

He explained that under § 1325(b)(1) of the Bankruptcy Code, chapter 13 debtors may be required to devote all their "projected disposable income" to payment of unsecured claims. *Hamilton v. Lanning* concerned the calculation of that disposable income. In that case, the debtor's financial situation had changed, as he had acquired a new job at a considerably lower salary. The Supreme Court rejected the mechanical approach of considering only the debtor's average monthly income for the six months

preceding the bankruptcy filing. Instead, it adopted a forward-looking approach that will allow bankruptcy courts to consider changes in a debtor's income and expenses after filing.

As a result of *Lanning*, he said, the advisory committee was considering amending OFFICIAL FORM 22C (chapter 13 statement of current monthly income and calculation of commitment period and disposable income). The form currently asks debtors only to list their pre-bankruptcy average income and current expenses. The proposed revision would ask them to list any changes in income and expenses that have already occurred or are virtually certain to incur during the 12 months following filing.

Judge Wedoff explained that *Schwab v. Reilly* concerned how a debtor may claim an exemption in property where the actual value of the property exceeds the maximum dollar amount allowed for the exemption under the relevant federal or state law. The Supreme Court held that if the debtor enters a specific dollar amount on the exemption form, he or she is then limited to that amount. If the full market value of the property exceeds that amount, the trustee may use the overage.

Judge Wedoff said that OFFICIAL FORM 6C (property claimed as exempt) is ambiguous. In *Schwab*, the Court stated that the debtor's listing of the claimed exemption and the value of the property in the same amount did not put the trustee on notice that the debtor was claiming the full market value of the property as exempt, whatever the value might turn out to be. As a result of *Schwab*, Judge Wedoff said, the advisory committee had tentatively agreed to amend Form 6C to permit the debtor to exempt the "full fair market value of the property." The change would put the trustee on notice of the need to object if he or she believes that the value of the property exceeds the allowed exemption amount.

FORMS MODERNIZATION

Judge Wedoff reported that the advisory committee was engaged in a major project to modernize and reformulate all the bankruptcy forms to make them clearer and easier to complete, and to take full advantage of technological advances. He noted that considerable progress had been made under the direction of its forms modernization subcommittee, chaired by Judge Elizabeth Perris and assisted by Carolyn Bocella Bagin, a nationally prominent forms expert. The subcommittee, he said, should complete a set of revised forms for individual debtors in the next few months, and he anticipated that the advisory committee may have all the forms ready to be published for public comment in August 2012.

BANKRUPTCY APPELLATE RULES

Judge Wedoff noted that the advisory committee was also making major progress in revising Part VIII of the bankruptcy rules – the bankruptcy appellate provisions. He pointed out that the current Part VIII rules are difficult to follow and inconsistent in several respects with the Federal Rules of Appellate Procedure. He reported that the advisory committee was working closely with the Advisory Committee on Appellate Rules, and the two committees would meet jointly in April 2011.

He explained that the advisory committee was in the process of deciding which of two structural approaches to pursue in revising the Part VIII rules:

(1) to maintain stand-alone bankruptcy appellate rules that repeat many of the provisions of the Federal Rules of Appellate Procedure; or

(2) to incorporate the Federal Rules of Appellate Procedure into Part VIII of the bankruptcy rules by citation – with listed exceptions and modifications – in the same manner that Part VII of the bankruptcy rules now incorporates the Federal Rules of Civil Procedure by citation for adversary proceedings.

He pointed out that the advisory committee had prepared alternate drafts of a revised FED. R. BANKR. P. 8003, and he asked the members for their preferences as to the two approaches.

Incorporation, he said, would result in shorter rules that are clearer to lawyers familiar with the Federal Rules of Appellate Procedure. Incorporation would also have the advantage that when the FRAP are amended in the future, no additional changes will be needed in the bankruptcy rules. But, he noted, it will be complicated to incorporate FRAP by reference into the bankruptcy rules because bankruptcy appeals are different in several respects from civil and criminal appeals.

Professor Gibson added that the incorporation model was shorter, but it will present a number of drafting problems. For example, there are three different appellate "courts" to which an appeal may be taken from a bankruptcy judge, three different "clerks," and there may be several different adversary proceedings within a bankruptcy case. The Federal Rules of Appellate Procedure, moreover, contain a number of matters that do not apply to bankruptcy appeals or can only be applied uneasily.

Several members expressed a preference for the sample self-contained rule over the incorporation rule, suggesting that it was clearer and more intelligible. They pointed out that the apparent brevity of the incorporation model was illusory because the text of the incorporated appellate rules would have to be published along with the bankruptcy

rules in any event. They emphasized, though, that if the advisory committee chooses the stand-alone model, the revised bankruptcy appellate rules should be parallel to the Federal Rules of Appellate Procedure to the maximum extent possible. Moreover, whenever a change is made in the FRAP in the future, it needs to be picked up right away in the bankruptcy rules.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set forth in Judge Kravitz's memorandum and attachments of December 6, 2010 (Agenda Item 5). Judge Kravitz reported that the advisory committee had no action items to present.

Informational Items

ELECTRONIC DISCOVERY

Judge Kravitz reported that electronic discovery continued to be an important matter on the advisory committee's agenda. It had also been a major topic of discussion at the committee's May 2010 conference at Duke Law School. He said that the participants at Duke had urged the committee to focus on two issues of particular concern to the bar – preservation and sanctions. The lawyers, he said, had been seeking greater certainty and uniformity, both as to their preservation obligations and the standards for imposing sanctions. He added that Mr. Joseph had chaired a superb panel discussion at the conference, and the panel had produced a paper setting forth the elements that should be included in a proposed federal rule governing preservation.

Following the Duke conference, he said, he had asked the advisory committee's discovery subcommittee, chaired by Judge David Campbell, to follow up on both issues. There was, however, concern about the committee's authority under the Rules Enabling Act to address preservation obligations. Generally, he said, the obligations are governed by state law, and they often vest before a federal case is filed. Nevertheless, he said, the subcommittee would move forward to draft a rule while the issue of the committee's authority remains under advisement.

Judge Kravitz noted that the subcommittee had asked the Federal Judicial Center to conduct empirical research on spoliation sanctions in order to ascertain how frequently they are imposed in the federal courts. The Center's findings, he said, would be summarized by Dr. Lee during the upcoming panel discussion on spoliation and sanctions. In addition, he said, Andrea Kuperman and Katherine David had prepared an excellent memorandum analyzing the pertinent case law.

The subcommittee, he added, was of the view that even though courts do not impose sanctions very often, the very threat of sanctions for failure to preserve information has a profound effect on litigant behavior. The subcommittee, he said, was having difficulty in drafting the language of a rule on preservation that would give lawyers the specificity and comfort they seek. The essential problem, he said, is that there is simply an infinite variety of pre-litigation situations that may trigger preservation obligations.

On the other hand, he said, it should be easier for the subcommittee to agree on the language of a rule addressing sanctions. Just by improving the rule on sanctions, moreover, it may be possible to affect preservation behavior at the front end of a case. He added that the advisory committee will discuss a proposed rule at its April 2011 meeting, and it might possibly have a sanctions proposal for the Standing Committee's consideration in June 2011.

PANEL DISCUSSION ON SPOLIATION AND SANCTIONS

Empirical Study

To introduce the discussion, Emery Lee of the Federal Judicial Center outlined the results of the empirical study that he conducted for the committee to identify litigation in the federal courts involving spoliation sanctions. The first task of the study, he said, had been to ascertain the frequency with which spoliation issues are actually litigated. He emphasized that an empirical study – based on tabulating the frequency of court docket events and records – is a very different exercise from a review of the reported case law.

The Center's study, he explained, had examined the records of 131,992 civil cases filed in 19 district courts during the years 2007 and 2008. The number of those cases with spoliation issues, he noted, was very small, as sanctions motions were filed in only 209 cases – or 0.15% of all cases.

But the study also showed that the cases with sanctions motions were particularly contentious. They also had much longer disposition times than other civil cases – taking 649 days on average from filing to disposition, versus 153 days for all cases. In addition, they were far more likely to go to trial. About 17% of the spoliation cases went to trial, versus fewer than 1% of all the cases. Spoliation motions also tended to be filed late in the cases – on average 513 days into a case.

Dr. Lee added that every dispute involving electronic discovery tends to increase the costs of a case by about 10%. The empirical study found that spoliation issues had occurred both in cases with electronically stored information (62% of the total) and cases

without it (38%). About two-thirds of spoliation motions were made by plaintiffs, and businesses were the targets of the motions 74% of the time.

Of the motions ruled on, 28% were granted by the courts and 72% denied. For cases involving electronically stored information, the grant rates were slightly higher, at 34% granted and 66% denied. Dr. Lee noted that the numbers in the empirical study were very different from those in recent studies of published orders and opinions, which showed grant rates approaching 60%. The explanation, he said, is that cases with published orders and opinions are simply not typical of all cases. When a court grants sanctions, the order is much more likely to be published.

As for the types of sanctions imposed by the courts, Dr. Lee reported that the study showed that FED. R. CIV. P. 37 was the most prevalent basis for sanctions. Of the sanctions granted, 45% resulted in adverse inferences or instructions, 48% resulted in preclusion of evidence or testimony, 23% led to dismissal or default, and 3% involved civil contempt.

Judge Kravitz concurred that sanctions are rarely granted. Nevertheless, he said, the fear of sanctions clearly drives litigant behavior. As a result, clients tend to over-collect and over-preserve their records.

Panel Discussion

The panel was chaired by Mr. Joseph and included Judge Rothstein, Judge Grimm, and Messrs. Allman, Barkett, and Girard.

A panelist emphasized that spoliation issues arise far more often than the Federal Judicial Center study indicated. Preservation, he said, is raised frequently at Rule 26(f) attorney conferences and in other discussions among counsel. Lawyers and parties, he added, try to avoid sanctions and commonly work out preservation disputes on their own without court involvement. These discussions, however, are not reflected on the court's docket or in its opinions. In addition, he said, third parties are frequently involved in spoliation issues that do not appear in court records. He added that he receives regular reports of all cases in which there is a sanctions issue, whether or not a motion is filed. In all, he said, he had counted nearly 4,000 cases involving spoliation issues in the federal and state courts.

Other panelists agreed that the frequency of spoliation issues is much greater than the court dockets seem to indicate. Almost all sanctions decisions, moreover, are published, and the behavior of lawyers and their clients is greatly affected by what they read in opinions and orders.

A panelist explained that preservation and sanctions law varies greatly from jurisdiction to jurisdiction. In the absence of a clear national standard, companies that conduct business in multiple states must comply with the most stringent preservation standards extant, greatly increasing precautionary practices and costs.

One possible improvement that the rules could make, he said, would be to fold the limited safe-harbor provision of Rule 37(e) (failure to provide electronically stored information) into the general standard of Rule 37(c) (failure to disclose or supplement). A revised rule might specify that in the absence of willfulness or bad faith, a court could not order sanctions against a party that has acted reasonably and in proportion to the stakes in the litigation. The rule, though, would also have to address instances where there is only negligence, rather than wilfulness, but the negligence leads to a loss of information that destroys the other side's case. The rule, therefore, would have to include elements of reasonableness, proportionality, and prejudice.

Another panelist endorsed that approach, but added that the rule should be limited to instances involving gross negligence. A party should be protected against ordinary mistakes that may be mildly negligent, but do not warrant sanctions.

Another panelist, though, expressed serious concern with the approach. He noted that a judge's inherent power is the most significant source of sanctions authority, regardless of whatever specific language is set forth in a rule. That inherent power is hard to limit, so a more effective approach might be to harness that power and specify in the rule the criteria for invoking the power.

It was suggested that the result might be achieved by eliminating the qualifying phrase "under these rules" in Rule 37(e). Judge Rosenthal explained that when Rule 37(e) was being discussed in the Standing Committee, the concern had been voiced that the committee was approaching the outer limits of its authority under the Rules Enabling Act. That is why the words "under these rules" were added – to guarantee that the committee had the authority to adopt the rule.

A panelist emphasized that the case law on sanctions is intensely factually driven, and it would be unwise to have a rule that binds the court's ability to act to a particular level of fault. A rule that inflexibly requires a certain level of culpability would inevitably create a rational incentive to destroy information. As such, it would interfere with the truth-finding process.

The rule, instead, should focus on the policy objectives to be achieved when a litigant fails to preserve, and it should give weight to the injured party's showing of how it was hurt by the spoliation. The actor's state of mind is often not as important as the consequences of an act. As a practical matter, courts try to restore the innocent party to where it would have been without the destruction of information. The right rule will not

be easy to draft, but it should focus on restoring the situation and require a nexus between the loss of the information and the resulting prejudice.

A panelist pointed out that the culpability standards found in the case law among the circuits are chaotic and inconsistent, and they need to be addressed. The most difficult situation, he said, involves the case where there is no culpability, but an act has severely prejudiced a party or deprived it of information that it needs to make its case. Including a "bad faith" or "wilfulness" standard may be appropriate in a rule, but prejudice also needs to be included in the rule. In other words, the rule should aim to take care of litigants who have been hurt by the conduct, even though the conduct did not constitute bad faith or wilfulness.

A participant suggested that the range of sanctions available to a judge in dealing with spoliation problems is quite wide, and it might be possible to calibrate the sanctions to fit the level of culpability and the extent of the prejudice. For example, the offending party might be required pay the costs of restoring a situation, or the court may extend the time for discovery. Dismissal of a case or other severe sanctions might be reserved for only the most egregious conduct.

A panelist recommended that the committee work from the elements of a preservation rule that had been developed by the panel at the Duke conference. He emphasized the importance of specifying the preservation "triggers" in the rule, *i.e.*, identifying the specific events and point in time when an obligation to preserve attaches.

He suggested three potential approaches. First, the committee could be aggressive and list the minimum factors that trigger the preservation obligation. That approach, though, would raise questions about the committee's pre-litigation authority under the Rules Enabling Act. Second, the rule might state what preservation obligations arise on commencement of the litigation, leaving the pre-litigation field to the common law. Third, the rule could specify that once the common-law test of "reasonable forseeability of litigation" is met, a party must act reasonably, in good faith, and in proportionality to the stakes of the litigation.

He concluded that the committee does in fact have the authority to draft a federal rule defining what pre-litigation conduct triggers preservation obligations because the spoliation ultimately affects the federal case. He suggested, though, that in the final analysis, the process of education may be more effective than the rulemaking process. He noted, for example, that the Sedona Conference had produced a document setting forth best practices regarding triggering events and preservation obligations.

A panelist reiterated that under the common law the duty to preserve is triggered when there is a reasonable forseeability of litigation. The duty, he explained, is owed to the court itself because the court needs to have the evidence readily available for the case.

The preservation obligation predates the federal lawsuit, but it is vested in the lawsuit itself. He argued that the committee had authority under the Rules Enabling Act to specify the preservation obligations in the rule because there is sufficient nexus between those obligations and the federal case.

Another panelist pointed to several examples of rules that regulate pre-litigation conduct and are predicated on the consequences that the conduct may have on later litigation decisions. For example, FED. R. CIV. P. 27 (depositions to perpetuate testimony) governs the pre-litigation preservation of evidence. That rule, he said, could be amended to specify the obligations and the consequences. He suggested, moreover, that if the committee drafts a preservation rule, it should not restrict the rule to electronically stored information.

A member strongly endorsed efforts by the committee to amend the rules to address both spoliation and sanctions. He said that spoliation problems arise far more frequently than the study of dockets and opinions suggests. The issues do not get reported very often, but they are either discussed informally with the court at pretrial conferences or resolved by the attorneys without court involvement. Preservation issues, moreover, can be very complex, very important, and very expensive. The bar, he concluded, needs definitive guidance and greater certainty on the matter from the committee. In particular, the rules should be clear in addressing the penalties for violations of preservation obligations.

A member explained that whether or not there is authority under the Rules Enabling Act to issue a preservation rule, it is essential that lawyers and parties have clear national guidelines that they can rely on. She noted, for example, that it is well established in antitrust law that companies that act within antitrust compliance guidelines are generally safe from adverse action by the Department of Justice. Likewise, companies that have anti-harassment programs in place enjoy a level of defense in employment discrimination litigation. In short, parties that comply with a set of accepted professional guidelines generally receive the benefit of the doubt from the courts.

Judge Kravitz emphasized that the civil rules committee was not just pursuing the rulemaking path. It was also working with the Federal Judicial Center on case-management and educational approaches. In some areas, he said, the current civil rules are sufficient, but the bench and bar may not be applying them properly and consistently.

A member agreed, but pointed to practical limitations with traditional educational efforts. The law school curriculum, for example, allows little time for legal ethics, and it does not lend itself to the level of complexity that the committee is attempting to address. On the other hand, law firms and bar associations might do more with continuing education to address ethical issues for litigators, including preservation obligations.

A member noted that most litigation occurs in the state courts. The committee, therefore, would be well advised to examine developments in the states regarding preservation and sanctions that could be adapted for possible use in the federal courts. Uniformity in this area among all the federal courts and all the states would be very desirable. Therefore, it would be profitable to work in conjunction with the states on the matter. Other participants agreed, noting that the federal rules have a major influence on the state courts, and a revised federal rule could have a beneficial impact on state litigation.

Judge Rosenthal pointed out that the discussions, both at the meeting and at the Duke conference, had focused on a federal rule that would both define preservation duties and specify the consequences for violations. She emphasized that a rule dealing with sanctions would be far easier to draft than a rule dealing with preservation. Since the fear of sanctions was driving much of the behavior of lawyers and clients, she asked whether a federal rule that addressed sanctions alone would be sufficient.

A panelist said that it would be a great beginning, but it would not be enough alone to influence the desired behavior. The proposed rule would also have to address preservation. But a member questioned how the rule could specify pre-lawsuit preservation obligations, other than to use broad terms such as "reasonable" and "foreseeable."

A participant suggested that the committee has clear authority to address sanctions in the federal rules. But in the absence of additional legislation, the Rules Enabling Act limits its authority to address preservation. He emphasized that the law of spoliation is essentially state law. The text of a federal procedural rule, he said, could make a reference to preservation duties, but it would have to recognize that the field is governed by state law, at least up to the point that a federal lawsuit is filed.

He recommended that corporate counsel think closely about developing a shared professional understanding as to what constitutes reasonable behavior. The professional standards that they develop could be recognized by courts in their rulings and listed as a relevant factor in a federal rule. He recommended that the corporate divisions of the American Bar Association focus on pursuing this approach.

A panelist expressed unease over the practical difficulty of applying any national preservation rule to small businesses and individuals. Adoption of national standards, he said, may result in disparate treatment. They may work very well for corporations or other large organizations that become familiar with them, but individuals and small organizations will not be as aware of their specific obligations. The disparity problem, he said, already exists with regard to document-preservation obligations. So, rather than devising a fixed culpability standard in a rule, which will inevitably be used by counsel

as a tool against their opponents, the federal rule should focus on providing comfort to those who act reasonably.

Finally, a panelist recommended that the committee address all three major issues discussed by the panel: (1) the triggers that initiate preservation obligations; (2) the scope of the preservation obligations; and (3) the culpability level required before sanctions may be imposed. Judge Kravitz said that the advisory committee and its subcommittee were planning to consider all three areas.

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering revisions to Rule 45 (subpoenas), and it had appointed a subcommittee to lead the effort, with Judge David Campbell as chair and Professor Marcus as reporter. The subcommittee, he said, had considered dozens of suggested improvements to Rule 45, but it had narrowed its focus to three main issues: (1) notice, (2) transfer of enforcement proceedings, and (3) the 100-mile rule. It was also considering overall simplification of the rule and was planning to present a revised rule to the Standing Committee at its June 2011 meeting.

(1) Notice of subpoena

Judge Kravitz explained that the current rule directs that "notice must be served on each party" before a subpoena to produce documents is served. Nevertheless, he said, few lawyers seem to follow the rule, perhaps because the notice requirement is buried in the last sentence of Rule 45(b)(1). The subcommittee planned to restructure the rule to give the requirement more prominence and a separate heading. Professor Cooper added that the revised rule would require for the first time that a copy of the subpoena be supplied with the notice.

Judge Kravitz said that beyond requiring notice to all parties that the subpoena has been served, the subcommittee had considered whether to add a requirement that notice also be provided to parties when the documents are produced. The subcommittee concluded, though, that the burden of providing notice could be great because a subpoena is often produced in pieces. Rule 45, moreover, is already too long. Adding another notice requirement would only make it harder to follow and comply with.

Nevertheless, he said, a prominent lawyer had informed the subcommittee that lack of notice of production is the most important problem that he faces in practice, and he often does not learn that documents have been produced until it is too late to act.

A member concurred strongly with this observation and recommended adding a provision to the rule requiring the server of a subpoena to give opposing parties notice of production and of any revisions to the subpoena, even if it further complicates the rule.

He said that lawyers are entitled to the documents, and they should receive copies when the subpoenaing party gets them. Other participants suggested, though, that lawyers normally tend to work out the problems on their own, even though they do not always comply with the details of the rule. They suggested that lawyers are always free to contact the subpoenaed party to ask for an update as to what has been produced, or they may serve their own subpoena. The member responded, though, that subpoenas are a substantial burden on third-party producers, and the third parties should not have to deal separately with all the lawyers. Having a rule that requires notice of production would be a much simpler approach.

(2) Transfer of enforcement proceedings

Judge Kravitz explained that under Rule 45, a subpoena is issued in the name of the court where the witness is located, and it is enforced by that court. He noted, though, that there are times when enforcement of a subpoena does not involve local issues. Rather, the issues go to the merits of the case and should be addressed by the court where the case is pending. Rule 45, however, does not currently provide for a transfer of authority for enforcement purposes, even though some courts have managed to find ways to transfer the enforcement dispute. It is also not unusual, he said, for a judge in the district where a subpoena has been served to call the presiding judge in the district where the case is pending to ask for advice.

Judge Kravitz noted that the subcommittee's pending proposal would explicitly authorize transfer of enforcement proceedings in certain limited circumstances. Judges should not routinely transfer cases, however, because enforcement issues are often truly local in nature and have nothing to do with the merits of a case. They frequently involve the convenience of the subpoenaed party. The subpoenaed party, moreover, should be able to use local counsel and go into the local court.

He noted that the subcommittee was struggling with drafting the language of the standard needed to justify a transfer. He said that one option would be to track 28 U.S.C. § 1404, the general change of venue provision dealing with "the interests of justice." Even if the subcommittee were to adopt that standard, the committee note would specify that if the issues are local, a case should not be transferred.

Professor Marcus said that a revised rule could take any of three approaches: (1) to favor transfer of enforcement most of the time; (2) to express no preference as to enforcement location; or (3) to oppose transfer of enforcement most of the time, but make it available in the right cases. He noted that the subcommittee had chosen the third option, and it was struggling to draft appropriate language.

Judge Kravitz added that the subcommittee had also asked whether Rule 45 should not simply discard the fiction and the complexity of having subpoenas issued in

the name of the court where a witness is located. The rule, instead, might move towards nationwide service, allowing the court where the case is pending to issue the subpoenas. But, he noted, that approach raises a number of other questions.

(3) The 100-mile rule

Judge Kravitz noted that in *In re Vioxx Products Liability Litigation*, 438 F. Supp.2d 664 (E.D.La. 2006), the district court had held that a subpoena may compel a party or a party's officer to appear as a witness at trial regardless of the 100-mile limit in FED. R. CIV. P. 45(b)(2). Some courts have followed the *Vioxx* ruling, while others have rejected it. The advisory committee, he said, planned to recommend an amendment to Rule 45 that would effectively undo the *Vioxx* ruling.

Judge Kravitz reported that the advisory committee was of the view that the 100-mile provision in Rule 45 should be retained and enforced for three reasons. First, there is a fear that litigants may demand the presence of high corporate officials at trial, even though they may not have first-hand knowledge of the facts, in order to force a settlement. Second, video depositions of corporate executives and other witnesses are a viable alternative to trial testimony in many cases. Third, if a high ranking official in fact has meaningful knowledge about a case, the presiding judge will attempt to persuade the party to bring the official to the trial.

Judge Kravitz noted that the committee was also considering publishing in brackets a non-favored alternative *Vioxx* approach that would allow a court to compel the presence of an official for trial under certain conditions. The subcommittee, he said, was working on drafting a high threshold standard for triggering the alternative.

PLEADING STANDARDS

Judge Kravitz reported that the Federal Judicial Center was conducting a survey of how motions to dismiss and motions to amend the pleadings are being handled in the 20 largest district courts since *Twombly* and *Iqbal*. Joe Cecil of the Center, he said, was examining the dockets and case files to ascertain the real impact of the *Twombly* and *Iqbal* decisions.

Judge Kravitz said that he had reported to the committee two years ago that a common-law process would develop following *Twombly* and *Iqbal* and that the federal courts would take a context-specific and nuanced approach to pleading requirements. That, he said, was in fact happening, and it had clearly been confirmed in Andrea Kuperman's summary of the extensive case law. He added that once the Federal Judicial Center's research findings are available, the advisory committee will discuss pleading issues and consider several different approaches in response to *Twombly* and *Iqbal*.

MISCELLANEOUS MATTERS

Judge Kravitz reported that following the May 2010 Duke conference, Judge John Koeltl had agreed to chair a subcommittee to implement the many suggestions raised at the conference. The subcommittee, he said, has had several meetings. In addition, the Duke Law Journal had published several of the articles produced for the conference, and the committee, in conjunction with the Standing Committee, had presented a report on the conference to the Chief Justice.

Judge Kravitz noted that the advisory committee still had FED. R. CIV. P. 26(c) (protective orders) on its agenda and will continue to monitor the case law on protective orders.

The advisory committee, he said, was generally of the view that it should eliminate the illustrative civil forms. But it had deferred action on the matter to avoid signaling any conclusions about *Twombly* and *Iqbal* if the pleading forms were to be abandoned. He noted, for example, that the patent bar had severely criticized the existing forms on patent litigation.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of December 8, 2010 (Agenda Item 7).

Amendments for Publication

FED. R. CRIM. P. 11

Judge Tallman reported that the proposed amendment to Rule 11 (pleas) had been motivated by the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). In *Padilla,* the Court found that the defendant had received ineffective assistance of counsel because his lawyer had failed to warn him about the possible deportation and immigration consequences of his guilty plea and conviction. The proposed amendment would require a court to expand the Rule 11 colloquy and advise defendants that if they are not United States citizens and are convicted, they may be removed from the country, denied citizenship, and denied admission in the future.

A member pointed out that Rule 11 does not currently require a court to advise a defendant of any of the collateral consequences of a conviction. He questioned why immigration had been singled out for inclusion in the rule and warned that it could lead to a "slippery slope" of other amendments – since several other collateral consequences are

equally important to some defendants. The proposal, moreover, would require judges to warn all defendants of the potential adverse consequences of deportation, even defendants who are United States citizens. At the most, he said, the rule should be limited only to defendants who are not citizens. He added that the Rule 11 plea colloquy is already very long, and many defendants do not understand all of it. Adding even more requirements may distract defendants from the more important consequences of conviction that they need to focus on.

Rule 11, he said, is a haven for prisoners who get buyer's remorse in prison after pleading guilty. He predicted that defendants will inevitably file motions attacking their sentence under 28 U.S.C. § 2255 on the grounds that the court did not follow the rule and inform them of the immigration consequences of their guilty plea.

Judge Tallman explained that the advisory committee had discussed these arguments extensively. But, he said, a majority of the members favored limiting the proposed amendment to immigration consequences because it had been the Supreme Court's focus in *Padilla.* The reason that the proposed amendment applied on its face to all defendants is that a judge cannot always tell at a Rule 11 proceeding whether the defendant is in fact an alien and subject to deportation. The defendant, for example, may not want to answer whether he is a citizen or may lie about citizenship.

Other participants expressed similar views and argued that the list of topics in Rule 11 is already too long. One emphasized that in *Padilla* the Supreme Court had placed the obligation to inform the defendant of deportation and immigration consequences squarely on defense counsel, and not on the court. There is, moreover, no real problem to address because most judges already include these consequences in their Rule 11 discussion whenever it is relevant. That practical approach is preferable to requiring a court by rule to advise every defendant of immigration consequences, even when not relevant.

A member expressed support for the proposed amendment as a matter of policy and pointed out that much of the Rule 11 colloquy is covered by the harmless error rule. If immigration consequences are not important in a particular case, such as when a defendant is a citizen, omitting it from the plea colloquy would clearly be harmless error.

A participant noted that the Department of Justice was in the process of adding language similar to the proposed amendment to its standard plea agreements. That course of action, she said, will help produce a record to assist the court of appeals.

A participant stated that the Bench Book for District Judges already recommends that judges include immigration consequences in the advice they give to defendants under Rule 11. Even if there were a violation of the rule, the case law is clear that it would not

rise to the level of constitutional due process if the judge failed to warn of immigration or other collateral consequences. She added that giving the warning of deportation consequences in open court at the plea proceedings will provide an additional safeguard. A defendant clearly will have no claim if the record shows that the judge clearly warned him or her of the consequences.

Even though several committee members expressed reservations about the wisdom of the proposed amendment, they all agreed that it should be published for public comment.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. CRIM. P. 12 and 34

Judge Tallman reported that the advisory committee was seeking authority to publish amendments to Rule 12 (pleadings and pretrial motions) that would clarify which motions must be raised before trial and the consequences if not timely raised. He noted that a proposal had first been presented to the Standing Committee in 2009. But it had been returned for further study, and the advisory committee was asked at that time to consider the differences between "waiver" and "forfeiture" and whether some or all violations of Rule 12(b)(3) should be considered forfeited rather than waived.

Professor Beale pointed out that the impetus for the proposed amendments had been the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002). The Court held in *Cotton* that the defects in an indictment are not jurisdictional in nature, so the court continues to have jurisdiction over the case if the defendant fails to file a motion to dismiss based on those defects. Accordingly, she said, defendants should be channeled into raising defects in the indictment before trial. Therefore, the proposed amendments specify that a motion based on a defect in the indictment must be made before trial if the basis for the motion is reasonably available before trial and the motion can be determined without a trial on the merits.

She added that in the current Rule 12, all defaults are described as "waivers," including inadvertent forfeitures. But failure to raise a defect in the indictment before trial is not like other "waivers" – a knowing, intentional waiver of rights. Therefore, in revising the rule, the advisory committee had to decide whether a defendant's failure to make the motion before trial should constitute to be characterized as a "waiver."

Judge Tallman explained that the advisory committee proposal would restructure Rule 12. Revised Rule 12(b)(2) specifies that a motion that the court lacks jurisdiction may be made at any time while a case is pending. Rule 12(b)(3) then lists all the motions that must be raised before trial.

Under revised Rule 12(e)(2), a party would "forfeit" any claim not timely raised if it is based on: (1) failure to state an offense; (2) double jeopardy; or (3) the statute of limitations. Relief from a forfeited claim would be governed by Rule 52(b) (plain error).

Under revised Rule 12(e)(1), a party would "waive" any other defense, objection, or request listed in Rule 12(b)(3) if not timely raised by motion. The court could grant relief upon "a showing of cause and prejudice." Professor Beale noted that the choices that the advisory committee had made on the list had been derived in large part from the case law and how the courts have been addressing these motions.

Several members suggested specific refinements in the list and in the language of the proposed amendments. One pointed out that the Supreme Court had sharpened the distinctions between forfeiture and waiver and questioned retaining the word "waiver" in Rule 12. She suggested that "waiver" in Rule 12 was a peculiar, unique use of the term because it does not deal with a knowing and intentional relinquishment of a right. The rules, she said, should not retain an idiosyncratic use of the term. The committee should aim for clarity, but the current language of the amendment had not yet achieved it in this particular respect.

A participant noted that the Department of Justice had initiated the request to revise Rule 12 because it wanted to make clear that a failure to raise the defense of a defect in the indictment is waived if not asserted before trial. But the advisory committee's deliberations had broadened the scope of the proposal to address other defenses, such as double jeopardy and the statute of limitations.

Judge Tallman pointed out that the advisory committee had spent a great deal of time focusing on the concepts of waiver and forfeiture. By using "waiver," he said, the committee was indeed trying to address matters that involve a knowing relinquishment of a right. But several lawyers had informed the committee that many lawyers do not even think about these issues until later in a case. The proposed rule, therefore, in effect imposes a due diligence requirement on counsel.

The participants debated the differences between waiver and forfeiture, the consequences of each, and which of the two carries the more stringent consequences. One participant suggested that in light of the uncertainty surrounding the two terms and the consequences flowing from them, it might well be better to introduce a new term in the rule, such as "default." Others concurred and recommended deleting the term "waiver" from the rule entirely and replacing it with alternative language.

A member emphasized that the proposed Rule 12 amendments, though not yet perfect, will be very beneficial. They will give lawyers and judges necessary clarity and provide a very helpful check list for the bench and bar. She recommended that the amendments be published for public comment, perhaps using an alternate term for

"waiver." Another member agreed that the revised rule was very valuable, but recommended that the language be refined further before being published.

Professor Beale suggested that the published rule might use the word "default" and place both "default" and "waiver" in brackets in the text to solicit public comments on them. The advisory committee might also bracket the words "double jeopardy" and "statute of limitations" in proposed Rule 12(b)(3) and ask for comments on whether those claims should moved from the forfeiture category to the waiver category. A member endorsed that approach and pointed out that including the alternatives in brackets will avoid the need to republish the rule if further changes are made after publication.

Several participants emphasized that the advisory committee was on the right track and should continue to refine the rule. One urged the committee to be more adventuresome in drafting the rule and devise new language to replace "waiver" and "forfeiture." He suggested that the standards for relief under the two concepts are not clearly stronger or weaker than each other. Another participant, though, expressed concerns about changing the labels or tinkering with the substance of current standards because a great deal of law had already been built on the current rule.

Ms. Claggett urged the advisory committee to continue its work. She suggested that the current Rule 12 is incorrect, is inconsistent with *Cotton,* and needs to be changed. She said that the drafting problems could be worked out.

Judge Tallman expressed reservations about sending the rule back to the advisory committee again for another round of drafting in light of the continuing uncertainty and apparent lack of consensus. But several participants said that the proposed amendments were a major improvement over the current rule, and they urged further refinement in the language.

Judge Rosenthal pointed out that it had been very helpful for the advisory committee to have brought the revised draft of Rule 12 to the Standing Committee for a thorough discussion. She said that many excellent suggestions had been made. As a result, it appeared to be the clear consensus of the Standing Committee that: (1) the advisory committee's recent restructuring of the rule was very beneficial and represented a major improvement over the current rule; and (2) the advisory committee should continue to refine the language and return to the Standing Committee in June 2011 for approval to publish the rule, perhaps placing certain terms in brackets to attract public comment.

The committee without objection by voice vote approved the proposed amendments in principle and asked the advisory committee to continue refining them for presentation at the June 2011 Standing Committee meeting.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman complimented the Federal Judicial Center for its excellent work in conducting a major survey of the bar on the issue of pretrial disclosure of exculpatory and impeachment information under *Brady v. Maryland,* 373 U.S. 83 (1963) and later cases. He noted that the survey had been sent to 1,500 federal judges, all the U.S. attorneys' offices, and 16,000 criminal defense lawyers. The response rate, he said, had been the highest of any Center survey ever. In addition, the survey had elicited 700 pages of detailed written comments.

The study, he said, had separated the federal judicial districts into two categories – districts that adhere literally to the current requirements of FED. R. CRIM. P. 16 (discovery and inspection) and those that have local rules supplementing Rule 16 with additional disclosure requirements. He added that the criminal discovery system must work within the framework of the Jencks Act. In practice, however, the statutory time frame is often honored in the breach. Disclosure of information by prosecutors before trial often helps to make the system work effectively and avoid trial adjournments.

Judge Tallman said that the central question for the advisory committee was to decide whether Rule 16 should be amended to require disclosure of exculpatory and impeaching information. He pointed out that 51% of judges responding to the Federal Judicial Center survey (64% in the broader disclosure districts) had favored an amendment to Rule 16 because it would: (1) eliminate confusion as to the "materiality " requirement for impeaching information; and (2) reduce the wide variation of discovery practices now existing among the federal courts and among individual judges. On the other hand, judges opposed to amending Rule 16 had asserted that the current system was working well and no changes were needed.

Judge Tallman noted that the Department of Justice opposed any amendment to Rule 16 and agreed with the reasoning of the judges who opposed changing the rule. The Department, he said, also emphasized another reason for opposition. It cited several important internal reforms that it has made, including: (1) major national efforts greatly increasing the advice and training given prosecutors and staff regarding their disclosure obligations; (2) appointment of a national discovery coordinator; and (3) establishment of local district discovery plans. He also pointed out that the Department stressed that there have been, on average, fewer than two complaints a year alleging *Brady* violations by prosecutors, even though 86,000 criminal cases had been filed in the federal courts last year.

He noted that a major concern raised by opponents of an expanded Rule 16 was its potential effect on the privacy and security of cooperating witnesses. The advisory

committee, he said, was extremely sensitive to that concern and to the impact that every proposed amendment may have on victims' rights. The Federal Judicial Center survey responses, though, showed that the great majority of respondents other than the Department of Justice had stated that an expanded rule would have little or no negative impact on witnesses. Nevertheless, the U.S. attorneys' offices remain very wary, and they argued that there is no way to know in advance with certainty whether there is going to be a threat in any particular case.

He suggested that it might have been better to have surveyed individual lawyers in the U.S. attorneys' offices, rather than the offices themselves. He pointed out that the survey had elicited many anecdotes and insights from the 5,000 individual defense lawyers, but very few details from the U.S. attorneys' offices. Therefore, it is difficult to fully assess the threat to cooperating witnesses in particular cases.

Judges who opposed a rule change in the survey had said that the gain to be derived from the rule would simply not be worth the gamble. Some had cited the potential chilling effect that an expanded rule would have on potential witnesses, even though many of them will not be called to testify at trial.

He said that U.S. attorneys' offices in the survey had relied heavily on the Jencks Act. They also responded that disclosure of information to defendants without regard to its materiality will result in making the lives of all potential witnesses an open book. It will also create a real risk that witnesses will simply refuse to come forward and cooperate or testify. At a minimum, moreover, any potential rule would have to include an exception for national security cases and certain other types of cases. Prosecutors should also be allowed in certain cases to defer turning over information until after the witness testifies.

The survey responses also showed, though, that judges have several devices to deal with security concerns, such as issuing protective orders. The survey also indicated that the defense bar was apparently not too concerned about the ethical problem raised by protective orders that prohibit them from disclosing information to their clients. They would rather have the information.

Proponents of an expanded disclosure rule also pointed out that exculpatory and impeaching information is turned over regularly in the state courts without adverse effects. They also argued that defendants for the most part already know who is going to testify against them.

On the other hand, survey respondents who oppose expanding Rule 16 had said that it would negatively impact safety and privacy and have a chilling effect on witnesses. Lawyers representing cooperating witnesses had also opposed greater

disclosure and said that their clients would be labeled as snitches and their safety in prison could not be guaranteed.

Judge Tallman said that it would be difficult to draft a rule requiring disclosure before trial that could be reconciled with the timing provisions of the Jencks Act. It would be necessary to ask Congress to change the Act. The rules committee, he advised, should not attempt to invoke the supersession clause of the Rules Enabling Act.

A member added that the Department had taken many important internal initiatives to emphasize the obligations of prosecutors to disclosure exculpatory and impeaching information. The Department, moreover, has asked that these initiatives continue to play out before the rules committees take any action on amending Rule 16.

Another member suggested that as long as the Department of Justice is adamantly opposed to a rule, the proposed amendments will never come to pass. The committee, therefore, should defer further action on the proposal.

Judge Tallman said that because of the sharp disagreements on fundamental, controversial issues among both bench and bar, the advisory committee was in a conundrum as to what to do. Much of the discussion to date, he said, had been general in nature and focused on broad policy concerns. The debates, though, have not identified with necessary precision the specific kinds of information that should be disclosed by prosecutors. A broad recommendation to delete the materiality requirement, for example, is well-meaning. But it would require disclosure of virtually everything, and it might well be unworkable.

He said that the advisory committee will have to decide at its next meeting whether to proceed at all with Rule 16 amendments. If it does decide to proceed, it will also have to decide the specifics of what to include in the amendments. He reported that the advisory committee was also considering developing a discovery check list that might be included in the Bench Book for District Judges. In addition, it was conferring with the Federal Judicial Center on publishing a best-practices guide that could be helpful to the litigating bar.

Judge Rosenthal pointed out that a great deal of creativity had been devoted to the issue, including the various non-rule approaches for dealing with disclosure of *Brady* materials. The debate, she said, had been a healthy development, and a great deal had already been accomplished, even without a rule change. The rules committees, however, will have to consider how much time and resources to continue devoting to the matter.

Judge Tallman added that about a third of the federal district courts have not waited for a national rule and have issued their own local rules, which offer quite varied solutions. Therefore, there is currently a lack uniformity in the federal courts.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of November 3, 2010 (Agenda Item 8). Judge Fitzwater reported that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that the advisory committee will hold its October 2011 meeting at the William and Mary Law School. In conjunction with that meeting, the advisory committee will host a symposium to commemorate the restyled evidence rules scheduled to take effect on December 1, 2011. The committee was planning to hear from a number of judges and law professors on the restyling process. He invited the Standing Committee members to attend.

He noted that the advisory committee expected to seek approval from the Standing Committee at its June 2011 meeting to publish a proposed amendment to Rule 803(10) – the hearsay exception for the absence of a public record. The change would be another in the line of fixes required by the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), dealing with testimonial statements.

He pointed to the Court's 2009 decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), holding unconstitutional a state procedure that allowed conviction on the basis of a certificate of forensic test results without personal testimony. The proposed amendment to Rule 803(a), he said, would adopt a notice-and-demand procedure, under which the government could give notice to the defendant of its intent to produce a certificate without personal testimony, and the defendant in turn could demand that the witness who produced the results testify in person at trial. In the absence of such a demand, the matter could proceed without the testimony.

He noted that Professor Capra had reviewed all the evidence rules for potential *Crawford* problems and had found no others. He added that the advisory committee was also working on a possible amendment to Rules 803(6), (7), and (8) that had surfaced during the restyling process.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the Privacy Subcommittee, presented the subcommittee's report. (Agenda Item 11)

Judge Raggi reported that the agenda book included the subcommittee's report on the 2007 federal privacy rules. The subcommittee, she said, had also produced several appendices to the report that documented the subcommittee's inquiries and the data that it had gathered.

Judge Raggi noted that the subcommittee in conducting its review had made extensive efforts to obtain information about: (1) how the privacy rules are working; and (2) how they might be improved. Among other things, she said, the subcommittee had explored whether there are any additional privacy needs that the current rules do not address.

She summarized the report's findings and recommendations, including the key conclusion that the privacy rules are being implemented effectively by courts and parties. In essence, judges, lawyers, and clerks are doing their jobs well. She explained that there was no need to amend the privacy rules at this point. Nevertheless, the subcommittee pointed out some areas where further implementation was in order, such as continuing education, periodic monitoring, and experimentation.

She explained that the Judicial Conference's privacy policies, now embodied in the 2007 federal privacy rules, had been developed by the Court Administration and Case Management Committee. Fundamental to the current Conference policy is the concept that "public is public," *i.e.*, that court records available to the public at the courthouse should also be available to the public on the Internet. The subcommittee, she said, did not attempt to revisit that policy, and it invited members of the Court Administration and Case Management Committee to serve on the subcommittee.

The subcommittee, she said, had studied the problems comprehensively and had collected substantial data that will be of continuing value to both committees. It had received a great deal of research and other staff assistance from both the Administrative Office and the Federal Judicial Center.

She noted that the subcommittee had examined a complaint that social security numbers appear widely in court records. The staff, though, had examined all the case files of the federal courts, and the evidence clearly showed the opposite conclusion. Unredacted social security numbers appear in very few cases and seem to be a minor problem. Nevertheless, the subcommittee urged continuing monitoring and spot checking, and the report recommended that the Federal Judicial Center conduct a random review of case filings every other year.

In addition, the subcommittee had sent a questionnaire to judges, clerks of court, government lawyers, and private lawyers asking about privacy practices in federal cases. The vast majority of the respondents stated that they were aware of the privacy rules and their redaction obligations.

The subcommittee had also conducted critical studies and convened a major conference on privacy and public access at Fordham Law School in April 2010. The conference included nearly 100 people with a strong interest in privacy matters, including judges, lawyers from all segments of the legal profession, prison officials, professors and the press. Every point of view was represented. There were, of course, conflicting views, but the conference provided the subcommittee with a great deal of information and a broad perspective, which are reflected in its report.

Judge Raggi reported that although the subcommittee had concluded that no changes were needed in the federal rules at this point, three points needed to be made. First, the subcommittee had discovered in its research that a few local-court rules conflict with the national rules by imposing additional requirements on parties. The subcommittee would prefer to deal with that issue in the traditional way by communicating with the chief judges of the pertinent courts and pointing out the discrepancies.

Second, there is the unresolved problem of how to deal with cooperating witnesses in criminal cases. Different practices prevail among the district courts on whether cooperation documents should be filed or made public. Two separate panels at the Fordham conference had been devoted to the issue.

The professors and lawyers on one panel agreed that there should be a national rule addressing the subject, but there was no consensus among them as to what that rule should provide. The other panel, composed of judges, emphasized that their courts had studied the problem carefully, had discussed it with the bar, and had debated at length before adopting their local rules and practices. Each court was convinced that they had arrived at the right solution after all the study and collaboration, but the courts arrived at very different solutions. So, she said, there is no single best practice that could be embodied in a national rule at this point.

In addition, the subcommittee had invited the Department of Justice to offer a model national rule. It had not yet produced a rule because the topic had generated extensive discussion and debate within the Department.

Third, there is a potential issue that may arise in the future with voir dire transcripts, particularly in criminal cases. Recent Judicial Conference policy states that jury selection should be presumptively open to the public. The voir dire transcripts, accordingly, will be posted on the Internet. No problems had been reported yet, and a rule change is not in order, but concerns have been expressed about the privacy and safety of potential jurors.

Judge Raggi thanked Professor Capra for his enormous support to the Privacy Subcommittee and for organizing the conference at Fordham Law School. Professor

Capra, in turn, thanked Heather Williams and Henry Wigglesworth of the Administrative Office and Joe Cecil and Meaghan Dunn of the Federal Judicial Center for their substantial staff assistance to the subcommittee.

Ms. Shapiro thanked Judge Raggi and Professor Capra on behalf of the Department of Justice for their support in addressing the issue of protecting the privacy and security of witnesses and cooperators. She noted that the Department was continuing to work on promoting greater uniformity of practices among the districts.

Judge Raggi emphasized that the subcommittee's study had been comprehensive, and it concluded that no further action was needed at this point. She said that the subcommittee would continue its efforts and would continue to coordinate with the Court Administration and Case Management Committee.

The committee unanimously by voice vote approved the subcommittee's report for submission to the Judicial Conference as an information item. It further agreed to continue working collaboratively with the Court Administration and Case Management Committee on privacy issues.

REVISION OF RULES COMMITTEE PROCEDURES

Judge Rosenthal pointed out that the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* govern the work of the rules committees. She reported that the procedures had been very effective, but they had not been updated since adoption by the Conference in 1983. She noted that committee staff and the reporters had prepared a draft revision of the procedures, and she invited the participants' comments.

Professor Coquillette summarized several of the changes that the proposed revisions would make in the current procedures. He noted that the suggested changes were not major, but they should bring greater clarity and direction to the process and define more sharply the respective responsibilities of the standing committee, the advisory committees, the reporters, and the staff. In addition, he said, the revised procedures adhere to the style conventions used in restyling the federal rules.

Judge Rosenthal added that the rules committees are "sunshine" committees, but there is disagreement over the contours of what documents and information must be made public. Some have suggested that e-mails, routine letters, draft documents, and subcommittee transactions should be public. Others countered that posting those materials is unnecessary and would chill and impede decision-making. Instead, only formal meetings and final drafts need be considered public.

LONG RANGE PLANNING

Judge Rosenthal reported that the committee had examined the Judicial Conference's new long-range plan and would report to the Conference's Ad Hoc Advisory Committee on Judiciary Planning on strategic initiatives that the rules committees were taking to implement the plan. She invited the members to send her any suggestions they may have.

NEXT MEETING

The committee will meet hold its next meeting on Thursday and Friday, June 2 and 3, 2011, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 3-A

112TH CONGRESS
1ST SESSION

S. 533

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 9, 2011

Mr. GRASSLEY (for himself and Mr. LEE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Lawsuit Abuse Reduction Act of 2011''.

SEC. 2. ATTORNEY ACCOUNTABILITY.

(a) SANCTIONS UNDER RULE 11.—Rule 11(c) of the Federal Rules of Civil Procedure is amended—

(1) in paragraph (1), by striking ''may'' and inserting ''shall'';

(2) in paragraph (2), by striking ''Rule 5'' and all that follows through ''motion.'' and inserting ''Rule 5.''; and

(3) in paragraph (4), by striking ''situated'' and all that follows through the end of the paragraph and inserting ''situated, and to compensate the parties that were injured by such conduct. Subject to the limitations in paragraph (5), the sanction shall consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the violation, including reasonable attorneys' fees and costs. The court may also impose additional appropriate sanctions, such as striking the pleadings, dismissing the suit, or other directives of a nonmonetary nature, or, if warranted for effective deterrence, an order directing payment of a penalty into the court''.

(b) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws.

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112TH CONGRESS
1ST SESSION

H. R. 966

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 9, 2011

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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(b) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws.

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

March 14, 2011

Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the Judicial Conference's Committee on the Rules of Practice and Procedure (the "Standing Rules Committee") and the Advisory Committee on the Federal Rules of Civil Procedure (the "Advisory Committee"), we write to oppose H.R. 966, which seeks to reduce lawsuit abuse by amending Rule 11 of the Federal Rules of Civil Procedure. The bill would reinstate a mandatory sanctions provision of Rule 11 that was adopted in 1983 and eliminated in 1993. The bill would also eliminate a provision adopted in 1993 to allow a party to withdraw challenged pleadings on a voluntary basis, without the added costs and delay to the challenging party of seeking and obtaining a court order. The concerns we express are the same concerns expressed by the Judicial Conference in 2004 and 2005, when similar legislation was introduced.

We greatly appreciate, and share, your desire to improve the civil justice system in our federal courts, including by reducing frivolous filings. But legislation that would restore the 1983 version of Rule 11 by undoing the 1993 amendments would create a "cure" far worse than the problem it is meant to solve. Such legislation also contravenes the longstanding Judicial Conference policy

opposing direct amendment of the federal rules by legislation instead of through the careful, deliberate process Congress developed in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077.

The 1993 changes followed years of examination and were made on the Judicial Conference's strong recommendation, with the Supreme Court's approval, and after congressional review. The 1983 provision for mandatory sanctions was eliminated because during the ten years it was in place, it did not provide meaningful relief from the litigation behavior it was meant to address. Instead, it generated wasteful satellite litigation that had little to do with the merits of cases and that added to the time and costs of litigation.

The 1983 version of Rule 11 required sanctions for every violation of the rule. The rule was abused by resourceful lawyers. An entire "cottage industry" developed that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship and little to do with underlying claims. Rule 11 motions came to be met with counter-motions that sought Rule 11 sanctions for making the original Rule 11 motion.

The 1983 version of Rule 11 spawned thousands of court decisions unrelated to the merits of the cases, sowed discord in the bar, and generated widespread criticism. As letters from the Judicial Conference commenting on prior similar bills pointed out, some of the serious problems caused by the 1983 amendments to Rule 11 included:

1. creating a significant incentive to file unmeritorious Rule 11 motions by providing a greater possibility of receiving money;

2. engendering potential conflicts of interest between clients and their lawyers, who advised withdrawal of particular claims despite the clients' preference;

3. exacerbating tensions between lawyers; and

4. providing a disincentive to abandon or withdraw a pleading or claim that lacked merit — and thereby admit error — after determining that it no longer was supportable in law or fact.

The 1993 amendments to Rule 11 were designed to remedy the major problems with the rule, strike a fair and equitable balance between competing interests, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions. Since 1993, the rule has established a safe harbor, providing a party 21 days within which to withdraw a particular claim or defense before sanctions can be imposed. If the party fails to withdraw an allegedly frivolous claim or defense within the 21 days, a court may impose sanctions, including assessing reasonable attorney fees. The 1983 version of Rule 11 authorized a court to sanction discovery-related abuse under Rule 11, Rule 26(g), or Rule 37, which created confusion. Under the 1993 amendments to Rule 11, sanctioning of discovery-related abuse was limited to Rules 26 and 37, which provide for sanctions that include awards of reasonable attorney fees.

The 1993 amendments to Rule 11 culminated a long, critical examination of the rule begun four years earlier. The Advisory Committee reviewed a significant number of empirical examinations of the 1983 version of Rule 11, including three separate studies conducted by the Federal Judicial Center in 1985, 1988, and 1991, a Third Circuit Task Force report on Rule 11 in 1989, and a New York State Bar Committee report in 1987.

After reviewing the literature and empirical studies of problems caused by the 1983 amendments to Rule 11, the Advisory Committee issued in 1990 a preliminary call for general comment on the operation and effect of the rule. The response was substantial and clearly called for a change in the rule. The Advisory Committee concluded that the cost-shifting in Rule 11 created an incentive for too many unnecessary Rule 11 motions. Amendments to Rule 11 were drafted. The Supreme Court promulgated and transmitted the amendments to Congress in May 1993 after extensive scrutiny and debate by the bench, bar, and public in accordance with the Rules Enabling Act process.

Experience with the amended rule since 1993 has demonstrated a marked decline in Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings. In June 1995, the Federal Judicial Center conducted a survey of 1,130 lawyers and 148 judges on the effects of the 1993 Rule 11 amendments. About 580 attorneys and 120 judges responded to the survey. The Center found general satisfaction with the amended rule. It also found that more than 75% of the judges and lawyers would oppose a provision that would require a court to impose a sanction when the rule is violated.

In 2005, the Federal Judicial Center surveyed the trial judges who apply the rules to get a clearer picture of how the revised Rule 11 was operating. A copy of the study is enclosed. The results of the Federal Judicial Center's study showed that judges strongly believed that the current Rule 11, which was carefully crafted to deter frivolous filings without unduly hampering the filing of legitimate claims or defenses, continues to work well. The study's findings include the following highlights:

- more than 80 percent of the 278 district judges surveyed indicated that "Rule 11 is needed and it is just right as it now stands";
- 87 percent prefer the existing Rule 11 to the 1983 version or the version proposed by legislation (e.g., H.R. 4571 (the Lawsuit Abuse Reduction Act of 2004) or H.R. 420 (the Lawsuit Abuse Reduction Act of 2005));
- 85 percent strongly or moderately support Rule 11's safe harbor provisions;
- 91 percent oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;

- 84 percent disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation;

- 85 percent believe that the amount of groundless civil litigation has not grown since the promulgation of the 1993 rule, with 12 percent noting that such litigation has not been a problem, 19 percent noting that such litigation decreased during their tenure on the federal bench, and 54 percent noting that such litigation has remained relatively constant; and

- 72 percent believe that addressing sanctions for discovery abuse in Rules 26(g) and 37 is better than in Rule 11.

The findings of the Federal Judicial Center underscore the judiciary's united opposition to legislation amending Rule 11. Lawyers share this view. In 2005, the American Bar Association issued a resolution opposing an earlier, similar proposed bill.

Minimizing frivolous filings is, of course, vital. But there is no need to reinstate the 1983 version of Rule 11 to work toward this goal. Judges have many tools available to respond to, and deter, frivolous pleadings. Those tools include 28 U.S.C. § 1915e, which authorizes courts to dismiss, *sua sponte*, before an answer is filed, a lawsuit that is frivolous or malicious. Rule 12(b)(6) authorizes courts to dismiss pleadings that fail to state a claim on which relief can be granted. Section 1927 of Title 28 of the United States Code authorizes sanctions against lawyers for "unreasonably and vexatiously" multiplying the proceedings in any case. And the present version of Rule 11 itself provides an effective, balanced tool, without the problems and satellite litigation the 1983 version created.

In May 2010, the Advisory Committee on the Civil Rules held a major conference on civil litigation, examining the problems of costs and delay — which encompass frivolous filings — and potential ways to improve the system. The Conference encouraged, and generated, a broad spectrum of criticisms by lawyers, litigants (including businesses and governmental entities), judges, and academics of the current approaches to federal civil cases, including the rules, and proposals for change. Conspicuous in its absence was any criticism of Rule 11 or any proposal to restore the 1983 version of the rule.

Undoing the 1993 Rule 11 amendments, even though no serious problem has been brought to the Rules Committees' attention, would frustrate the purpose and intent of the Rules Enabling Act. There is no need to reinstate the 1983 version of Rule 11 that proved contentious and diverted so much time and energy of the bar and bench. Doing so would add to, not improve, the problems of costs and delay that we are working to address. I urge you on behalf of the Rules Committees to not support the proposed legislation amending Rule 11.

We greatly appreciate your consideration of the Rules Committees' views. We look forward to continuing to work together to ensure that our civil justice system is working well to fulfill its vital

role. If you or your staff have any questions, please contact Andrea Kuperman, Chief Counsel to the Rules Committees, at 713-250-5980.

Sincerely,

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee
on Civil Rules

Enclosure

cc: Honorable Trent Franks

Identical letter sent to: Honorable John Conyers, Jr.

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

March 14, 2011

Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Representative Conyers:

On behalf of the Judicial Conference's Committee on the Rules of Practice and Procedure (the "Standing Rules Committee") and the Advisory Committee on the Federal Rules of Civil Procedure (the "Advisory Committee"), we write to oppose H.R. 966, which seeks to reduce lawsuit abuse by amending Rule 11 of the Federal Rules of Civil Procedure. The bill would reinstate a mandatory sanctions provision of Rule 11 that was adopted in 1983 and eliminated in 1993. The bill would also eliminate a provision adopted in 1993 to allow a party to withdraw challenged pleadings on a voluntary basis, without the added costs and delay to the challenging party of seeking and obtaining a court order. The concerns we express are the same concerns expressed by the Judicial Conference in 2004 and 2005, when similar legislation was introduced.

We greatly appreciate, and share, your desire to improve the civil justice system in our federal courts, including by reducing frivolous filings. But legislation that would restore the 1983 version of Rule 11 by undoing the 1993 amendments would create a "cure" far worse than the problem it is meant to solve. Such legislation also contravenes the longstanding Judicial Conference policy

opposing direct amendment of the federal rules by legislation instead of through the careful, deliberate process Congress developed in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077.

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3. exacerbating tensions between lawyers; and

4. providing a disincentive to abandon or withdraw a pleading or claim that lacked merit — and thereby admit error — after determining that it no longer was supportable in law or fact.

The 1993 amendments to Rule 11 were designed to remedy the major problems with the rule, strike a fair and equitable balance between competing interests, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions. Since 1993, the rule has established a safe harbor, providing a party 21 days within which to withdraw a particular claim or defense before sanctions can be imposed. If the party fails to withdraw an allegedly frivolous claim or defense within the 21 days, a court may impose sanctions, including assessing reasonable attorney fees. The 1983 version of Rule 11 authorized a court to sanction discovery-related abuse under Rule 11, Rule 26(g), or Rule 37, which created confusion. Under the 1993 amendments to Rule 11, sanctioning of discovery-related abuse was limited to Rules 26 and 37, which provide for sanctions that include awards of reasonable attorney fees.

The 1993 amendments to Rule 11 culminated a long, critical examination of the rule begun four years earlier. The Advisory Committee reviewed a significant number of empirical examinations of the 1983 version of Rule 11, including three separate studies conducted by the Federal Judicial Center in 1985, 1988, and 1991, a Third Circuit Task Force report on Rule 11 in 1989, and a New York State Bar Committee report in 1987.

After reviewing the literature and empirical studies of problems caused by the 1983 amendments to Rule 11, the Advisory Committee issued in 1990 a preliminary call for general comment on the operation and effect of the rule. The response was substantial and clearly called for a change in the rule. The Advisory Committee concluded that the cost-shifting in Rule 11 created an incentive for too many unnecessary Rule 11 motions. Amendments to Rule 11 were drafted. The Supreme Court promulgated and transmitted the amendments to Congress in May 1993 after extensive scrutiny and debate by the bench, bar, and public in accordance with the Rules Enabling Act process.

Experience with the amended rule since 1993 has demonstrated a marked decline in Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings. In June 1995, the Federal Judicial Center conducted a survey of 1,130 lawyers and 148 judges on the effects of the 1993 Rule 11 amendments. About 580 attorneys and 120 judges responded to the survey. The Center found general satisfaction with the amended rule. It also found that more than 75% of the judges and lawyers would oppose a provision that would require a court to impose a sanction when the rule is violated.

In 2005, the Federal Judicial Center surveyed the trial judges who apply the rules to get a clearer picture of how the revised Rule 11 was operating. A copy of the study is enclosed. The results of the Federal Judicial Center's study showed that judges strongly believed that the current Rule 11, which was carefully crafted to deter frivolous filings without unduly hampering the filing of legitimate claims or defenses, continues to work well. The study's findings include the following highlights:

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- 87 percent prefer the existing Rule 11 to the 1983 version or the version proposed by legislation (e.g., H.R. 4571 (the Lawsuit Abuse Reduction Act of 2004) or H.R. 420 (the Lawsuit Abuse Reduction Act of 2005));
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- 85 percent believe that the amount of groundless civil litigation has not grown since the promulgation of the 1993 rule, with 12 percent noting that such litigation has not been a problem, 19 percent noting that such litigation decreased during their tenure on the federal bench, and 54 percent noting that such litigation has remained relatively constant; and

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The findings of the Federal Judicial Center underscore the judiciary's united opposition to legislation amending Rule 11. Lawyers share this view. In 2005, the American Bar Association issued a resolution opposing an earlier, similar proposed bill.

Minimizing frivolous filings is, of course, vital. But there is no need to reinstate the 1983 version of Rule 11 to work toward this goal. Judges have many tools available to respond to, and deter, frivolous pleadings. Those tools include 28 U.S.C. § 1915e, which authorizes courts to dismiss, *sua sponte*, before an answer is filed, a lawsuit that is frivolous or malicious. Rule 12(b)(6) authorizes courts to dismiss pleadings that fail to state a claim on which relief can be granted. Section 1927 of Title 28 of the United States Code authorizes sanctions against lawyers for "unreasonably and vexatiously" multiplying the proceedings in any case. And the present version of Rule 11 itself provides an effective, balanced tool, without the problems and satellite litigation the 1983 version created.

In May 2010, the Advisory Committee on the Civil Rules held a major conference on civil litigation, examining the problems of costs and delay — which encompass frivolous filings — and potential ways to improve the system. The Conference encouraged, and generated, a broad spectrum of criticisms by lawyers, litigants (including businesses and governmental entities), judges, and academics of the current approaches to federal civil cases, including the rules, and proposals for change. Conspicuous in its absence was any criticism of Rule 11 or any proposal to restore the 1983 version of the rule.

Undoing the 1993 Rule 11 amendments, even though no serious problem has been brought to the Rules Committees' attention, would frustrate the purpose and intent of the Rules Enabling Act. There is no need to reinstate the 1983 version of Rule 11 that proved contentious and diverted so much time and energy of the bar and bench. Doing so would add to, not improve, the problems of costs and delay that we are working to address. I urge you on behalf of the Rules Committees to not support the proposed legislation amending Rule 11.

We greatly appreciate your consideration of the Rules Committees' views. We look forward to continuing to work together to ensure that our civil justice system is working well to fulfill its vital

role. If you or your staff have any questions, please contact Andrea Kuperman, Chief Counsel to the Rules Committees, at 713-250-5980.

Sincerely,

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee
on Civil Rules

Enclosure

cc: Honorable Jerrold Nadler

Identical letter sent to: Honorable Lamar S. Smith

Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure

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Federal Judicial Center
2005

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Introduction

The Judicial Conference's Advisory Committee on Civil Rules asked the Federal Judicial Center to design and implement a survey of a representative national sample of federal district judges. The purpose of the survey was to gather information about the judges' experiences with Rule 11 of the Federal Rules of Civil Procedure as well as to elicit their opinions about recent proposals in Congress to amend Rule 11. The chair of the Advisory Committee and the committee's reporters helped develop the questionnaires. Center staff conducted the survey and analyzed the results during December 2004 and January 2005.

As currently written, Rule 11 expressly authorizes judges to impose sanctions on lawyers and parties who present to a district court a pleading, written motion, or other paper without reasonable support in fact or law or for an improper purpose, such as to cause unnecessary cost or delay. Rule 11 provides that sanctions for violations are within the judge's discretion; that a party should have a period of time, a "safe harbor," within which to withdraw or correct a filing alleged to violate Rule 11; and that Rule 11's primary purpose is to deter future violations and not necessarily to compensate the opposing party for losses, including attorney fees.

In the 108th Congress, the House of Representatives passed H.R. 4571, the Lawsuit Abuse Reduction Act of 2004,[1] which would have amended Rule 11. That bill would have provided for mandatory sanctions for violations, repealed the safe harbor, and required judges to order the offending lawyer or party to compensate the opposing party for attorney fees incurred as a direct result of a Rule 11 violation. The proposed legislation would have reversed three amendments to Rule 11 adopted through the rulemaking process in 1993: to convert mandatory sanctions to discretionary sanctions, to create a safe harbor, and to deemphasize attorney fee awards. The proposed legislation also would have introduced a requirement that a district court suspend an attorney's license to practice in that district for one year if the attorney was found to have violated Rule 11 three or more times in that district.

The survey was designed, in part, to elicit district judges' views based on their experience with the 1993 amendments. The Advisory Committee was particularly interested in having the survey identify any differences in the views of district judges concerning the current Rule 11, the legislative pro-

1. H.R. 4571, 108th Cong. 2d Sess. (2004). The House version was introduced in the Senate on Sept. 15, 2004, referred to the Committee on the Judiciary, and was not the subject of a vote.

posal, and the pre-1993 version of Rule 11. The pre-1993 version differs from the legislative proposal in significant ways, particularly in its treatment of attorney fees as a discretionary, not a mandatory, sanction for a violation of Rule 11.

On December 10, 2004, the Center E-mailed questionnaires to two random samples of 200 district judges each. District Judge Lee H. Rosenthal, chair of the Advisory Committee on Civil Rules, provided a cover letter for the E-mail. One sample comprised solely judges appointed to the bench before January 1, 1992, who would be expected to have had considerable experience with the pre-1993 version of Rule 11. The other sample comprised solely judges appointed to the bench after January 1, 1992, who would be expected to have had most of their judicial experience working with the 1993 amended version of Rule 11. Judge Rosenthal sent a follow-up E-mail on January 3, 2005. Of the 400 judges, 278 responded, a rate of 70%. Appendix A explains the methods used to select the samples. Appendix B contains a composite copy of the two questionnaires used in the survey.

Summary of Results

More than 80% of the 278 district judges indicated that "Rule 11 is needed and it is just right as it now stands." In evaluating the alternatives, 87% of the respondents preferred the current Rule 11, 5% preferred the version in effect between 1983 and 1993, and 4% preferred the version proposed in H.R. 4571.

Judges' opinions about specific provisions in Rule 11 and the proposed legislation followed a similar pattern. The results indicated that relatively large majorities of the judges who responded to our survey have the following views about Rule 11:

- 85% strongly or moderately support Rule 11's safe harbor provision;
- 91% oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;
- 84% disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation; and
- 72% believe that having sanctions for discovery in Rules 26(g) and 37 is best.

A majority of the judges (55%) indicated that the purpose of Rule 11 should be both deterrence and compensation; almost all of the other judges (44%) indicated that deterrence should be the sole purpose of Rule 11.

The views of judges who responded to the survey are likely to be related to their estimation of the amount of groundless civil litigation they see in their own docket, especially when focusing on cases where the plaintiff is represented by counsel. Approximately 85% of the district judges view groundless litigation in such cases as no more than a small problem and another 12% see such litigation as a moderate problem. About 3% view groundless litigation brought by plaintiffs who are represented by counsel as a large or very large problem. For 54% of the judges who responded, the amount of groundless litigation has remained relatively constant during their tenure on the federal bench. Only 7% indicated that the problem is now larger. For 19%, the amount of groundless civil litigation has decreased during their tenure on the federal bench, and for 12% there has never been a problem.

Results

The Advisory Committee was especially interested in having a survey that was designed to inquire about district court judges' experience with Rule 11 as well as to solicit judges' opinions about the current Rule 11 relative to the proposed changes contained in the legislation. Those interests shaped the organization and content of the survey questionnaires. The survey results in this section of the report are presented in tables and text in the order in which the questions appeared on the survey instrument. The title of each table states the question asked of the judges, and the response categories are a shorthand version of the responses called for in the questionnaire. The preface of each questionnaire indicated in bold type that "This questionnaire is about the effects of Rule 11 in cases in which the plaintiff is represented by counsel." Many of the questions were modeled on questions asked of judges in a 1995 Center survey.[2] In order to facilitate comparisons between the findings of the 1995 survey and the current survey, we present applicable results of both surveys with appropriate references.

Frequency of Groundless Litigation

The questionnaire first asked judges about their perception of any problems with groundless litigation and whether such problems, if they exist, had

2. John Shapard et al., Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure (Federal Judicial Center 1995) [hereinafter FJC 1995 Rule 11 Survey].

changed since Rule 11 was last amended in 1993. Table 1 shows that 85% of the judges described any perceived problem with groundless litigation as being no more than a small one. Among judges commissioned before January 1, 1992, this figure was over 75%; the figure was almost 90% for judges commissioned after that date. In our 1995 study, 40% of the judges indicated that the problem with groundless litigation was moderate to very large;[3] only 15% believed this to be the case in the current study.

Table 1
Responses to Question 1.1, Is there a problem with groundless litigation in federal civil cases on your docket?

Possible Answer	All Judges (*N*=276)[4]	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=148)
No problem	15%	13%	16%
Very small problem	38%	31%	43%
Small problem	32%	34%	30%
Moderate problem	12%	16%	9%
Large problem	2%	2%	2%
Very large problem	1%	3%	0%
I can't say	0%	1%	0%

The questionnaire next asked whether such problems, if they exist, had changed since Rule 11 was last amended in 1993. Table 2 shows that about 7% said that the problem had increased. More than half said that the problem was the same, and 12% said that there has never been a problem. Judges commissioned after January 1, 1992, were more likely to say that there has never been a problem but, if there is a problem, it is about the same as it was during their first year on the bench.

3. *Id.* at 3.

4. *N* refers to the number of judges who answered the question. The value of *N* varies across tables because of differences in the number of judges who answered a particular question. Percentages in columns with results for all judges are weighted to reflect the fact that, by drawing two samples independently from two groups of judges, we have a stratified sample. In this case, weighted results for the entire sample are appropriate. Weighting is unnecessary for results reported separately by group. Finally, as a result of rounding, column percentages may not sum to 100.

Table 2
Responses to Question 1.2, Is the current problem (if any) with groundless litigation in civil cases on your docket smaller than, about the same as, or larger now than it was

before Rule 11 was amended? (asked of pre-1992 judges) *or*

during your first year as a federal district judge? (asked of post-1992 judges)

Possible Answer	All Judges (*N*=276)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=148)
There has never been a problem	12%	9%	14%
The problem is much smaller now than it was then	8%	11%	6%
The problem is slightly smaller now than it was then	11%	14%	9%
The problem is the same now as it was then	54%	48%	59%
The problem is slightly larger now than it was then	6%	5%	7%
The problem is much larger now than it was then	1%	2%	1%
I can't say	7%	11%	4%

"Safe Harbor" Provision and Rule 11 Activity

The questionnaire asked judges if they supported or opposed the Rule 11 "safe harbor" provision, which was added as part of the 1993 amendments. Table 3 shows that 86% of the judges said they supported it, with the majority of the judges expressing strong support. Table 3 also shows somewhat stronger support among judges commissioned after 1992. This subgroup has very little or no experience with the pre-1993 version of Rule 11, which did not include the safe harbor provision. Overall, the percentage of judges supporting the safe harbor has increased from 70% to 86% since 1995; judges showing strong support has increased from 32% to 60%. The percentage of judges opposing the safe harbor has decreased from 16% to 10%.[5]

5. FJC 1995 Rule 11 Survey, *supra* note 2, at 4.

Table 3
Responses to Question 2.1, Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support Rule 11's "safe harbor" provision?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Strongly support	60%	53%	65%
Moderately support	26%	25%	26%
Moderately oppose	6%	9%	3%
Strongly oppose	4%	5%	2%
I find it difficult to choose	4%	6%	3%
I can't say	1%	1%	1%

The questionnaire contained a follow-up question for the pre-1992 judges about changes in Rule 11 activity as a result of the addition of the safe harbor provision. Judges commissioned prior to 1992 were asked how the safe harbor provision has affected the amount of Rule 11 activity since the provision went into effect in 1993. Table 4 shows that 45% of these judges reported that Rule 11 activity had decreased, either slightly or substantially, and 29% reported that activity was about the same. Only 5% reported increases in Rule 11 activity, and 21% indicated that they could not give a definitive answer to this question. Similarly, judges commissioned after 1992 were asked about Rule 11 activity since their first year on the bench. Table 4 shows that almost two-thirds of the post-1992 judges reported that Rule 11 activity had remained about the same, 22% reported decreases, and 7% reported increases.

Table 4
Responses to Question 2.2,

How has the safe harbor provision affected the amount of Rule 11 activity on your docket since it went into effect in 1993? (asked of pre-1992 judges) *or*

Since your first year as a district judge what, if any, changes have you observed in the amount of Rule 11 activity on your docket? (asked of post-1992 judges)

Possible Answer	Judges Commissioned Before 1/1/92 (*N*=127)	Judges Commissioned After 1/1/92 (*N*=148)
Increased substantially	1%	0%
Increased slightly	4%	7%
About the same	29%	65%
Decreased slightly	17%	12%
Decreased substantially	28%	10%
I can't say	21%	6%

Rule 11 Sanctions

The current version of Rule 11 allows a district judge to impose sanctions for violations of the rule, at his or her own discretion, with the purpose of deterring similar conduct in the future. H.R. 4571 would require sanctions for every violation, with the purpose of compensating the injured party for reasonable expenses and attorney fees as well as to deter repetitions of such conduct.

The judges were asked first whether sanctions, monetary or nonmonetary, should be required. Table 5 shows that 91% said that sanctions should not be required. Among judges commissioned before 1992, 86% said sanctions should not be required; for judges commissioned after 1992 the figure was 95%. In 1995, 22% of the judges thought that a sanction should be required for every Rule 11 violation, compared with 9% who think so now.[6]

6. *Id.* at 6.

Table 5
Responses to Question 3.1, Should the court be required to impose a monetary or nonmonetary sanction when a violation is found?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	9%	13%	5%
No	91%	86%	95%
I can't say	0%	1%	0%

Judges were next asked whether an award of attorney fees, sufficient to compensate the injured party, should be mandatory when a sanction is imposed. Table 6 shows that 84% of the judges said no. The result is approximately the same whether the judges were commissioned before or after 1992. The percentage of judges favoring mandatory attorney fees for Rule 11 violations was 15% in both the 1995 and 2005 surveys.[7]

Table 6
Responses to Question 3.2, When a sanction is imposed, should it be mandatory that the sanction include an award of attorney fees sufficient to compensate the injured party?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	15%	14%	16%
No	84%	85%	83%
I can't say	1%	1%	1%

Regarding the proposed legislation's inclusion of financial compensation as a general purpose for Rule 11, judges were asked what should be the purpose of Rule 11. Almost 100% of the judges said that a purpose of Rule 11 should be deterrence. Their views were split on the role of compensation. The results in Table 7 reveal that slightly more than half, 55%, said that the purpose should be deterrence *and* compensation; 44% said that the purpose should be deterrence, with compensation if needed for the sake of deterrence. Reading the Table 7 results in light of the opinions expressed in

7. *Id.*

Table 5 and 6, it appears that most judges who favor compensating the opposing party do not favor such compensation in all cases and do not necessarily favor compensation in the form of attorney fees. In the 1995 survey, 66% of the judges thought that Rule 11 should include both compensatory and deterrent purposes.[8]

Table 7
Responses to Question 3.3, What should the purpose of Rule 11 sanctions be?

Possible Answer	All Judges (*N*=275)	Judges Commissioned Before 1/1/92 (*N*=126)	Judges Commissioned After 1/1/92 (*N*=149)
Deterrence (& compensation if warranted)	44%	40%	46%
Compensation only	0%	1%	0%
Both deterrence & compensation	55%	58%	53%
Other	1%	1%	1%

Three Strikes

Under the proposed legislation, when an attorney violates Rule 11 the federal court would determine how many times that attorney had violated Rule 11 in that court during the attorney's career. If that attorney had committed three or more violations, the court would suspend for one year the attorney's license to practice in that court.

To gauge the frequency with which this portion of the proposed Rule 11 might be invoked, judges were asked whether they had encountered an attorney with three or more violations in their district. Table 8 shows that 77% of the judges reported that they had not. Of the remaining 23%, more than half were not sure if they had encountered an attorney with three or more violations. Judges commissioned before 1992 were more likely to say they had encountered such an attorney. This result may, of course, be largely the result of their longer time on the bench.

8. *Id.*

Table 8
Responses to Question 4.1, In your experience as a district judge, have you encountered an attorney who has violated Rule 11 three or more times in your district?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	11%	15%	8%
No	77%	71%	81%
I can't say	12%	14%	11%

At present, the efforts and methods required to enable courts to track attorney violations, in order to apply the proposed legislation's "three strikes" provision, are unknown. Judges were asked for their views, which are reported in Table 9. The choices were not mutually exclusive: Judges could check more than one response and therefore the percentages do not sum to 100. The most frequent response, given by 48% of the judges, was that a new database would be required to track Rule 11 violations. Examination of prior docket records was the next most frequent response, given by 35% of the judges. Only 4% said that little or no additional effort would be required, and nearly one-third (32%) were unsure about what would be needed to apply the three strikes provision.

Table 9
Responses to Question 4.2, In your district, how much effort would be required to obtain information about the number of prior Rule 11 violations committed by an attorney during his or her career?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Little or no additional effort	4%	3%	5%
Examining prior docket records for past violations	35%	35%	34%
Creating a new database for Rule 11 violations	48%	53%	44%
An affidavit or declaration from each attorney	19%	17%	20%
Other court action	3%	2%	3%
I can't say	32%	29%	34%

Judges were next asked their views on the impact of the proposed three strikes provision in deterring groundless litigation relative to the cost of implementation and in light of their courts' existing procedures for disciplining attorneys. Table 10 shows that 40% felt that the cost of implementation would exceed the deterrent value, while 25% of the judges felt that the value of the deterrent effect would exceed the cost of implementation. However, 27% were unsure about the tradeoff between cost and deterrent effect. Judges commissioned after 1992, compared with those commissioned earlier, were more likely to view the cost as exceeding the value of the proposed legislation and were less likely to view the deterrent value as exceeding the cost. They were also more likely to express uncertainty over the tradeoff.

Table 10
Responses to Question 4.3, Which of the following statements best captures your expectations regarding the impact of the proposal in deterring groundless litigation in comparison to the cost of implementing the proposal in your district?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Value of the deterrent effect would greatly exceed its cost	16%	15%	16%
Value of the deterrent effect would somewhat exceed its cost	9%	11%	7%
Value of the deterrent effect would about equal its cost	9%	13%	7%
Cost of implementing the proposal would somewhat exceed the value of the deterrent effect	10%	6%	13%
Cost of implementing the proposal would greatly exceed the value of the deterrent effect	30%	32%	28%
I can't say	27%	23%	30%

Application of Rule 11 to Discovery

The proposed legislation would extend Rule 11's application to discovery-related activity. Standards and sanctions for discovery are currently covered by Federal Rules of Civil Procedure 26(g) and 37, and the proposed legislation would augment these rules with an expanded Rule 11. The sampled judges were asked their opinion on the best combination of rules and sanctions. Table 11 shows that 72% of the judges (compared with 48% in 1995)[9] feel that the best option is the current version of Rule 11; 14% favored the proposed legislation. Judges commissioned after 1992 were a little more likely to favor the current version of the rule than judges commissioned before 1992.

9. *Id.* at 7.

Table 11
Responses to Question 5, Based on your experience, which of the following options do you believe would be best?

Possible Answer	All Judges (*N*=276)	Judges Commissioned Before 1/1/92 (*N*=127)	Judges Commissioned After 1/1/92 (*N*=149)
Sanctions provisions contained only in Rules 26(g) and 37	72%	68%	75%
Sanctions provisions contained in Rules 26(g), 37, and 11	13%	15%	12%
Sanctions provisions consolidated in Rule 11	5%	7%	3%
No significant difference among the three options	5%	6%	4%
I can't say	5%	5%	5%

How to Control Groundless Litigation?

To gauge judges' overall views on the proposed legislation and on controlling groundless litigation, the judges were asked whether Rule 11 should be modified. Table 12 shows their responses to the given options. The great majority of judges (81%) said that Rule 11 is just right as currently written. In 1995, 52% of the judges indicated that the same version of Rule 11 was just right as written. In 2005, there were differences among judges depending on when they were commissioned: 71% of judges commissioned before 1992 agreed that the current Rule 11 is just right, compared with 89% of judges commissioned afterwards. There was almost no support for modifying Rule 11 to reduce the risk of deterring meritorious filings, and only some support, primarily among the longer-serving judges, to modify Rule 11 to more effectively deter groundless filings.

Table 12
Responses to Question 6, Based on your view of how effective or ineffective these other methods are, how, if at all, should Rule 11 be modified?

Possible Answer	All Judges (*N*=270)	Judges Commissioned Before 1/1/92 (*N*=124)	Judges Commissioned After 1/1/92 (*N*=146)
Modified to increase its effectiveness in deterring groundless filings	13%	21%	7%
Rule 11 is just right as it now stands	81%	71%	89%
Modified to reduce the risk of deterring meritorious filings	1%	2%	1%
Rule 11 is not needed	1%	2%	1%
I can't say	3%	4%	3%

Finally, the judges were asked which version of Rule 11 they would prefer to have if and when they have to deal with groundless litigation. Given the choice among the current version of Rule 11, the pre-1993 version, or the proposed legislation, 87% of the judges preferred the current version. The percentages for surveyed judges commissioned before and after 1992 are 83% and 91%, respectively. There was little support expressed for either the pre-1993 version or the version contained in H.R. 4571.

Table 13
Responses to Question 7, Proposed legislation would repeal the safe harbor provision in Rule 11 and require that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion, or other paper in violation of Rule 11 standards. Which approach would you prefer in dealing with groundless litigation?

Possible Answer	All Judges (*N*=271)	Judges Commissioned Before 1/1/92 (*N*=123)	Judges Commissioned After 1/1/92 (*N*=148)
The current Rule 11	87%	83%	91%
The 1983–1993 version of Rule 11	5%	7%	4%
The proposed legislation	4%	7%	2%
I can't say	4%	4%	3%

Conclusion

Based on their experiences in managing groundless civil litigation in their own courts, federal district judges find the current Rule 11 to be well suited to their needs. Almost all of the judges reported that, in their experience, groundless civil litigation is a small or at most a moderate problem. District judges' views on proposed changes to Rule 11 appear to be consistent with their experiences on the federal bench. Substantial majorities of the responding judges said, in effect, that none of the proposals for changing Rule 11—that is, proposals for mandatory sanctions, mandatory attorney fee awards, removal of the safe harbor, and application of Rule 11 to discovery disputes—would resolve problems that district judges are experiencing.

Appendix A
Method

Separate forms of the questionnaire were E-mailed by Center staff with a cover letter from the chair of the Advisory Committee to two samples of active and active-senior federal district court judges. The samples, each one of 200 judges, were separately and randomly selected from within two groups of judges defined by their commission date. Judges commissioned before January 1, 1992, formed one group; judges commissioned on or after that date formed the other. This date was selected in order that all judges in the first group would have had at least one year on the bench before the 1993 amendments to Rule 11 went into effect. This group of judges received a form of the questionnaire that, where necessary, asked them to use their pre-1993 period on the bench as a basis for comparison. The second group of judges received a questionnaire that instead asked them to use their first year on the bench as their basis for comparison. A composite of the two versions of the questionnaire is contained in Appendix B.

In order to quickly and easily convert the returned questionnaires into data files, Center research staff used special software to produce and read the questionnaires. Each of the two forms of the questionnaire was converted to Portable Document Format (PDF) and sent via E-mail to the 400 sampled judges. Each judge's file was named using a sequential, numbered ID that was used to track returned questionnaires for follow-up purposes. Upon receipt of the file, the judges were able to open the PDF file, answer the questions, save the file, and return it via E-mail. The software that produced the files was used to convert the returned questionnaires to a data file for analysis. Judges were also given the option of printing the PDF file, completing it, and faxing it to a fax server at the Center. Of the 280 responses received, 44 were returned via E-mail; the remainder were returned via fax. The questionnaires were sent on December 9, 2004, and a reminder was sent on January 3, 2005, to judges who had not yet responded. The response rates for the two samples were different. Post-1992 judges were more likely to return the questionnaire (74%) than were pre-1992 judges (64%).

The sample procedure described above produced a stratified sample in which the judges' commission dates defined the strata. In order to correctly interpret results for the sample of all judges, when reported, these data were weighted to reflect the fact that different sampling fractions were used for

the different strata. Results reported separately by strata do not require weighting.

Appendix B
Questionnaire

The questionnaire sent to judges commissioned before January 1, 1992 is reproduced below. Questions 1.2 and 2.2 differed in the version sent to judges commissioned on or after that date. The differences are indicated by bracketed text. Bold and underlined text was in that format in the original questionnaires.

RULE 11 SURVEY

PURPOSE AND INSTRUCTIONS. Federal Rule of Civil Procedure 11 (**Rule 11**) provides sanctions for presenting a pleading, written motion, or other paper without reasonable support in fact or law or for an improper purpose, such as to cause unnecessary cost or delay. This questionnaire seeks information from you about how Rule 11 is working and also seeks your evaluation of several issues concerning Rule 11 and current Congressional proposals to amend that rule. Rule 11 provides that sanctions for violations are within the judge's discretion; that a party should have a period of time, a "safe harbor," within which to withdraw or correct a filing alleged to violate Rule 11; and that Rule 11's primary purpose is to deter future violations and not necessarily to compensate the opposing party for losses, including attorney fees.

Proposed legislation (HR 4571, adopted by the House of Representatives on September 14, 2004) would amend Rule 11 to provide that sanctions for violations be mandatory, repeal the safe harbor, and require courts to order compensation to a party for attorney fees incurred as a direct result of a Rule 11 violation. The proposed legislation would reverse three changes made by **Rule11 amendments adopted in 1993**, namely to delete mandatory sanctions, to deemphasize attorney fee awards, and to create a safe harbor. The **proposed legislation** also requires a district court to suspend an attorney's license to practice in that district for one year if the attorney has violated Rule 11 three or more times in that district.

This questionnaire is about the effects of Rule 11 in cases in which the plaintiff is represented by counsel. Do not include in your evaluation of Rule 11 the effects it may or may not have had on cases in which the plaintiff is proceeding pro se.

Please respond to the questions on the basis of <u>your own</u> experience as a judge with cases on your docket, not the experiences of other judges or attorneys.

For convenience, throughout this questionnaire we refer to pleadings, written motions, and other papers that do not conform to the requirements of Rule 11 as *groundless litigation.*

Please respond by marking the box next to your answer.

1. FREQUENCY OF GROUNDLESS LITIGATION

1.1 Is there a problem with groundless litigation in federal civil cases on your docket? Please mark one.

a) There is no problem.
b) There is a very small problem.
c) There is a small problem.
d) There is a moderate problem.
e) There is a large problem.
f) There is a very large problem.
g) I can't say.

1.2 Is the current problem (if any) with groundless litigation in civil cases on your docket smaller, about the same as, or larger than it was before Rule 11 was amended in 1993? **[**Is the current problem (if any) with groundless litigation in civil cases on your docket smaller, about the same as, or larger than it was during your first year as a federal district judge?**]** Please mark one.

a) There has never been a problem.
b) The problem is much smaller now than it was then.
c) The problem is slightly smaller now than it was then.
d) The problem is the same now as it was then.
e) The problem is slightly larger now than it was then.
f) The problem is much larger now than it was then.
g) I can't say.

2. THE SAFE HARBOR PROVISION. **Rule 11** provides that a motion for sanctions shall not be filed with the court until 21 days after a copy is served on the opposing party. This provision creates a "safe harbor" by specifying that a party will not be subjected to sanctions on the basis of another party's motion unless, after receiving the motion, the party fails to withdraw or correct the challenged filing. **Proposed legislation** would eliminate the "safe harbor" provision.

Proponents of the safe harbor provision argue that it leads to the efficient resolution of both the Rule 11 issues and the underlying legal and factual issues with less court involvement; gives incentives to parties to withdraw or abandon questionable positions; decreases the number of sanctions motions that are filed for inappropriate reasons; and provides that abuses of the "safe harbor" can be dealt with by sua sponte sanctions. **Opponents** of the "safe harbor" provision argue that it allows filing of groundless papers without penalty and denies compensation to parties who have been subjected to groundless filings.

2.1 Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support Rule 11's "safe harbor" provision? Please mark one.

a) I strongly support Rule 11's safe harbor provision.
b) I moderately support Rule 11's safe harbor provision.
c) I moderately oppose Rule 11's safe harbor provision.
d) I strongly oppose Rule 11's safe harbor provision.
e) I find it difficult to choose because the pros and cons of the safe harbor provision are about equally balanced.
f) I can't say.

2.2 How has the safe harbor provision affected the amount of Rule 11 activity on your docket since it went into effect in 1993? **[**Since your first year as a federal district judge what, if any, changes have you observed in the amount of Rule 11 activity on your docket?**]** Please mark one.

a) Rule 11 activity has increased substantially
b) Rule 11 activity has increased slightly
c) Rule 11 activity has remained about the same
d) Rule 11 activity has decreased slightly
e) Rule 11 activity has decreased substantially
f) I can't say

3. RULE 11 SANCTIONS. **Rule 11** provides that the court "may" impose a sanction when the rule has been violated, leaving the matter to the court's discretion. **Rule 11** also provides that the purpose of Rule 11 sanctions is to deter repetition of the offending conduct, rather than to compensate the parties injured by that conduct; that monetary sanctions, if imposed, should ordinarily be paid into court; and that awards of compensation to the injured party should be made only when necessary for effective deterrence.

Proposed legislation would alter these standards and require that a sanction be imposed for every violation. **Proposed legislation** would also provide that a purpose of sanctions is to compensate the injured party as well as to deter similar conduct and would require that any sanction be sufficient to compensate the injured party for the reasonable expenses and attorney fees that an injured party incurred as a direct result of a Rule 11 violation.

Please indicate for each of the three questions below what you think would be, on balance, the fairest form of Rule 11 for the types of cases you encounter on your docket.

3.1 Should the court be <u>required</u> to impose a monetary or nonmonetary sanction when a violation is found? Please mark one.

a) Yes
b) No
c) I can't say.

3.2 When a sanction is imposed, should it be mandatory that the sanction include an award of attorney fees sufficient to compensate the injured party? Please mark one.

a) Yes, an award of attorney fees should be mandatory if a sanction is imposed.
b) No, an award of attorney fees should not be mandatory.
c) I can't say.

3.3 What should the purpose of Rule 11 sanctions be? Please mark one.

a) deterrence (and compensation if warranted for effective deterrence)
b) compensation only
c) both compensation and deterrence
d) other (please specify in the answer space for question 8)

4. THREE STRIKES PROVISION. **Proposed** legislation would require a federal district court, after it has determined that an attorney violated Rule 11, to "determine the number of times that attorney has violated [Rule 11] in that Federal district court during that attorney's career. If an attorney has violated Rule 11 three or more times, the court must suspend that attorney's license to practice in that court for a period of one year."

4.1 In your experience as a district judge, have you encountered an attorney who has violated Rule 11 three or more times in your district? Please mark one:

a) Yes
b) No
c) I can't say

4.2 In your district, how much effort would be required to obtain information about the number of prior Rule 11 violations committed by an attorney during his or her career? Mark all that apply.

a) Obtaining such information would require little or no additional effort
b) Obtaining such information would require examining prior docket records for past violations
c) Obtaining such information would require creating a new database for Rule 11 violations
d) Obtaining such information would require an affidavit or declaration from each attorney
e) Obtaining such information would require other court action (specify) _____
f) I can't say

4.3 Which of the following statements best captures your expectations regarding the impact of the proposal in deterring groundless litigation in comparison to the cost of implementing the proposal in your district. In assessing the value of the proposal consider the effectiveness of existing procedures in your district for disciplining lawyers found to have engaged in misconduct of the type forbidden by Rule 11.Please mark one:

a) The value of the deterrent effect would greatly exceed its cost
b) The value of the deterrent effect would somewhat exceed its cost
c) The value of the deterrent effect would about equal its cost
d) The cost of implementing the proposal would somewhat exceed the value of the deterrent effect.
e) The cost of implementing the proposal would greatly exceed the value of the deterrent effect.
f) I can't say

5. APPLICATION TO DISCOVERY. Rule 11 does not apply to discovery-related activity because Federal Rules of Civil Procedure 26(g) and 37 establish standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. **Proposed** legislation would amend Rule 11 to make it applicable to discovery-related activity.

Proponents of that legislative proposal argue that including discovery under Rule 11 or under Rule 11 together with Rules 26(g) and 37 is more effective in deterring groundless discovery-related activity than Rules 26(g) and 37 alone. **Opponents** of that proposal support the current version of Rule 11 and argue that discovery should not be covered by Rule 11 because the sanctions provisions of Rules 26(g) and 37 are stronger and are specifically designed for the discovery process.
Based on your experience, which of the following options do you believe would be best? Please mark one.

a) Sanctions provisions related to discovery contained only in Rules 26(g) and 37 (the current rule).
b) Sanctions provisions related to discovery contained in both Rules 26(g) and 37 and Rule 11.
c) Sanctions provisions related to discovery consolidated in Rule 11 and eliminated from Rules 26(g) and 37.
d) There is no significant difference among the three options.
e) I can't say.

6. RULE 11 AND OTHER METHODS OF CONTROLLING GROUNDLESS LITIGATION. Federal statutes, the Federal Rules of Civil Procedure, and inherent judicial authority provide judges with a number of opportunities and methods for deterring or minimizing the harmful effects of groundless claims, defenses, or legal arguments (e.g., informal admonitions, Rule 16 and Rule 26(f) conferences, 28 U.S.C. Section 1927, prompt dismissal of groundless claims, summary judgment). Based on your view of how effective or ineffective those other methods are, how, if at all, should Rule 11 be modified? Please mark one.

a) Rule 11 is needed, but it should be modified to increase its effectiveness in deterring groundless filings (even at the expense of deterring some meritorious filings).
b) Rule 11 is needed, and it is just right as it now stands.
c) Rule 11 is needed, but it should be modified to reduce the risk of deterring meritorious filings (even at the expense of failing to deter some groundless filings).
d) Rule 11 is not needed.
e) I can't say.

7. PREFERENCE FOR CURRENT OR PAST VERSIONS OF RULE 11 OR PROPOSED LEGISLATION.

The **version** of **Rule 11 in effect from 1983 to 1993** required that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, have included an order to pay the opposing party's reasonable attorney fees.

Rule 11 now provides that a court may impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, include an order to pay the opposing party's reasonable attorney fees. **Rule 11** also provides a safe harbor that permits withdrawal without penalty of a filing that allegedly violates Rule 11, as long as the withdrawal takes place within 21 days of notice that another party intends to file a motion for Rule 11 sanctions.

Proposed legislation would repeal the safe harbor provision in Rule 11 and require that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The proposed legislation would also require that the appropriate sanction be sufficient to compensate the parties injured by the conduct, including reasonable expenses and attorney fees. Which of the above approaches would you prefer to use in dealing with groundless litigation? Please mark one.

a) I prefer the current Rule 11
b) I prefer the 1983-1993 version of Rule 11
c) I prefer the proposed legislation
d) I can't say

8. Please use the space provided for any additional comments or suggestions you may have about issues raised in this questionnaire or about Rule 11 in general.

The Federal Judicial Center

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About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including satellite broadcasts, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovations & Development Office and Communications Policy & Design Office—in using print, broadcast, and on-line media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.

112TH CONGRESS
1ST SESSION

S. 623

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 17, 2011

Mr. KOHL introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation Act of 2011".

SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Restrictions on protective orders and sealing of cases and settlements

''(a)(1) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enter, by stipulation or otherwise, an order otherwise authorized under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records unless in connection with such order the court has first made independent findings of fact that—

''(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

''(B)(i) the public interest in the disclosure of past, present, or potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

''(ii) the requested order is no broader than necessary to protect the confidentiality interest asserted.

''(2) No order entered as a result of the operation paragraph (1), other than an order approving a settlement agreement, may continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) continue to be met.

''(3) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden of proof in obtaining such an order.

''(4) This section shall apply even if an order under paragraph (1) is requested—

''(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure; or

''(B) by application pursuant to the stipulation of the parties.

''(5)(A) The provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure.

''(B) A court shall not approve any party's stipulation or request to stipulate to an order that would violate this section.

''(b)(1) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not approve or enforce any provision of an agreement between or among parties, or approve or enforce an order entered as a result of the operation of subsection (a)(1), to the extent that such provision or such order prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

''(2) Any such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.

''(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement described under subsection (a)(1) between or among parties that prohibits 1 or more parties from—

''(A) disclosing the fact that such settlement was reached or the terms of such settlement, other than the amount of money paid; or

''(B) discussing a civil action, or evidence produced in the civil action, that involves matters relevant to the protection of public health or safety.

''(2) Paragraph (1) applies unless the court has made independent findings of fact that—

''(A) the public interest in the disclosure of past, present, or potential public health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

''(B) the requested order is no broader than necessary to protect the confidentiality interest asserted.

''(d) When weighing the interest in maintaining confidentiality under this section, there shall be a rebuttable presumption that the interest in protecting personally identifiable information relating to financial, health or other similar information of an individual outweighs the public interest in disclosure.

''(e) Nothing in this section shall be construed to permit, require, or authorize the disclosure of classified information (as defined under section 1 of the Classified Information Procedures Act (18 U.S.C. App.)).''.

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1659 the following:

''1660. Restrictions on protective orders and sealing of cases and settlements.''.

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall—

(1) take effect 30 days after the date of enactment of this Act; and

(2) apply only to orders entered in civil actions or agreements entered into on or after such date.

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112TH CONGRESS
1ST SESSION

H. R. 592

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 9, 2011

Mr. NADLER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation Act of 2011".

SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Restrictions on protective orders and sealing of cases and settlements

''(a)(1) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enter, by stipulation or otherwise, an order otherwise authorized under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order otherwise authorized approving a settlement agreement that would restrict the disclosure of such information, or an order otherwise authorized restricting access to court records unless in connection with such order the court has first made independent findings of fact that—

''(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

''(B)(i) the public interest in the disclosure of past, present, or potential public health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

''(ii) the requested order is no broader than necessary to protect the confidentiality interest asserted.

''(2) No order entered as a result of the operation of paragraph (1), other than an order approving a settlement agreement, may continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) continue to be met.

''(b) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enforce any provision of an agreement between or among parties to a civil action, or enforce an order entered as a result of the operation of subsection (a)(1), to the extent that such provision or such order prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

''(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement in any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, between or among parties that prohibits one or more parties from—

''(A) disclosing the fact that such settlement was reached or the terms of such settlement (excluding any money paid) that involve matters relevant to the protection of public health or safety; or

''(B) discussing matters relevant to the protection of public health or safety involved in such civil action.

''(2) Paragraph (1) applies unless the court has made independent findings of fact that—

''(A) the public interest in the disclosure of past, present, or potential public health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information in question; and

''(B) the requested order is no broader than necessary to protect the confidentiality interest asserted.

''(d) Notwithstanding subsections (a)(1)(B)(i) and (c)(2)(A), when weighing the interest in maintaining confidentiality under this section, there shall be a rebuttable presumption that the interest in protecting personally identifiable information of an individual outweighs the public interest in disclosure.

''(e) Nothing in this section shall be construed to permit, require, or authorize the disclosure of classified infor-

mation (as defined under section 1 of the Classified Information Procedures Act (18 U.S.C. App.)).''.

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1659 the following:

''1660. Restrictions on protective orders and sealing of cases and settlements.''.

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall—

(1) take effect 30 days after the date of enactment of this Act; and

(2) apply only to orders entered in civil actions or agreements entered into on or after such date.

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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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SIDNEY A. FITZWATER
EVIDENCE RULES

May 2, 2011

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We write on behalf of the Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure to oppose the Sunshine in Litigation Act of 2011 (S. 623), which was introduced on March 17, 2011. The Rules Committees have consistently opposed the similar protective-order bills regularly introduced since 1991. Our letters opposing such bills are available on request. Our opposition to S. 623, like the opposition to those earlier bills, is based in part on the fact that they are inconsistent with the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. Our opposition is also based on the specific provisions of S. 623 and similar earlier bills.

Bills that would amend the Civil Rules to regulate the issuance of protective orders in discovery, similar to S. 623, have been introduced regularly since 1991. Like S. 623, these proposed bills would require courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to learn about the problems that these bills seek to solve and to bring the strengths of the Rules Enabling Act process to bear on any problems that might be found. Under that process, the Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, and initiated and evaluated empirical research studies. The Committees' work led to the conclusions that: (1) there

was no evidence that discovery protective orders create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery will become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that adds conditions before any discovery protective order could be entered would impose significant burdens on the court system, resulting in increased delay and costs for litigants; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

1. Proposed Legislation Amending Rule 26(c) of the Federal Rules of Civil Procedure

As part of its careful study of the issues, the Rules Committees asked the Federal Judicial Center (FJC) to undertake an empirical study on whether discovery protective orders issued in federal courts were operating to keep information about public safety or health hazards from the public. The FJC examined 38,179 civil cases filed in the District of Columbia, the Eastern District of Michigan, and the Eastern District of Pennsylvania from 1990 to 1992. The study showed that discovery protective orders were requested in about 6% of civil cases; most requests were made by motion; courts carefully reviewed such motions and denied or modified a substantial proportion of them; about one-quarter of the requests were made by party stipulations that courts usually accept; and most protective orders restricting parties from disclosing discovery material were entered in cases other than personal injury cases, in which public health and safety issues are most likely to arise.

Since the FJC study, the need for protective orders to maintain the confidentiality of highly sensitive personal and commercial information has only increased. The explosive growth in electronically stored information and the fact that most discovery is electronic, as well as the federal courts' adoption of electronic court filing systems that permit public remote electronic access to court files, have increased the risks of unduly imposing on privacy interests. Protective orders to safeguard against dissemination of highly personal and sensitive information are critical to both plaintiffs and defendants. If protective orders are restricted, litigation burdens are increased and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal information. Section 1660(d) of the proposed legislation, which provides a rebuttable presumption that the interest in protecting certain personally identifiable information of an individual outweighs the public interest in disclosure, is inadequate reassurance. The proposed legislation would impose a cumbersome and time-consuming process that is much less likely to accurately identify and protect confidential and sensitive personal or proprietary information than current protective order practices. Litigants would be required to absorb the added costs and delays of the process and bear an increased risk of disclosure of sensitive information.

The need for protective orders for effective discovery management has also increased with the explosive growth in electronically stored information. Even relatively small cases often involve huge volumes of information. Relying on the ability to designate information as confidential, parties voluntarily produce much information without the need for extensive direct judicial supervision. If obtaining an enforceable protective order required item-by-item judicial consideration to

determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, that would create discovery disputes. Requiring courts to review information—which can often amount to thousands or even millions of pages—to make such determinations, and requiring parties to litigate and courts to resolve related discovery disputes, would impose significant costs, burdens, and delays on the discovery process. Such satellite litigation would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The Committees' study revealed no significant problem of protective orders impeding access to information that affects the public health or safety. Close examination of the commonly cited illustrations has shown that in these cases, information sufficient to protect public health or safety was publicly available from other sources. And the case law shows that when parties file motions for protective orders, courts review them carefully and grant only the protection needed, recognizing the importance of public access to court filings. The case law also shows that courts reexamine protective orders if intervenors or third parties raise public health or safety concerns about them.

The Committees' careful study led to the conclusion that no change to the present protective-order practice is warranted. The Committees' conclusion is grounded in case law, studies, and analyses developed and reviewed over the past 15 years.

The Rules Committees also asked the FJC to do an extensive empirical study on court orders that limit the disclosure of settlement agreements filed in the federal courts. That study showed no need for legislation like S. 623. Both the discovery protective order and the settlement agreement studies have previously been provided to the Senate Judiciary Committee.[1]

2. Specific Concerns about S. 623

a. Section 1660(a)(1): The Scope of S. 623

S. 623 is narrower than some earlier protective-order bills because it is limited to cases in which the pleadings "state facts that are relevant to the protection of public health or safety." The language recognizes that most cases in the federal courts do not implicate public health or safety and should not be affected by the added requirements S. 623 would impose. But the provisions defining the scope of S. 623 are problematic. In many cases, it would not be possible for the court to determine by reviewing the pleadings whether S. 623 applies. The standard of "facts that are relevant to the protection of public health or safety" is so broad and indefinite that it will either sweep up many cases having little to do with public health or safety and impose on all these cases the costly and time-consuming requirements of S. 623, or require the parties and court to spend

[1] Additional copies can be obtained at:
http://www.fjc.gov/public/pdf.nsf/lookup/0029.pdf/$file/0029.pdf;
http://www.cklawreview.com/wp-content/uploads/vol81no2/Reagan.pdf;
http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/$file/sealset3.pdf.

extensive time and resources litigating whether the statute applies.

b. Section 1660(a)(1)(A) and (B): The Procedure for Entering a Discovery Protective Order

Once an action is identified as one that based on the pleadings falls under S. 623, the requirement that the court make independent findings of fact before issuing a protective order in discovery is triggered. This requirement is very similar to prior protective-order bills. The Committees have consistently opposed those bills because the procedure they require would delay discovery, increase motions practice, and impose significant and unworkable new burdens on lawyers, litigants, and judges. S. 623 raises the same concerns.

In many cases, parties are unwilling to begin exchanging information in discovery until an enforceable protective order is entered. The vital role protective orders play in effective discovery management is well recognized. The information the parties exchange in discovery often includes highly sensitive personal and private information or extremely valuable confidential information. Plaintiffs as well as defendants have discoverable information that must be protected from public dissemination. And discoverable private or confidential information is often not just in the parties' hands, but may also be held by nonparties such as witnesses, coworkers, patients, customers, and many others. The internet has made it much more difficult to protect private and confidential information and has increased the importance of protective orders.

Protective orders avoid delay and cost by allowing the parties to exchange information in discovery that they would not exchange otherwise without objection or motion, hearing, and court order. The requesting party's chief interest is to get discovery produced as quickly and with as little expense and burden as possible. Protective orders serve that interest by allowing the parties to exchange information—with electronic discovery, in volumes that are often huge—without time-consuming, costly, and burdensome pre-production motions and hearings. S. 623 would frustrate the role of protective orders and would make discovery even more burdensome, time-consuming, and expensive than it already is.

The language of the proposed legislation, as in similar prior bills, calls for a procedure under which no protective order can issue unless and until: (1) the party seeking the order designates all the information that would be produced in discovery subject to restrictions on disclosure; (2) the judge reviews all this information to determine whether any of it is relevant to the protection of public health or safety; (3) if any of the information is determined to be relevant to the protection of public health or safety, the judge determines whether any of that information is subject to a specific and substantial interest in maintaining its confidentiality; (4) the judge then determines whether the public interest in the disclosure of any information about public health or safety hazards is outweighed by that interest; and (5) the judge then decides whether the requested order is no broader than necessary to protect that confidentiality interest. The procedure in the proposed legislation would often require the judge's review to occur relatively early in the litigation, when the judge—who knows less about the case than the parties—is the least informed about the case. Information sought in discovery does not come with labels such as "impacts public health or safety"

or "raises specific and substantial interest in confidentiality." The judge will often simply be unable to tell whether the information she is reviewing is relevant to public health or safety. The judge also will not be able to tell whether there are "specific and substantial" privacy or confidentiality interests or how they should be weighed.

Even in cases in which the pleadings state facts relevant to public health or safety, much of the information sought and produced in discovery will not implicate public health or safety. Indeed, much of the information will not be important or even relevant to the case and will not be used by the parties in litigating the case. But there may be significant amounts of private or confidential information that should be protected from public disclosure. Under the procedure set out in S. 623, a lawyer representing a client—plaintiff or defendant—could not seek a protective order without first doing the expensive and time-consuming work of identifying specific information to be obtained through discovery that would be subject to disclosure restrictions. The judge could not issue a protective order to restrict the dissemination of any information obtained through discovery without making the independent findings of fact as to all that information. The effect would be delay, increased motions, and a reduction in timely, cost-effective access to justice.

In addition to causing delay and increased costs in the cases in which protective orders are sought, the procedure in S. 623 would cause delays in access to the federal court system in all cases. If judges have to look through every document produced in discovery in cases in which a protective order is sought in order to be able to make the findings required by the legislation, that will take time away from other pressing court business that litigants expect judges to take care of in a timely manner.

Comparing the procedure under S. 623 with the protective-order practice followed under current law in the federal courts further illustrates problems the legislation would create. Under current law, when the parties ask the court to enter a protective order before discovery begins, the language of Rule 26(c) and the case law require the court to find good cause for entering such an order, even if the parties agree on the terms. In most cases in which a discovery protective order is sought, the court makes the good-cause determination by examining the nature of the case and the types or categories of information that are likely to be exchanged in discovery. Neither the parties nor the court is required to conduct a time-consuming and burdensome pre-discovery review of all the information that will be produced. But such time-consuming and burdensome pre-discovery review is required by the language of S. 623, and will result in increased costs and delays.

The protective order typically sets up a procedure for the parties to designate documents exchanged in discovery—as opposed to filed with the court—as confidential, restricting their dissemination. Most protective orders include "challenge provisions" under which the receiving party or third parties may dispute the designation of a particular document or categories of documents as confidential. Even without such challenge provisions, the case law provides this right. Once the requesting party—who knows the case much better than the judge—gets the documents in discovery and can review them, that party may ask the court to permit the dissemination of documents designated as confidential, to modify the terms of the protective order, or to dissolve the protective order. Among the reasons for modification are the relevance of the documents to

protecting public health or safety and the need to bring them to the appropriate regulatory agency, and the desire to use the documents in related litigation. The court can effectively and efficiently consider such requests because they are focused on specific documents or information. With this focus, the court is able to resolve the requests by applying the factors the case law establishes, including the protection of public health or safety.

The procedures followed under current law meet the goals of S. 623, including in the relatively small number of cases filed in federal courts that implicate public health or safety, without the grave additional burdens, costs, and delays S. 623 would impose. In contrast, the procedure established under S. 623 is ineffective to meet its purpose and would create severe problems in discovery.

c. Section 1660(a)(1): The Application to Orders Restricting Access to Court Records

Section 1660(a)(1) imposes the same requirements on court orders that would restrict public access to court records that apply to orders restricting public access to information exchanged in discovery. This provision weakens the standard federal courts apply under current law for ensuring public access to documents that are filed with the federal court. Under current law, if the parties want to take the material exchanged in discovery and file it with the court, either with a motion or in an evidentiary hearing or at trial, a standard different and higher than the discovery protective-order standard applies before a court can seal it from public view. Courts recognize a general right of public access to all materials filed with the court that bear on the merits of a dispute. This presumption of access usually can be overcome only for compelling reasons; access is granted without the need to show a threat to public health or safety or any other particular justification unless a powerful need for confidentiality is shown. A lower good-cause standard applies to an order restricting disclosure of information exchanged in discovery but not filed with the court.

This distinction between the standard for protecting the confidentiality of information exchanged in discovery and the standard for filing under seal is critical. It reflects the longstanding recognition that while there is no right of public access to information exchanged between litigants in discovery, there is a presumptive right of public access to information that is filed in court and used in deciding cases. Courts require a much more stringent showing to seal documents filed in court than to limit dissemination of documents exchanged in discovery but never filed with the court.
Section 1660(a)(1) reduces the standard necessary to seal documents filed in court and collapses it into the standard necessary to restrict public dissemination of documents exchanged in discovery. As a result, S. 623 weakens the right of public access to court documents.

d. Section 1660(a)(2): Discovery Protective Orders After the Entry of Final Judgment

Section 1660(a)(2) would make a discovery protective order unenforceable after final judgment unless the judge makes separate findings of fact that each of the requirements of (a)(1)(A) and (B) are met. The burden of proof provision in (a)(3) requires that the need for continuing

protection be demonstrated as to all the information obtained in discovery subject to the protective order. Under current practice, the protective order often continues in effect, subject to requests made by either parties or nonparties to release documents or information. Once a party or third party identifies documents or information for which disclosure is sought, the burden of proof is much clearer and efficiently applied. The court is able to effectively and efficiently determine whether the protective order should be modified or lifted because the focus is on specifically identified documents or information. This current practice is adequate to meet the purposes of S. 623 without the added burdens, delays, and costs the bill would add.

Section 1660(a)(2) would greatly add to the costs and burdens of conducting discovery because parties could not be confident that even the most sensitive information they produced would remain subject to the protective order provisions when the case ended. The great importance of limiting access to such highly confidential private information is evidenced by the frequent use in protective orders of "attorneys' eyes only" provisions, which preclude a receiving attorney from sharing certain information received in discovery even with her clients. Such provisions are frequently used in litigation involving complex technology. The parties involved in such litigation often require the return or destruction of their highly confidential and proprietary materials at the conclusion of litigation, to ensure that materials so confidential that they could not even be shared with the receiving attorney's client during the litigation remain confidential when the litigation ends. Such provisions are also used in many other cases in which highly sensitive and private information about both parties and nonparties is obtained in discovery. It is essential to the effective and efficient operation of discovery that litigants be able to rely on the continuing confidentiality of information produced, including after the case ends, subject to the right of others to ask the court to permit broader dissemination of specific information for reasons that could include relevance to public health or safety. S. 623 destroys the reliability that makes protective orders effective, with no evidence that such a step is needed.

e. The Provisions Relating to Orders Approving Settlement Agreements

Section 1660(a)(1) would prohibit a court from entering an order approving a settlement agreement that restricts the disclosure of information obtained through discovery, in a case in which the pleadings state facts that are relevant to the protection of public health or safety, unless the court makes the specified independent findings of fact. Section 1660(c)(1) would preclude a court from enforcing any provision of a settlement agreement in a case with such pleadings that restricts a party from disclosing the fact of settlement or the terms of the settlement (other than the amount of money paid), or that restricts a party from "discussing the civil action, or evidence produced in the civil action, that involves matters relevant to public health or safety," unless the court makes the specified independent findings of fact.

There are very few federal court orders approving settlement agreements. Settlements are generally a matter of private contract. Settlement agreements usually are only brought to a court for approval if the applicable law requires it, as in settlements on behalf of minors or absent class members. Similarly, federal courts are rarely called on to enforce settlement agreements. Unless the agreement specifically invokes a court's continuing jurisdiction or an independent basis for

jurisdiction applies, enforcement actions are generally brought in state courts. Because federal courts are rarely involved in approving or enforcing settlement agreements, the settlement provisions in S. 623 are an ineffective means of addressing the concerns behind the proposed legislation.

The extensive empirical study done by the FJC on court orders that limit the disclosure of settlement agreements filed in the federal courts and a follow-up study showed that in the few cases in which a potential public health or safety hazard might be involved and in which a settlement agreement was sealed by court order, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints identified the three most critical pieces of information about possible public health or safety risks: the risk itself, the source of that risk, and the harm that allegedly ensued. In many cases, the complaints went considerably further. The complaints, as well as other documents, provided the public with access to information about the alleged wrongdoers and wrongdoings, without the need to also examine the settlement agreement.

Based on the relatively small number of federal cases involving any sealed settlement agreement and the availability of other sources to inform the public of potential hazards in these few cases, the Rules Committees concluded that a statute restricting confidentiality provisions in settlement agreements is unnecessary and unlikely to be effective. S. 623 does not change these conclusions. Its primary effect is likely to be an added barrier to access to the federal courts by making it more difficult and cumbersome to resolve disputes, sending more disputes to private mediation or other avenues where there is no public access to information at all.

3. The Civil Rules Committee's Continued Work

In May 2010, the Civil Rules Committee sponsored an important conference on civil litigation at Duke University Law School. That conference addressed problems of costs, delays, and barriers to access at every stage ranging from pre-litigation to pleadings, motions, discovery, case-management, and trial. Many studies were conducted and many papers were prepared in conjunction with the conference.[2] It is worth noting that in all the studies conducted, the papers submitted, and the criticisms of and suggestions for improving the present system, no one raised problems with protective orders or orders limiting access to settlement agreements filed with the federal courts. This further underscores the lack of any need for legislation.

The Civil and Standing Rules Committees are deeply committed to identifying problems with the federal civil justice system that can be addressed by changes to the Federal Rules of Civil Procedure, and to making those changes through the process Congress established—the Rules Enabling Act. As part of that process, the Civil Rules Committee is continuing to monitor the case law under Rule 26(c) to ensure that it is not operating to prevent public access to important information about public health or safety. A memorandum has been prepared setting out the case law in every circuit on entering protective orders, modifying protective orders, and entering sealing

[2] The wide array of papers prepared for the conference are available on the conference's website at http://civilconference.uscourts.gov.

orders. The case law set out in the memo shows that courts are attuned to the public interest and have developed procedures for addressing the need to produce discovery materials to other litigants and agencies. The memo on protective order case law is available online.[3] The Advisory Committee continues to monitor the case law and protective order practice to ensure that rule amendments are not needed.

The Rules Committees very much appreciate the opportunity to express our views and share our concerns. If it would be useful, we are available to discuss these issues. Thank you for your consideration and for the continued dialogue on improving the system of justice in our federal courts.

Sincerely,

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee
on Civil Rules

cc: Democratic Members, Judiciary Committee

Identical letter sent to: Honorable Charles E. Grassley

[3] The memo is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Caselaw_Study_of_Discovery_Protective_Orders.pdf.

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

May 2, 2011

Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Grassley:

We write on behalf of the Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure to oppose the Sunshine in Litigation Act of 2011 (S. 623), which was introduced on March 17, 2011. The Rules Committees have consistently opposed the similar protective-order bills regularly introduced since 1991. Our letters opposing such bills are available on request. Our opposition to S. 623, like the opposition to those earlier bills, is based in part on the fact that they are inconsistent with the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. Our opposition is also based on the specific provisions of S. 623 and similar earlier bills.

Bills that would amend the Civil Rules to regulate the issuance of protective orders in discovery, similar to S. 623, have been introduced regularly since 1991. Like S. 623, these proposed bills would require courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to learn about the problems that these bills seek to solve and to bring the strengths of the Rules Enabling Act process to bear on any problems that might be found. Under that process, the Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, and initiated and evaluated empirical research studies. The Committees' work led to the conclusions that: (1) there

was no evidence that discovery protective orders create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery will become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that adds conditions before any discovery protective order could be entered would impose significant burdens on the court system, resulting in increased delay and costs for litigants; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

1. Proposed Legislation Amending Rule 26(c) of the Federal Rules of Civil Procedure

As part of its careful study of the issues, the Rules Committees asked the Federal Judicial Center (FJC) to undertake an empirical study on whether discovery protective orders issued in federal courts were operating to keep information about public safety or health hazards from the public. The FJC examined 38,179 civil cases filed in the District of Columbia, the Eastern District of Michigan, and the Eastern District of Pennsylvania from 1990 to 1992. The study showed that discovery protective orders were requested in about 6% of civil cases; most requests were made by motion; courts carefully reviewed such motions and denied or modified a substantial proportion of them; about one-quarter of the requests were made by party stipulations that courts usually accept; and most protective orders restricting parties from disclosing discovery material were entered in cases other than personal injury cases, in which public health and safety issues are most likely to arise.

Since the FJC study, the need for protective orders to maintain the confidentiality of highly sensitive personal and commercial information has only increased. The explosive growth in electronically stored information and the fact that most discovery is electronic, as well as the federal courts' adoption of electronic court filing systems that permit public remote electronic access to court files, have increased the risks of unduly imposing on privacy interests. Protective orders to safeguard against dissemination of highly personal and sensitive information are critical to both plaintiffs and defendants. If protective orders are restricted, litigation burdens are increased and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal information. Section 1660(d) of the proposed legislation, which provides a rebuttable presumption that the interest in protecting certain personally identifiable information of an individual outweighs the public interest in disclosure, is inadequate reassurance. The proposed legislation would impose a cumbersome and time-consuming process that is much less likely to accurately identify and protect confidential and sensitive personal or proprietary information than current protective order practices. Litigants would be required to absorb the added costs and delays of the process and bear an increased risk of disclosure of sensitive information.

The need for protective orders for effective discovery management has also increased with the explosive growth in electronically stored information. Even relatively small cases often involve huge volumes of information. Relying on the ability to designate information as confidential, parties voluntarily produce much information without the need for extensive direct judicial supervision. If obtaining an enforceable protective order required item-by-item judicial consideration to

determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, that would create discovery disputes. Requiring courts to review information—which can often amount to thousands or even millions of pages—to make such determinations, and requiring parties to litigate and courts to resolve related discovery disputes, would impose significant costs, burdens, and delays on the discovery process. Such satellite litigation would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The Committees' study revealed no significant problem of protective orders impeding access to information that affects the public health or safety. Close examination of the commonly cited illustrations has shown that in these cases, information sufficient to protect public health or safety was publicly available from other sources. And the case law shows that when parties file motions for protective orders, courts review them carefully and grant only the protection needed, recognizing the importance of public access to court filings. The case law also shows that courts reexamine protective orders if intervenors or third parties raise public health or safety concerns about them.

The Committees' careful study led to the conclusion that no change to the present protective-order practice is warranted. The Committees' conclusion is grounded in case law, studies, and analyses developed and reviewed over the past 15 years.

The Rules Committees also asked the FJC to do an extensive empirical study on court orders that limit the disclosure of settlement agreements filed in the federal courts. That study showed no need for legislation like S. 623. Both the discovery protective order and the settlement agreement studies have previously been provided to the Senate Judiciary Committee.[1]

2. Specific Concerns about S. 623

a. Section 1660(a)(1): The Scope of S. 623

S. 623 is narrower than some earlier protective-order bills because it is limited to cases in which the pleadings "state facts that are relevant to the protection of public health or safety." The language recognizes that most cases in the federal courts do not implicate public health or safety and should not be affected by the added requirements S. 623 would impose. But the provisions defining the scope of S. 623 are problematic. In many cases, it would not be possible for the court to determine by reviewing the pleadings whether S. 623 applies. The standard of "facts that are relevant to the protection of public health or safety" is so broad and indefinite that it will either sweep up many cases having little to do with public health or safety and impose on all these cases the costly and time-consuming requirements of S. 623, or require the parties and court to spend

[1] Additional copies can be obtained at:
http://www.fjc.gov/public/pdf.nsf/lookup/0029.pdf/$file/0029.pdf;
http://www.cklawreview.com/wp-content/uploads/vol81no2/Reagan.pdf;
http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/$file/sealset3.pdf.

extensive time and resources litigating whether the statute applies.

b. Section 1660(a)(1)(A) and (B): The Procedure for Entering a Discovery Protective Order

Once an action is identified as one that based on the pleadings falls under S. 623, the requirement that the court make independent findings of fact before issuing a protective order in discovery is triggered. This requirement is very similar to prior protective-order bills. The Committees have consistently opposed those bills because the procedure they require would delay discovery, increase motions practice, and impose significant and unworkable new burdens on lawyers, litigants, and judges. S. 623 raises the same concerns.

In many cases, parties are unwilling to begin exchanging information in discovery until an enforceable protective order is entered. The vital role protective orders play in effective discovery management is well recognized. The information the parties exchange in discovery often includes highly sensitive personal and private information or extremely valuable confidential information. Plaintiffs as well as defendants have discoverable information that must be protected from public dissemination. And discoverable private or confidential information is often not just in the parties' hands, but may also be held by nonparties such as witnesses, coworkers, patients, customers, and many others. The internet has made it much more difficult to protect private and confidential information and has increased the importance of protective orders.

Protective orders avoid delay and cost by allowing the parties to exchange information in discovery that they would not exchange otherwise without objection or motion, hearing, and court order. The requesting party's chief interest is to get discovery produced as quickly and with as little expense and burden as possible. Protective orders serve that interest by allowing the parties to exchange information—with electronic discovery, in volumes that are often huge—without time-consuming, costly, and burdensome pre-production motions and hearings. S. 623 would frustrate the role of protective orders and would make discovery even more burdensome, time-consuming, and expensive than it already is.

The language of the proposed legislation, as in similar prior bills, calls for a procedure under which no protective order can issue unless and until: (1) the party seeking the order designates all the information that would be produced in discovery subject to restrictions on disclosure; (2) the judge reviews all this information to determine whether any of it is relevant to the protection of public health or safety; (3) if any of the information is determined to be relevant to the protection of public health or safety, the judge determines whether any of that information is subject to a specific and substantial interest in maintaining its confidentiality; (4) the judge then determines whether the public interest in the disclosure of any information about public health or safety hazards is outweighed by that interest; and (5) the judge then decides whether the requested order is no broader than necessary to protect that confidentiality interest. The procedure in the proposed legislation would often require the judge's review to occur relatively early in the litigation, when the judge—who knows less about the case than the parties—is the least informed about the case. Information sought in discovery does not come with labels such as "impacts public health or safety"

or "raises specific and substantial interest in confidentiality." The judge will often simply be unable to tell whether the information she is reviewing is relevant to public health or safety. The judge also will not be able to tell whether there are "specific and substantial" privacy or confidentiality interests or how they should be weighed.

Even in cases in which the pleadings state facts relevant to public health or safety, much of the information sought and produced in discovery will not implicate public health or safety. Indeed, much of the information will not be important or even relevant to the case and will not be used by the parties in litigating the case. But there may be significant amounts of private or confidential information that should be protected from public disclosure. Under the procedure set out in S. 623, a lawyer representing a client—plaintiff or defendant—could not seek a protective order without first doing the expensive and time-consuming work of identifying specific information to be obtained through discovery that would be subject to disclosure restrictions. The judge could not issue a protective order to restrict the dissemination of any information obtained through discovery without making the independent findings of fact as to all that information. The effect would be delay, increased motions, and a reduction in timely, cost-effective access to justice.

In addition to causing delay and increased costs in the cases in which protective orders are sought, the procedure in S. 623 would cause delays in access to the federal court system in all cases. If judges have to look through every document produced in discovery in cases in which a protective order is sought in order to be able to make the findings required by the legislation, that will take time away from other pressing court business that litigants expect judges to take care of in a timely manner.

Comparing the procedure under S. 623 with the protective-order practice followed under current law in the federal courts further illustrates problems the legislation would create. Under current law, when the parties ask the court to enter a protective order before discovery begins, the language of Rule 26(c) and the case law require the court to find good cause for entering such an order, even if the parties agree on the terms. In most cases in which a discovery protective order is sought, the court makes the good-cause determination by examining the nature of the case and the types or categories of information that are likely to be exchanged in discovery. Neither the parties nor the court is required to conduct a time-consuming and burdensome pre-discovery review of all the information that will be produced. But such time-consuming and burdensome pre-discovery review is required by the language of S. 623, and will result in increased costs and delays.

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The procedures followed under current law meet the goals of S. 623, including in the relatively small number of cases filed in federal courts that implicate public health or safety, without the grave additional burdens, costs, and delays S. 623 would impose. In contrast, the procedure established under S. 623 is ineffective to meet its purpose and would create severe problems in discovery.

c. Section 1660(a)(1): The Application to Orders Restricting Access to Court Records

Section 1660(a)(1) imposes the same requirements on court orders that would restrict public access to court records that apply to orders restricting public access to information exchanged in discovery. This provision weakens the standard federal courts apply under current law for ensuring public access to documents that are filed with the federal court. Under current law, if the parties want to take the material exchanged in discovery and file it with the court, either with a motion or in an evidentiary hearing or at trial, a standard different and higher than the discovery protective-order standard applies before a court can seal it from public view. Courts recognize a general right of public access to all materials filed with the court that bear on the merits of a dispute. This presumption of access usually can be overcome only for compelling reasons; access is granted without the need to show a threat to public health or safety or any other particular justification unless a powerful need for confidentiality is shown. A lower good-cause standard applies to an order restricting disclosure of information exchanged in discovery but not filed with the court.

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Section 1660(a)(1) reduces the standard necessary to seal documents filed in court and collapses it into the standard necessary to restrict public dissemination of documents exchanged in discovery. As a result, S. 623 weakens the right of public access to court documents.

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Section 1660(a)(2) would make a discovery protective order unenforceable after final judgment unless the judge makes separate findings of fact that each of the requirements of (a)(1)(A) and (B) are met. The burden of proof provision in (a)(3) requires that the need for continuing

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Based on the relatively small number of federal cases involving any sealed settlement agreement and the availability of other sources to inform the public of potential hazards in these few cases, the Rules Committees concluded that a statute restricting confidentiality provisions in settlement agreements is unnecessary and unlikely to be effective. S. 623 does not change these conclusions. Its primary effect is likely to be an added barrier to access to the federal courts by making it more difficult and cumbersome to resolve disputes, sending more disputes to private mediation or other avenues where there is no public access to information at all.

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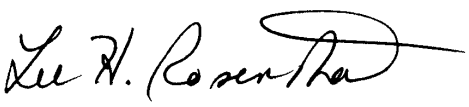
The Rules Committees very much appreciate the opportunity to express our views and share our concerns. If it would be useful, we are available to discuss these issues. Thank you for your consideration and for the continued dialogue on improving the system of justice in our federal courts.

Sincerely,



Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee
on Civil Rules

cc: Republican Members, Judiciary Committee

Identical letter sent to: Honorable Patrick J. Leahy

[3] The memo is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Caselaw_Study_of_Discovery_Protective_Orders.pdf.

March 23, 2011

The Honorable Eugene R. Wedoff
Chairman, Advisory Committee on Bankruptcy Rules
Judicial Conference of the United States
Everett McKinley Dirksen United States Courthouse
219 South Dearborn Street
Chicago, IL 60604

Re: Advisory Committee on Bankruptcy Rules—Proposed Rule 4009 to the Federal Rules of Bankruptcy Procedure

Dear Judge Wedoff,

I write to ask that the Advisory Committee on Bankruptcy Rules move forward on the petition submitted by the U.S. Chamber of Commerce's Institute for Legal Reform to improve the openness and transparency of 524(g) asbestos trusts and initiate a formal process to give full consideration to the proposal in the rules-consideration process.

The increased transparency that the proposed rule would provide will benefit Congress, the judiciary, and all stakeholders with an interest in how asbestos trusts operate. In particular, asbestos trust claimants would benefit greatly from access to detailed information about trust payments. Disclosure of this information should assist in eliminating duplicate or erroneous claims, which should in turn help ensure that asbestos trusts and solvent tort defendants have adequate funds to pay asbestos claimants when actually appropriate.

Another reason to support greater openness and transparency relates to the amount of funds in asbestos trusts. There are estimates from reputable private-sector sources that asbestos trusts administer approximately $30-$60 billion in total assets. In my view, the normal checks and balances that ensure oversight of such a large amount of assets are largely absent for asbestos trusts. As the *Kananian* case referenced in the Institute for Legal Reform's petition shows, the inability to provide adequate oversight has allowed unscrupulous actors to make contradictory claims. The proposal before the Advisory Committee would help to remedy this lack of oversight.

Finally, the proposal would further Congress's intent when it enacted section 524(g), the explicit purpose of which is to ensure that present and future asbestos claimants would be treated equally. Without full transparency, it is difficult for Congress to determine whether the law is working as intended. For this reason, last year, I asked the Government Accountability Office to review the transparency and openness of the asbestos trust system. Although that review is not yet completed, I expect it will be in time to help inform the Bankruptcy Rules Committee's process in evaluating the proposed rule should you move forward.

In sum, there is ample evidence that justifies moving forward on the proposal to bring greater transparency to the asbestos trust system. Accordingly, I encourage the Bankruptcy Rules Committee to undertake formal consideration of the Institute for Legal Reform's proposed rule. Thank you for considering my views on this important matter. If you wish to discuss this matter, the appropriate counsel on the Judiciary Committee whom you may contact is Zachary Somers, who may be reached at 202-225-2825.

Sincerely,

Lamar Smith
Chairman

cc: Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure

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

May 4, 2011

Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Re: Advisory Committee on Bankruptcy Rules – Proposed Rule 4009

Dear Mr. Chairman:

Thank you for your letter of March 23, requesting that the Advisory Committee on Bankruptcy Rules move forward on a suggestion of the U.S. Chamber of Commerce's Institute for Legal Reform. The Institute's suggestion is for a bankruptcy rule involving asbestos trusts established under § 524(g) of the Bankruptcy Code. I am writing to let you know the status of the Advisory Committee's consideration of the suggestion.

The suggestion has been the subject of extensive consideration in the Advisory Committee. The Committee's Business Subcommittee was asked to conduct an initial review. The subcommittee recognized the serious nature of the request and the concerns that motivated it. At the same time, the subcommittee raised issues about whether the proposed rule might exceed the scope of federal rules of procedure. One of the issues raised was that asbestos trusts are established pursuant to confirmed plans in Chapter 11 cases, and the jurisdiction of the courts after plan confirmation is limited. *See, e.g.*, *Pettibone Corp. v. Easley*, 935 F.2d 120, 122 (7th Cir. 1991) ("Once the bankruptcy court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval."). Accordingly, the subcommittee recommended that the Advisory Committee carefully consider the scope of its rulemaking authority and whether implementing the proposed rule might exceed the scope of bankruptcy jurisdiction under 28 U.S.C. § 1334(a) and (b). The subcommittee's preliminary review is reflected in a memorandum enclosed with this letter.

At the Advisory Committee's meeting held on April 8, 2011, the Institute's suggestion and the subcommittee's analysis were given careful attention. At that meeting, the Advisory Committee determined to continue its study by obtaining the views of interested parties—including those of the Institute and the National Bankruptcy Conference—on the question of the appropriateness of a procedural rule governing asbestos trusts. The Advisory Committee will give the suggestion further consideration at its fall meeting after hearing responses from interested parties.

If any further information would be helpful, please let me know. Thank you again for your support of the rulemaking process.

Sincerely,

Eugene R. Wedoff
United States Bankruptcy Judge
Northern District of Illinois
Chair, Advisory Committee on
Bankruptcy Rules

Enclosure

cc: Honorable John Conyers, Jr.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: SUGGESTION FOR RULE REQUIRING QUARTERLY REPORTING BY § 524(g) TRUSTS

DATE: MARCH 10, 2011

The Institute for Legal Reform ("ILR"), an affiliate of the U.S. Chamber of Commerce, has submitted a suggestion (10-BK-H) for a new rule that is aimed at requiring "greater transparency in the operation of trusts established under 11 U.S.C. § 524(g)." In the chapter 11 case of an asbestos defendant,[1] § 524(g) authorizes the creation of, and channeling of liability to, a trust for the post-confirmation compensation of present and future claimants. According to a 2010 study by the RAND Corporation,[2] 54 asbestos bankruptcy trusts had been established through June 2010. ILR argues that there is a need for greater access to information about the operation of these trusts in order to prevent the payment of duplicate demands for trust payments, inaccurate or inconsistent demands, and avoidance of tort system allocation rules. The Advisory Committee chair referred this suggestion to the Subcommittee for a preliminary discussion of it during its conference call on March 2.

Part I of this memorandum provides some background information about asbestos bankruptcy trusts and § 524(g). Part II discusses ILR's proposed rule and implementing form and its arguments in support of the suggestion. Part III then discusses some issues regarding the

[1] According to §524(g)(2)(B)(i)(I), the provision applies to a debtor that "has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products."

[2] LLOYD DIXON, GEOFFREY MCGOVERN & AMY COOMBE, RAND INST. FOR CIVIL JUSTICE, ASBESTOS BANKRUPTCY TRUSTS – AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS xii (2010).

suggestion that the Subcommittee has identified and would like to consider further. The Subcommittee agrees with the importance of ensuring that trusts established through the bankruptcy process operate with integrity and in a manner consistent with the intent underlying § 524(g). It has some doubts, however, about whether bankruptcy rulemaking is an appropriate means of achieving these goals. After considering the matter in greater depth, the Subcommittee will be in a position to report its recommendation to the Advisory Committee at its fall 2011 meeting.

I. Asbestos Bankruptcy Trusts and § 524(g)[3]

The first bankruptcy cases filed by asbestos manufacturers in order to resolve their tort liability were commenced in 1982 by UNR and by Johns-Manville. At the time of the filing of these chapter 11 cases, the use of bankruptcy to resolve such large numbers of personal injury claims was unprecedented. The courts in these cases therefore had to grapple with a variety of novel issues presented by the attempt to apply the Bankruptcy Code to the resolution of hundreds of thousands of unliquidated tort claims held by both present and future claimants. The ways in which these issues were resolved by the UNR and Johns-Manville cases laid the groundwork for the numerous asbestos bankruptcy cases that followed.

The reorganization plans that were eventually confirmed in both the UNR and Johns-Manville cases provided for the creation of a trust to assume and resolve the asbestos claims against the debtor. The asbestos trust was funded by stock in the reorganized company and other company assets, including insurance proceeds. A so-called channeling injunction was entered, which prevented present and future claimants from pursuing their claims against the reorganized

[3] The information in this section is derived primarily from the following sources: S. ELIZABETH GIBSON, FED. JUDICIAL CTR., JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES (2005); S. ELIZABETH GIBSON, FED. JUDICIAL CTR., CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS (2000).

debtor and related entities. Thus claimants' only means of obtaining compensation with respect to this particular defendant was to follow the procedures established for seeking compensation from the trust. This method of providing compensation to asbestos claimants permitted the deferral of individual claims resolution to the post-confirmation phase of the bankruptcy case.

In 1994 Congress amended the Bankruptcy Code to add § 524(g),[4] which to a large degree validated and wrote into the law for future asbestos bankruptcy cases the approach that the first asbestos bankruptcy cases had taken. This complex and detailed statutory provision specifies the circumstances under which a channeling injunction may be entered in an asbestos bankruptcy case. Among other things, it requires the creation of a trust to assume the debtor's liability for damages due to the exposure of claimants to the debtor's asbestos-containing products. This trust must be funded by securities of the debtor and by the debtor's obligation to make future payments, including dividends, to the trust. The trust is required to own a majority of the voting shares of the debtor company or a parent or subsidiary corporation, and it must use its assets to pay claims (or demands) of present and future tort claimants. In order for the channeling injunction to be valid, § 524(g) requires approval by at least 75% of the affected tort claimants who vote on the confirmation of the reorganization plan. Moreover, for the injunction to be enforceable against future claimants, the bankruptcy court must have appointed a legal representative to protect the rights of future claimants in the bankruptcy proceedings.

Trust documents governing the creation and operation of asbestos bankruptcy trusts and documents specifying the trust distribution procedure ("TDP") have either been incorporated into confirmed bankruptcy reorganization plans or have been separately approved by the bankruptcy court presiding over an asbestos debtor's reorganization case. The TDP specifies in detail the procedures that the trust will follow in paying asbestos personal injury claims that are submitted

[4] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111, 108 Stat. 4106, 4114 (1994).

to it. Because payment from the trust is a claimant's exclusive avenue for compensation on account of injury by the debtor – given the channeling injunction – a claimant must comply with the TDP. The payment procedures are designed to ensure that the trust retains sufficient funds to make equitable payments to all eligible present and future claimants.

Typically a TDP for an asbestos bankruptcy trust specifies several categories of asbestos-related diseases and a scheduled value for most of those types of diseases. The values range from several hundred dollars for a non-asbestosis, non-malignant asbestos disease to a hundred thousand dollars or more for mesothelioma. If a claimant submits satisfactory evidence of diagnosis and exposure to satisfy the announced criteria of a particular category, the trust will offer to liquidate the claim at the scheduled amount. That offer, however, does not mean that the claimant is paid the scheduled value. Instead, with the exception of the lowest dollar amount, the liquidated value is multiplied by a payment percentage (for example 10%) set by the trustees in order to ensure the retention of sufficient funds to pay future claims at approximately the same level. The trustees retain the right to periodically adjust the payment percentage as they deem appropriate.

If a claimant fails to satisfy the medical or exposure criteria or chooses not to accept the scheduled value, he or she may seek an individual evaluation of the claim. This process could result in the trust offering to liquidate the claim for an amount that is either greater or less than the scheduled value. Again, however, actual payment would be the product of the liquidated amount multiplied by the payment percentage.

A claimant who does not accept the liquidated amount offered by the trust generally may seek either binding or non-binding arbitration. If non-binding arbitration is chosen and the result is not accepted, the claimant may at that point bring a lawsuit against the trust in the tort system.

The payment percentage is applicable to any judgment that is rendered, and additional restrictions may apply to the timing of payment of such judgments.

Courts presiding over asbestos and other mass tort bankruptcy cases have continued to exercise post-confirmation jurisdiction over proceedings involving or affecting the trust that was established to pay the tort claims. Among the actions of this type that bankruptcy courts have taken are the removal of trustees, limitation of fees for claimants' attorneys, entry of orders governing procedures for litigated and arbitrated claims against the trust, interpretation of confirmed plans and confirmation orders, enforcement of channeling injunctions, oversight of continued funding of the trust, receipt of annual reports and financial statements of the trust, and settlement of accounts of trustees.

II. ILR Suggestion

ILR has proposed that the following bankruptcy rule be adopted in order to make information about claims submitted and paid by asbestos bankruptcy trusts publicly accessible:

Rule 4009. Reports from Trusts Established Under Section 524(g)

> In addition to performing other duties prescribed by the Code and the rules, and subject to reasonable privacy safeguards, a trust established under Section 524(g) shall file periodic reports, available to the public and in a form prescribed by the Judicial Conference, on a quarterly basis. Such reports shall describe, with particularity, each demand for payment the trust received during the reporting period, including exposure history, as well as each amount paid for demands during the report period. Such reports shall not include confidential medical records or claimant social security numbers. If trust payments or demands are relevant to an action in any state or federal court, the trust

established under Section 524(g) shall provide information related to demands and payments to any party to such action, upon written request and subject to protective orders as appropriate.

ILR also proposes an official form for making the required reports. It would provide an attachment for listing demands presented to the trust during the reporting period, revealing for each demand the name of the party making it, the amount of the demand, and the factual basis for it, including exposure history. There would also be an attachment for demands paid, which would require disclosure for each payment of the party to whom it was made, the amount paid, and the factual basis for the payment and amount.

In support of its suggested new rule, ILR argues that greater transparency regarding the operation of asbestos bankruptcy trusts is needed. It notes concern about claimants making demands for payment from several trusts that rest on inconsistent exposure histories or constitute duplicate demands. This overclaiming, it argues, undermines the congressional desire for equitable treatment of present and future claimants, which purpose underlies § 524(g). Of special concern for ILR is the difficulty that defendants to tort actions brought by trust claimants have in obtaining information from the trusts about demands made by and amounts paid to the plaintiffs. The unavailability of this information undermines state rules for contribution and allocation of liability among tortfeasors and prevents defendants from introducing evidence of the plaintiffs' prior inconsistent allegations of the cause of their injuries.

ILR asserts that the Rules Enabling Act, 28 U.S.C. § 2075, provides authority for promulgation of the proposed rule because it authorizes the establishment of "rules that facilitate the operation of the bankruptcy laws so long as the rules do not modify existing substantive

rights." Suggestion at p. 2. Mere disclosure of information, it contends, does not impact any substantive right created by § 524(g).

III. Some Issues Raised by the Suggestion

The ILR proposal brings to the Advisory Committee an important issue – disclosure of information about the operation of asbestos bankruptcy trusts – that has recently attracted congressional attention. Representative Lamar Smith, chair of the House Committee on the Judiciary, has requested the GAO to undertake a study on asbestos bankruptcy trust claims and payments, so it is possible that there will be legislative efforts on this issue.

A threshold issue for the Advisory Committee is whether the problem described by ILR is properly addressed by the Bankruptcy Rules. The Subcommittee, in its preliminary discussions, identified three issues that it believes need to be resolved in order to determine what action to recommend regarding this proposal.

1. Does the proposed rule fall within the scope of the Supreme Court's rulemaking authority? The Bankruptcy Rules Enabling Act provides that the "Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11. Such rules shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2075. Existing bankruptcy rules, as well as some pending amendments, require the disclosure of various types of information by parties participating in bankruptcy cases. The rule proposed by ILR, however, would operate after a chapter 11 plan is confirmed and would apply to entities that, although created through the reorganization process, act outside the contours of a bankruptcy case. The Subcommittee noted in particular the last sentence of the proposed rule, which would require § 524(g) trusts to provide information upon written request to parties in state or federal court actions. Members of the Subcommittee were

concerned that mandating discovery in tort and other non-bankruptcy suits might exceed the authority to prescribe rules for "the practice and procedure in cases under title 11."

2. Would implementation of the proposed rule exceed the scope of bankruptcy jurisdiction? Bankruptcy jurisdiction, whether exercised by a district or a bankruptcy judge in the first instance, extends to "all cases under title 11 [and] all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a), (b). While this conferral of jurisdiction has spawned much litigation, its scope is especially uncertain in the post-confirmation phase of a chapter 11 case. It is generally recognized that the bankruptcy court's jurisdiction does not cease in its entirety upon plan confirmation, but it does decrease at that point. *See, e.g.*, Binder v. Price Waterhouse & Co. (*In re* Resorts Int'l, Inc.), 372 F.3d 154, 165 (3d Cir. 2004). The Third Circuit held that the test for whether the bankruptcy court retains jurisdiction after confirmation is "whether there is a [sufficiently] close nexus to the bankruptcy plan or proceeding." *Id.* at 166. It went on to explain that "[m]atters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus." *Id.* at 167.

Bankruptcy courts that have confirmed plans in asbestos bankruptcies that created trusts under § 524(g) have continued to exercise jurisdiction in the case to receive annual reports and accounts from the trustees. In the Eagle-Picher asbestos bankruptcy case,[5] for example, the plan was confirmed in November 1996. A recent check of the docket in that case showed that Judge Perlman entered an order on June 10, 2010, approving the trustees' annual report and account for the 2009 calendar year and releasing the trustees from further liability for that period. The annual report and account, which was accompanied by audited financial statements, provided a summary of the claims processed and amounts paid to date and during 2009, as well as

[5] Consolidated Case No. 1-91-10100 (Bankr. S.D. Ohio).

information about trust and asset management. Of relevance to the ILR suggestion, the Eagle-Picher trust report stated that during 2009 the trust had responded to approximately 459 subpoenas that sought claims filing information. This information, it said, was sought primarily by non-asbestos defendants. The trust stated that it "did not divulge any medical information or trust settlement amounts in responding to the subpoenas." Annual Report and Account at p. 5.

Courts have provided relatively little explanation of the basis of continuing jurisdiction over the asbestos trusts. The exercise of that jurisdiction may be based on the view that the court that approved the creation and operating procedures of the trust has jurisdiction to provide continuing oversight of its operation. Even so, the Subcommittee questioned whether the existence of jurisdiction to provide an annual accounting necessarily extends to receipt of all of the information that the proposed rule would require. The resolution of that issue leads to the final question identified by the Subcommittee.

3. Is there a bankruptcy need for the quarterly reporting of the information sought by ILR? Two reasons are put forth for the need for greater disclosure by asbestos bankruptcy trusts: (1) ensuring the integrity of the trust payment system, and (2) enabling defendants in tort actions to determine whether the plaintiff has already received payment for the injury being alleged and whether the plaintiff has made inconsistent claims of exposure or causation.

As for the first goal, it is not clear to the Subcommittee that the quarterly reporting sought by ILR to each court that has approved the creation of a trust will provide a mechanism for rooting out improper claim payments. The mere fact that one person has sought and received payment from several trusts does not reveal impropriety. Many asbestos claimants were exposed to several different manufacturers' asbestos products, and they generally are paid less than 100% of their damages from any trust. It would be difficult to determine, therefore, when a claimant

has received more than he or she is entitled to receive. Furthermore, it is unlikely that any bankruptcy judge would be in a position to compare the various reports that are filed over time with numerous courts to determine if there have been inconsistent allegations or overpayments.

With respect to the second goal, the Subcommittee was concerned that it is beyond the scope of the bankruptcy court's responsibilities to serve as a repository of information merely for use in non-bankruptcy litigation. The bankruptcy court does not need information at the proposed level of detail in order to approve the trustees' report and account, and ILR does not suggest any use that the bankruptcy court will make the quarterly reports. It instead seems to be seeking to use the Bankruptcy Rules to mandate public disclosure of information that has been difficult or impossible to obtain.

To the extent that non-bankruptcy law allows a tort defendant to share liability with other tortfeasors or to offset against a judgment any amounts that the plaintiff has already been paid for the same injury, the Subcommittee agreed that there should be a way to discover this information. But if discovery tools in the tort litigation have proven to be ineffective and it is determined that the trusts should be providing more information than they currently are, the Subcommittee's preliminary thought was that this may be a matter more appropriately addressed by a legislative solution – such as an amendment of § 524(g) that imposes additional requirements on trusts created under that provision.

TAB 3-B

Administrative Report will be oral

TAB 4

Report of the Federal Judicial Center will be oral

TAB 5A-E

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: May 2, 2011

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

FROM: Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure

RE: Report of the Civil Rules Advisory Committee

I. Introduction

The Civil Rules Advisory Committee met at the University of Texas School of Law on April 4 and 5, 2011. Draft Minutes of this meeting are attached.

Part I presents the Committee's recommendation to publish for comment revisions of Civil Rule 45.

Part II presents several matters on the Committee agenda for information and possible discussion. Part II A provides illustrations of approaches that might be taken to crafting a rule on preserving information for discovery. These illustrations have been prepared to stimulate discussion at a miniconference the Committee plans to hold in September. II B describes continuing study of pleading standards, including a report by the Federal Judicial Center. II C is an account of the work being done to carry forward the ideas and energy generated by the 2010 Litigation Review Conference at Duke Law School. Finally, II D describes two general questions posed by Rule 6(d):

the best approach to take when an inadvertent ambiguity has been created by applying Style Project principles in amending rule text, and whether the time has come to reconsider the decision to extend time periods by three days when service is made by e-mail or some of the other means that now support the extension.

Part III notes pending legislation that would directly amend or limit Civil Rules.

I ACTION ITEM: CIVIL RULE 45

Although separated from the comprehensive discovery provisions in Rules 26 to 37, Rule 45 covers both trial subpoenas and discovery subpoenas. The Advisory Committee and its Discovery Subcommittee have spent several years studying Rule 45. The work was prompted by suggestions submitted by the public, extended to a review of the pertinent literature, and generated further ideas within the Committee. This work produced a list of 17 different possible areas for amendment.

The Subcommittee and Committee were assisted by many representatives of the Bench and Bar. Careful analyses were submitted, for example, by the Magistrate Judges' Association, and by the ABA Section of Litigation. In addition, in October, 2010, the Subcommittee held a very informative miniconference on Rule 45.

The ideas drawn from these sources were winnowed down to a package that was unanimously endorsed by the Advisory Committee. Although there are a number of small changes included as well, the main features are:

Notice of service of subpoena: The 1991 amendments to Rule 45 introduced the "documents only" subpoena, and added a requirement in Rule 45(b)(1) that each party be given notice of a subpoena that requires document production. In 2007 this provision was clarified to direct that the notice be provided before the subpoena is served.

As it examined Rule 45 practice, the Committee was repeatedly informed that many lawyers were not complying with this notice requirement, and that this failure caused problems fairly frequently. It concluded that the requirement should be moved to a more prominent position, and as a result the amendment package proposes that it be transferred to become Rule 45(a)(4), entitled "Notice to other parties."

The Committee also determined that modest improvements in the notice requirement were in order. Thus, proposed Rule 45(a)(4) directs that the notice include a copy of the subpoena; in this way other parties can learn what materials should be forthcoming under the subpoena, determine whether they want to seek additional materials, and perhaps conclude that there is a ground for resisting or seeking protection with regard to production of some materials. And the notice requirement is extended to trial subpoenas by striking the words that now limit it to subpoenas that

command production "before trial." The advantages of notifying the parties before the subpoena is served seem equally important for trial subpoenas.

On a number of occasions during consideration of the notice provision, attorneys argued that notice should also be required on one or more occasions after service. Various proposals along this line included requiring the party that served the subpoena to provide a description of what was produced, that it give notice when materials were produced, that it notify the other parties of any modifications of the subpoena negotiated with the person on whom it was served, and that it supply or provide access to the materials obtained. Variations of these suggestions were discussed during the Standing Committee meeting in January, 2011. After the January meeting, the ABA Section of Litigation urged that a second notice be added to the rule. Spurred by that proposal and the Standing Committee's discussion, the Discovery Subcommittee reexamined the question and decided to adhere
to its earlier conclusion that adding such a requirement would not be desirable. The matter was explored at the Advisory Committee's April meeting. The points examined earlier were re-examined. The robust discussion added the observation that the current rules provide an opportunity to alleviate any anticipated problems. Lawyers concerned about such access could include it in their Rule 26(f) plans, and ask the court to include provision for further notice or access in the scheduling order.

In all of these discussions, it has been agreed that the parties should cooperate in communicating about materials obtained pursuant to a subpoena and providing access to those materials. But each time it was concluded that adding a specific requirement to the rule would not be desirable. Often, production is handled on a rolling basis, and the timing and nature of the additional notice and access could prove difficult. Rather than handle this problem through a rule provision, it seemed that the more sensible solution would lie with the lawyers who received the initial notice; they could persist in seeking the materials from the party who served the subpoena, and perhaps contact the nonparty served with the subpoena. That effort should bear fruit, and adding further notice requirements to the rule might cause problems. It could introduce "gotcha" efforts on the eve of trial, when parties might argue that other parties' notice efforts were inadequate, and that the materials obtained by subpoena should therefore be excluded from evidence.

Ultimately, the Advisory Committee unanimously approved the notice provision.

Transfer of subpoena-related motions: The amendments continue to direct that motions to enforce or quash a subpoena, or to obtain a ruling on whether privilege protects material that was allegedly produced inadvertently, be made in the district where compliance with the subpoena is required, even when the underlying action is pending in a different district. But experience has shown that on occasion there are strong reasons to have some issues resolved by the judge presiding over the main action. That judge may already have ruled on the same or closely related issues, or the issues may directly impact management of the underlying action. Subpoenas may have been served or may be expected in a number of districts, raising a possibility of inconsistent resolution of issues bearing on all of them. On occasion, the issue raised regarding enforcement of a subpoena

may overlap with the merits of the underlying case so that a judge deciding whether to enforce the subpoena is, in effect, "deciding" part of the case itself.

The current rules do not absolutely require the court where the discovery is sought to shoulder the burden to decide all such issues when raised in connection with a disputed subpoena. Rule 26(c)(1) explicitly permits a person from whom discovery is sought to seek a protective order in the court where the underlying action is pending. If a motion for protection is instead filed in the district where the subpoena requires compliance, the matter may nonetheless be sent to the judge presiding over the underlying action. As recognized by the Committee Note to the 1970 amendments to Rule 26(c), "[t]he court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending." "Given the clear language of Rule 26 and the Advisory Committee Notes, there is no question that a Rule 26 motion for a protective order may be transferred or remitted from a court with ancillary jurisdiction over a discovery dispute to the forum court in which the underlying action is pending." Melder v. State Farm Mut. Auto. Ins. Co., 2008 WL 1899569 (N.D. Ga., April 25, 2008) at *4. Authority to transfer a motion to enforce a subpoena is less clearly addressed in the current rule. Although there is some conflict in authority on that point, a respected treatise opines that it is "within the discretion of the district court that issued the subpoena to transfer motions involving the subpoena to the district where the action is pending." 9A C. Wright & A. Miller, Federal Practice & Procedure § 2463.1 at 520 (3d ed. 2008).

These amendments remove any uncertainty about authority to transfer to the court where the action is pending by adding Rule 45(f), which permits a court asked to rule on a motion under Rule 45 to transfer the motion. The standard for transfer has evolved as the Subcommittee and Advisory Committee have studied the issues. The basic objective is to ensure that transfer is a rare event. The proposed amendment authorizes transfer if the parties and the person subject to the subpoena consent to it, and directs that absent consent transfer is authorized only in "exceptional circumstances." The Committee Note fleshes out the sorts of circumstances that would support transfer, stressing that such circumstances would be rare.

Proposed Rule 45(f) also addresses additional matters that may be important when transfer is granted. Although the motion will usually be fully briefed by the time transfer is ordered, it directs that any lawyer admitted to practice in the district where the motion is filed may file papers and present argument in the court where the action is pending. In addition, when needed to enforce the order rendered by the court where the action is pending, the rule authorizes retransfer to the court where the motion was filed.

Parallel amendments to Rule 45(g) and Rule 37(b)(1) make clear that disobedience of a subpoena-related order entered after transfer is contempt of the court that entered the order and of the court where the motion was filed.

Simplification of Rule 45: Rule 45 is long and complicated. In part, that is because it seeks

to encompass in one rule all the pertinent discovery directions for subpoena practice that correspond to the topics covered for party discovery in Rules 26 through 37.

But some features of the rule provide further complications. The present rule presents a variety of challenges that do not arise in party discovery. It is necessary to determine which court should be the "issuing court," to find where the subpoena may be served, and to parse provisions located in several parts of the rule to determine where a person subject to a subpoena can be required to comply. Together, these features produce what the Subcommittee came to call the "three-ring circus" aspect of the rule.

Those complications in the rule were early recognized by thoughtful analysts. Evaluating the amended rule in 1991, Professor Siegel carefully sorted through the variety of sometimes competing provisions and concluded, with some vehemence, that "the rule comes off like a Tower of Babel," and that "it sometimes appears to require at least a college minor in mathematics just to figure out safely what court to issue the subpoena 'from' and where to effect its service." Siegel, Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure, 139 F.R.D. 197, 209, 214 (1991). For two decades, lawyers have struggled with these difficulties.

These amendments seek to simplify the 1991 rule to reduce those difficulties. Proposed Rule 45(a)(2) provides that the subpoena should issue from the court where the action is pending. Under the 1991 version, any lawyer admitted in that court could issue a subpoena in the name of any district court, even though that court would never learn that it had "issued" a subpoena unless a dispute led to a motion being filed before it as the "issuing court." The Committee Note accompanying the 1991 amendment recognized the reality of what it was doing: "In authorizing attorneys to issue subpoenas from distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party." This amendment recognizes the reality established in 1991 while removing the guessing game on which court's name should be entered at the top of the subpoena.

Proposed Rule 45(b)(2) removes the uncertainty about where a subpoena may be served; in place of a four-part provision in the current rule, the amended rule simply authorizes service "at any place within the United States." The rule is modeled on Fed. R. Crim. P. 17(e), which provides for nationwide service of subpoenas in criminal cases.

But unlike Criminal Rule 17(e), the amended rule does not purport to require a person subject to a subpoena to comply in the issuing court. Instead, new Rule 45(c) collects the provisions on place of compliance that were formerly located in a number of provisions of Rule 45 and simplifies them. The current provisions about place of compliance have contributed to a split in authority about whether parties and party officers can be required to travel more than 100 miles from outside the state to testify at trial. As discussed below, Rule 45(c) resolves that split.

More generally, Rule 45(c) simplifies the task of a lawyer who wants guidance about where compliance with a subpoena can be compelled. For example, while the current rule sometimes

requires that state law be consulted to answer this question, the amended rule does not. By gathering together the previously dispersed provisions on place of compliance and simplifying them, the amendments attempt to respond to the concerns voiced two decades ago by Professor Siegel.

At the same time, the amendments preserve protections for a nonparty subject to a subpoena. Rule 45(c) conforms very closely to the scattered provisions of the current rule regarding place of compliance, and the amendments direct that subpoena-related motions be filed in the district in which compliance may be required. Although Rule 45(f) adds authority to transfer those motions, that is permitted only in exceptional circumstances.

Trial subpoenas for distant parties and party officers: Present Rule 45(c)(3)(A)(ii) directs that a subpoena be quashed if it "requires a person who is neither a party nor a party's officer to travel more than 100 miles" to attend trial (except that a nonparty can be required to attend trial anywhere within the state if so authorized in the state's courts and undue expense would not be incurred). Rule 45(b)(2) — relating to the place of serving a subpoena — provides that it is "subject to" Rule 45(c)(3)(A)(ii).

These provisions have produced conflicting interpretations in the courts, sometimes between judges in the same district. One interpretation is that subpoenas may only be served and enforced within the boundaries permitted by Rule 45(b)(2), and that the additional protections of Rule 45(c)(3)(A)(ii) operate within those limitations. See *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in a Fair Labor Standards Act action could not be compelled to travel more than 100 miles from a place outside the state to attend trial because they were not served with subpoenas in the state in accordance with Rule 45(b)(2)). Another interpretation is that the exclusion of parties and party officers from the protections of Rule 45(c)(3)(A)(ii) means that attendance at trial of these witnesses can be compelled without regard to the geographical limitations on serving subpoenas contained in Rule 45(b)(2). See *In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D. La. 2006) (requiring an officer of the defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served at a place within Rule 45(b)(2)).

The Committee has concluded that the 1991 amendments were not intended to create the expanded subpoena power recognized in *Vioxx* and its progeny. The Committee is also concerned that allowing subpoenas on an adverse party or its officers without regard to the geographical limitations of Rule 45(b)(2) — Rule 45(c) under the amended rule — would raise a risk of tactical use of a subpoena to apply inappropriate pressure to the adverse party. Officers subject to such subpoenas might often be able to secure protective orders against having to attend trial, but the motions would burden the courts and the parties. In addition, in many cases a party's other employees, not its officers, are the best witnesses about the matters actually in dispute in the case. To the extent that a party's or officer's testimony is truly needed, there are satisfactory alternatives to compelling their attendance at trial. See, e.g., Rule 30(b)(3) (authorizing audiovisual recording of deposition testimony); Rule 43(a) (permitting the court to order testimony by contemporaneous transmission).

These amendments are intended to restore the original meaning of the 1991 amendments and make clear that all subpoenas are subject to the geographical limitations of Rule 45(c), which are modeled on those of former Rule 45(b)(2).

Appendix seeking comment on providing authority to require trial testimony from a party or party officer: Although the Committee decided to reject the line of cases finding authority under the current rule to command testimony at trial from distant parties and party officers, some lawyers supported creating some limited authority to order such testimony in appropriate cases. In addition, some of the courts that regard the rule as preventing them from ordering a party or its officer to testify at trial seem to regard that as a poor policy choice.

Responding to these concerns, the Committee is providing an Appendix that invites public comment on whether it would be desirable to include explicit authority for such orders under limited circumstances. The Appendix makes clear that this is not the Committee's proposal, and that it is being presented only to obtain public comment. At the same time, if the public comment shows that the addition of this authority would be a good idea, including the Appendix in the published preliminary draft could obviate the need to republish.

The Appendix offers for comment a new Rule 45(c)(3), which would permit a judge, for good cause, to order a party or its officer to attend trial and testify. The Committee Note makes clear that the prime consideration of the good-cause inquiry is whether there is a real need for this person's testimony at trial. Even if there is, the court is directed to consider alternatives such as a videotaped deposition or testimony by simultaneous transmission from another location. In addition, the added provision would empower the court to order that the person be compensated for the expense incurred in attending trial.

Rule 45. Subpoena

(a) In General.

(1) ***Form and Contents.***

(A) ***Requirements – In General.*** Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action~~, the court in which it is pending,~~ and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d~~c~~) and (e~~d~~).

(B) *Command to Attend a Deposition – Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information*. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out

in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) ***Command to Produce; Included Obligations.*** A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person ~~party~~ to permit inspection, copying, testing, or sampling of the materials.

(2) ***Issuing ~~Issued from Which~~ Court.*** A subpoena must issue from the court where the action is pending. ~~as follows~~:

~~(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;~~

~~(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and~~

~~(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.~~

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court. ~~as an officer of:~~

~~(A) a court in which the attorney is authorized to practice; or~~

~~(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action~~

~~is pending.~~

(4) ***Notice to Other Parties.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises, then before it is served, a notice and a copy of the subpoena must be served on each party.

(b) Service.

(1) ***By Whom and How; Tendering Fees; ~~Serving a Copy of Certain Subpoenas~~.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. ~~If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.~~

(2) ***Service in the United States.*** A subpoena may be served at any place within the United States. ~~Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:~~

~~(A) within the district of the issuing court;~~

~~(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;~~

~~(C) within the state of the issuing court if a state statute or court rule allows~~

~~service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or~~

~~(D) that the court authorizes on motion and for good cause, if a federal statute so provides;~~

(3) ***Service in a Foreign Country*****.** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service*****.** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Place of compliance.

(1) ***For a trial, hearing, or deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if

(i) the person is a party or a party's officer; or

(ii) the person is commanded to attend a trial, and would not incur substantial expense.

(2) ***For other discovery.*** A subpoena may command:

(A) Production of documents, tangible things, or electronically stored

information at a place reasonably convenient for the person commanded to produce.

(B) Inspection of premises, at the premises to be inspected.

(d)~~(c)~~ Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The ~~issuing~~ court for the district where compliance is required under Rule 45(c) must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney's fees – on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required*. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections*. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises – or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for

compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the ~~issuing~~ court for the district where compliance is required under Rule 45(c) for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required*. On timely motion, the ~~issuing~~ court for the district where compliance is required under Rule 45(c) must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

~~(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person – except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;~~

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iii~~v~~) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the ~~issuing~~ court for the district where compliance is required under Rule 45(c) may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.~~; or~~

~~(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.~~

(C) *Specifying Conditions as an Alternative*. In the circumstances described in Rule 45(d~~c~~)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e~~d~~) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents*. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must

organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Production.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced*. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court for the district where compliance is required under Rule 45(c) under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Transfer of Subpoena-related Motions. When a motion is made under this rule in a court where compliance is required, and that court did not issue the subpoena, the court may transfer the motion to the issuing court if the parties and the person subject to the subpoena consent or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(ge) Contempt. The court for the district where compliance is required under Rule 45(c) -- or, after

transfer of the motion, the issuing court -- may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to the subpoena. ~~A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).~~

COMMITTEE NOTE[1]

Rule 45 was extensively amended in 1991. The general goal of these amendments is to clarify and simplify the rule. In particular, the amendments recognize the court where the action is pending as the issuing court, permit nationwide service of a subpoena, and collect in a new subdivision (c) the previously scattered provisions regarding place of compliance. These changes resolve a conflict that arose after the 1991 amendment about compelling a party or party officer to travel long distances to testify at trial; such testimony may now be required only as specified in new Rule 45(c). In addition, the amendments introduce authority in new Rule 45(f) for the court where compliance is required to transfer a subpoena-related motion to the court where the action is pending in exceptional circumstances or by agreement of the parties and the person subject to the subpoena.

Subdivision (a). As part of the simplification of Rule 45, subdivision (a) is amended to provide that a subpoena issues from the court in which the action is pending. Subdivision (a)(3) specifies that an attorney authorized to practice in the court in which the action is pending may issue a subpoena, which is consistent with current practice.

In Rule 45(a)(1)(D), "person" is substituted for "party" because the subpoena may be directed to a nonparty.

Rule 45(a)(4) is added to highlight and slightly modify a notice provision first included in the rule in 1991. The 1991 amendments added a requirement to Rule 45(b)(1) that prior notice of the service of a "documents only" subpoena be given to the other parties. Rule 45(b)(1) was clarified in 2007 to specify that this notice must be served before the subpoena is served on the witness.

The Committee has been informed that parties serving subpoenas frequently fail to give the required notice to the other parties. This amendment responds to that concern by moving the notice

[1] The following Committee Note was originally drafted before the rule language above was improved based on suggestions from the Standing Committee's style consultant. Some minor adjustments in Committee Note language may be necessary to take account of those style improvements.

requirement to a new provision in Rule 45(a), where it is hoped that it will be more visible. In addition, new Rule 45(a)(4) requires that the notice include a copy of the subpoena. This requirement is added to achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials. The amendment also deletes the words "before trial" that appear in the current rule. Notice of trial subpoenas for documents is as important as notice of discovery subpoenas.

Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving the subpoena or the person served with the subpoena to obtain such access. When access is requested, the party serving the subpoena should make reasonable provision for prompt access.

Subdivision (b). The former notice requirement in Rule 45(b)(1) has been moved to new Rule 45(a)(4).

Rule 45(b)(2) is amended to provide that a subpoena may be served at any place within the United States, thereby removing the complexities prescribed in prior versions of the rule.

Subdivision (c). Subdivision (c) is new. It has been added to collect the various provisions on where compliance can be required, and to simplify them. Unlike the prior rule, place of service is not critical to place of compliance. Although Rule 45(a)(1)(A)(iii) permits the subpoena to direct a place of compliance, that place must be selected under the provisions of Rule 45(c).

Rule 45(c)(1) addresses a subpoena to testify at a trial, hearing, or deposition. It provides that compliance is only required within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. For parties and party officers, compliance may be required anywhere in the state in which the person resides, is employed, or regularly conducts business in person. Nonparty witnesses can be required to travel more than 100 miles within the state where they reside, are employed, or regularly conduct business in person only if "substantial expense would not be imposed on that person." When it appears that travel over 100 miles could impose substantial expense on the witness, one solution would be for the party that served the subpoena to pay that expense, and the court could condition enforcement of the subpoena on such payment.

These amendments resolve a split in interpretation of Rule 45 concerning subpoenas for trial testimony of parties and party officers. Compare In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D. La. 2006) (finding authority to compel a party officer from New Jersey to testify at trial in New Orleans), with Johnson v. Big Lots Stores, Inc., 251 F.R.D. (E.D. La. 2008) (holding that Rule 45 did not require attendance of plaintiffs at trial in New Orleans when they would have to travel more than 100 miles from outside the state). Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer to travel more than 100 miles from outside the state.

For other discovery, Rule 45(c)(2) directs that inspection of premises occur at the premises to be inspected, and that production of documents, tangible things, and electronically stored information occur at a place reasonably convenient for the producing person. The Committee is informed that under the current rule the place of production has not presented difficulties, and the flexibility of this provision is designed to ensure that it does not present difficulties in the future. For electronically stored information, for example, it may often be that the materials can be produced electronically. For documents and tangible things, the place for production must be reasonably convenient for the producing person. If issues about place of production arise, the party that served the subpoena and the person served with it should be flexible about a reasonable place for production, keeping in mind the assurance of Rule 45(d)(1) that undue expense or burden must not be imposed on the person subject to the subpoena. In some instances, it may be that documents or tangible things are located in multiple places and that producing them all in a single location would be unduly burdensome, but generally it is to be hoped that inspections at multiple locations can be avoided.

Subdivision (d). Subdivision (d) contains the provisions formerly in subdivision (c). It is revised to recognize the court where the action is pending as the issuing court, and to take account of the addition of Rule 45(c) to specify where compliance with a subpoena is required, which renders some provisions of the former rule superfluous.

Subdivision (f). Subdivision (f) is new. Under Rules 45(d)(2)(B), 45(d)(3), and 45(e)(2)(B), subpoena-related motions and applications are to be made to the court where compliance is required under Rule 45(c). Rule 45(f) provides authority for the court where compliance is required to transfer the motion to the court where the action is pending. It applies to all motions under this rule, including an application under Rule 45(e)(2)(B) for a privilege determination.

Subpoenas are essential to obtain discovery from nonparties. To protect local nonparties, local resolution of disputes about subpoenas is assured by the limitations of Rule 45(c) and the requirements in Rules 45(d) and (e) that motions be made in the court in which compliance is required under Rule 45(c).

Transfer to the court where the action is pending is sometimes warranted, however. If the parties and the person subject to the subpoena consent to transfer, Rule 45(f) provides that the court where compliance is required may do so. In the absence of such consent, the court may transfer in exceptional circumstances. Such circumstances will be rare, and the proponent of transfer bears the burden of showing that such circumstances are presented. Rule 45(d)(1) recognizes that nonparties subject to a subpoena should be protected against undue burden or expense; that consideration may often weigh heavily against transfer.

The rule authorizes transfer absent consent in "exceptional circumstances." A precise definition of "exceptional circumstances" is not feasible. Past experience suggests examples, however. On occasion the nonparty may actually favor transfer, and opposition to transfer may instead come from one of the parties to the underlying action, perhaps because that court has already

indicated a view -- or made a ruling -- on the issue raised in regard to the subpoena. More generally, if the issue in dispute on the subpoena-related motion has already been presented to the issuing court or bears significantly on its management of the underlying action, or if there is a risk of inconsistent rulings on subpoenas served in multiple districts, or if the issues presented by the subpoena-related motion overlap with the merits of the underlying action, transfer may be warranted. Other exceptional circumstances may arise, but the rule contemplates that transfers will be truly rare events.

If the motion is transferred, it should often be true that it has already been fully briefed, but on occasion further filings may be needed. In addition, although it is hoped that telecommunications methods can be used to minimize the burden a transfer imposes on nonparties, it may be necessary for attorneys admitted in the court where the motion is made to appear in the court in which the action is pending. The rule provides that if these attorneys are authorized to practice in the court where the motion is made, they may file papers and appear in the court in which the action is pending in relation to the motion as officers of that court.

After transfer, the court where the action is pending will decide the motion. If the court rules that discovery is not justified, that should end the matter. If the court orders further discovery, it is possible that retransfer may be important to enforce the order. One consequence of failure to obey such an order is contempt, addressed in Rule 45(g). Rule 45(g) and Rule 37(b)(1) are both amended to provide that disobedience of an order enforcing a subpoena after transfer is contempt of the issuing court and the court where compliance is required under Rule 45(c). In some instances, however, there may be a question about whether the issuing court can impose contempt sanctions on a distant nonparty. If such circumstances arise, or if it is better to supervise compliance in the court where compliance is required, the rule provides authority for retransfer for enforcement. It is possible that a nonparty subject to such an order would, after retransfer, try to persuade the judge in

the Rule 45(c) district to modify the order. But since that court originally transferred the motion to the issuing court, instances of refusal to enforce the resulting order should be rare.

Subdivision (g). Subdivision (g) carries forward the authority of former subdivision (e) to punish disobedience of subpoenas as contempt. It is amended to make clear that, in the event of transfer of a subpoena-related motion, such disobedience constitutes contempt of both the court where compliance is required under Rule 45(c) and the court where the action is pending. If necessary for effective enforcement, Rule 45(f) authorizes retransfer after the motion is resolved.

The rule is also amended to clarify that contempt sanctions may be applied to a person who disobeys a subpoena-related order, as well as one who fails entirely to obey a subpoena. In civil litigation, it would be rare for a court to use contempt sanctions without first ordering compliance with a subpoena, and the order might not require all the compliance sought by the subpoena. Often contempt proceedings will be initiated by an order to show cause, and an order to comply or be held

in contempt may modify the subpoena's command. Disobedience of such an order may be treated as contempt.

The second sentence of former subdivision (e) is deleted as unnecessary.

Conforming Amendment to Rule 37

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(b) Failure to Comply with a Court Order.

(1) ***Sanctions Sought in the District Where the Deposition is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) ***Sanctions Sought in the District Where the Action is Pending.***

* * * * *

COMMITTEE NOTE

Rule 37(b) is amended to conform to amendments made to Rule 45, particularly the addition of Rule 45(f) allowing for transfer of a subpoena-related motion to the court where the action is pending. A second sentence is added to Rule 37(b)(1) to deal with contempt of orders entered after such a transfer. The Rule 45(f) transfer provision is explained in the Committee Note to Rule 45.

APPENDIX

New Rule 45(c) limits the geographic scope of the duty to comply with a subpoena in ways that eliminate the authority some judges found in the 1991 version of the rule to compel parties and party officers to testify at trial in distant fora. After consulting with practitioners and reviewing the relevant case law, the Committee concluded that the power to compel parties and party officers to testify at trial should not be expanded. Nonetheless, because some dissenting voices the Committee encountered during its consideration of these issues felt that in unusual cases there may be reason to empower the judge to order a distant party officer to attend and testify at trial, the Committee decided to seek public comment about adding such a power to the rules and to suggest rule language that could be used for that purpose.

This Appendix provides that language in the form of a new Rule 45(c)(3), which could be added to new Rule 45(c) proposed above by the Committee. The Committee invites comment on (a) whether the rules should be amended to include such power to order testimony, and (b) whether the following draft provision would be a desirable formulation of such power were it added to the rules. This is not a formal proposal for amendment, but instead an invitation to comment. If the public comment shows that this approach is strongly favored, the Committee will have the option of recommending it for adoption in substantially the form illustrated below without the need to republish for a further round of comment unless the testimony and comments suggest revisions that make republication desirable.

Rule 45. Subpoena

* * *

(c) Place of compliance.

(1) ***For a trial, hearing, or deposition.*** A subpoena may require a person to appear at a trial, hearing, or deposition as follows:

(A) For a party or the officer of a party, [subject to the court's power under Rule 45(c)(3),] within the state where the party or officer resides, is employed, or regularly transacts business in person, or within 100 miles of where the party or officer resides, is employed, or regularly transacts business in person;

(B) For a person who is not a party or officer of a party, within 100 miles of where the person resides, is employed, or regularly transacts business in person; except that such a person may be required to attend trial within the state where the person resides, is employed, or regularly transacts business in person, if substantial expense would not be imposed on that person.

(2) ***For other discovery.*** A subpoena may require:

(A) Production of documents, tangible things, or electronically stored information at a place reasonably convenient for the producing person.

(B) Inspection of premises, at the premises to be inspected.

(3) ***Order to party to testify at trial or to produce officer to testify at trial.*** Notwithstanding the limitations of Rule 45(c)(1)(A), for good cause the court may order a party to appear and testify at trial, or to produce an officer to appear and testify at trial. In determining whether to enter such an order, the court must consider the alternative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a), and may order that the party or officer be reasonably compensated for expenses incurred in attending the trial. The court may impose the sanctions authorized by Rule 37(b) on the party subject to the order if the order is not obeyed.

COMMITTEE NOTE

[This Note language could be integrated into the Note above were this provision added to the amendment package]

Subdivision (c)

* * * * *

Rule 45(c)(1)(A) places geographic limits on where subpoenas can require parties and party officers to appear and testify. These amendments disapprove decisions under the 1991 version of the rule that found it to authorize courts to require parties and party officers to testify at trial without regard to where they were served or where they resided, were employed, or transacted business in person. The amended provisions in part reflect concern that unrestricted power to subpoena party witnesses could be abused to exert pressure, particularly on large organizational parties whose officers might be subpoenaed to testify at many trials even though they had no personal involvement in the underlying events.

On occasion, however, it may be important for a party or party officer to testify at trial. New Rule 45(c)(3) therefore authorizes the court to order such trial testimony where a suitable showing of need is made. There is no parallel authority to order testimony by party witnesses at a "hearing," although in some cases a hearing may evolve into the trial on the merits.

The starting point in deciding whether to use the authority conferred by Rule 45(c)(3) is to determine whether there is a real need for testimony from the individual in question. The rule permits such an order only for good cause. The burden is on the party seeking the order to show that attendance of this specific witness is warranted. In evaluating that question, the court must consider the alternative of an audiovisual deposition or testimony by contemporaneous transmission. In some cases, the court may ask whether a different witness could be used to address the issues on which this witness would testify. The court should be alert to the possibility that a party may be attempting to place settlement or other pressure on the other party by seeking to force a busy officer to travel and to testify at trial.

Whether the witness is a party or the party's officer, the court's order is directed to the party. If the witness does not obey the order, the court may impose the sanctions authorized by Rule 37(b) on the party; the rule does not create authority to impose sanctions directly on a nonparty witness. In determining whether to impose a sanction for failure of a nonparty witness to appear and testify -- or which sanction to impose -- the court may consider the efforts the party made to obtain attendance of the nonparty witness at trial.

MEMORANDUM

DATE: December 15, 2010

TO: Discovery Subcommittee

FROM: Kate David

CC: Judge Mark Kravitz
Judge Lee H. Rosenthal
Professor Edward Cooper
John Rabiej

SUBJECT: Enforcing Subpoenas Nationwide

This memorandum addresses whether a rule can overcome jurisdictional issues that might arise when a court serves a subpoena in an out-of-state district. The Discovery Subcommittee is currently examining the possibility of amending Rule 45 to provide courts with the ability to serve subpoenas nationwide. The Discovery Subcommittee asked me to research whether a rule can constitutionally provide federal district courts with the ability to enforce subpoenas that are issued outside of the state where the district court is located. This memo summarizes my findings.

I. History of Limited Subpoena Power

From the beginning, subpoenas, inventions of the 14th Century English judicial system, had geographically limited enforceability which was tied to the jurisdiction of the issuing court. James B. Sloan and William T. Gotfried, *Eliminating the 100 Mile Limit for Civil Trial Witnesses: A Proposal to Modernize Civil Trial Practice*, 140 F.R.D. 33, 34 (1992) (citing Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37, 43-46 (1989). At the time:

> [T]he trial process in England involved the selection of jurors qualified to serve by their being members of the community who either had personal knowledge of the matter brought before the tribunal or who could conduct an independent investigation of the incident. "Witnesses" as separate actors in the trial process were of lesser critical value than under modern justice systems.

Id.

In 1793, Congress enacted a statute enabling federal courts to issue subpoenas for trial witnesses residing within 100 miles from the site of the court. *Id.* at 35 (citing Act of March 2, 1973, ch. 22, § 6, 1 Stat. 333, 335 (1793)). In 1922, responding to protests by the Justice Department about its inability to assure the appearance and testimony of all necessary witnesses in actions against war materials contractors who had defrauded the United States, Congress amended the general subpoena statute to allow nationwide service of process, "upon proper application and good cause shown." *See id.* at 36 (citing 62 CONG. REC. 12,368 (Sept. 11, 1922) and Act of September 19, 1922, ch. 344, Pub. No. 310, 42 Stat. 848 (1921-23)).

Soon after, the Rules Enabling Act was passed, and the Federal Rules of Civil Procedure became effective as of 1938. *See id.* From the beginning, the Civil Rules incorporated the 100-mile-limit expressed in statute (thereby allowing service within 100 miles of the place of hearing or trial, regardless of state boundaries), and provided a general exception for other Acts of Congress expanding the court's ability to serve subpoenas. FED. R. CIV. P. 45(e)(1) (1934) ("A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.").

Current Rule 45(b)(2) continues to impose the 100-mile-limit, despite the fact that Great Britain modernized its procedures in 1854, "to provide that in actions or suits pending in the courts of England, Ireland and Scotland, judges of those courts could compel the personal attendance at trial of witnesses by subpoena which could be served in any part of the United Kingdom." Sloan

and Gotfried, 140 F.R.D. at 36-37.

II. The Power To Authorize Nationwide Service

Unless expanded by Congress, the jurisdiction of district courts is limited to its territory. *See Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925) ("Under the general provisions of law, a United States District Court cannot issue process beyond the limits of the district"); *State of Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 467 (1945) ("Apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial.").

Congress has the power to extend a district court's reach by authorizing nationwide service: "Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court. Congress has the power, likewise, to provide that the process of every District Court shall run into every other part of the United States." *Robertson*, 268 U.S. at 622; *see Eastman Kodak Co. of New York v. S. Photo Materials Co.*, 273 U.S. 359, 403-04 (1927) ("That Congress may, in the exercise of its legislative discretion, fix the venue of a civil action in a federal court in one district, and authorize the process to be issued in another district in which the defendant resides or is found, is not open to question."); *Coleman v. Am. Export Isbrandtsen Lines, Inc.*, 405 F.2d 250, 252 (2d Cir. 1968) ("Congress has power to provide that the process of every District Court shall run into every part of the United States....") (internal quotation omitted). As one court explained:

> [I]t is a matter of general agreement that the discretion of Congress 'as to the number, the character, [and] the territorial limits' of the inferior federal courts is not limited by the Constitution. Congress might have established only one such court, or a mere handful; in that event, nationwide service would have been a practical necessity clearly consonant with the Constitution. That it was considered expedient to establish federal judicial districts in harmony with state boundaries, did not alter the scope of legislative discretion in this regard, and in fact Congress has, on occasion, provided for nationwide service.

Briggs v. Goodwin, 569 F.2d 1, 9-10 (D.C. Cir. 1977), *rev'd on other grounds sub nom, Stafford v. Briggs*, 444 U.S. 527 (1980); *see also U.S. v. Union Pac. R.R. Co.*, 98 U.S. 569, (U.S. 1878) ("It would have been competent for Congress to organize a judicial system analogous to that of England and of some of the States of the Union, and confer all original jurisdiction on a court or courts which should possess the judicial power with which that body thought proper, within the Constitution, to invest them, with authority to exercise that jurisdiction throughout the limits of the Federal government.").

A. Statutes Expanding Territorial Jurisdiction.

Congress has authorized nationwide service in "a few clearly expressed and carefully guarded exceptions to the general rule of jurisdiction *in personam*." *Robertson*, 268 U.S. at 624. Some early examples were described in *Robertson*:

> In one instance, the Credit Mobilier Act March 3, 1873, c. 226, § 4, 17 Stat. 485, 509, it was provided that writs of subpoena to bring in parties defendant should run into any district. This broad power was to be exercised at the instance of the Attorney Gengeral [sic] in a single case in which, in order to give complete relief, it was necessary to join in one suit defendants living in different States. *United States v. Union Pacific Railroad*, 98 U. S. 569, 25 L. Ed. 143. Under similar circumstances, but only for the period of three years, authority was granted generally by Act Sept. 19, 1922, c. 345, 42 Stat. 849 (Comp. St. Ann. Supp. 1923, § 1035), to institute a civil suit by or on behalf of the United States, either in the district of the residence of one of the necessary defendants or in that in which the cause of action arose; and to serve the process upon a defendant in any district. The Sherman Act (Act July 2, 1890, c. 647, § 5, 26 Stat. 209, 210 [Comp. St. § 8827]), provides that when 'it shall appear to the court' in which a proceeding to restrain violations of the act is pending 'that the ends of justice require that other parties should be brought before the court,' it may cause them to be summoned although they reside in some other district. The Clayton Act (Act Oct. 15, 1914, c. 323, § 15, 38 Stat. 730, 737 [Comp. St. § 8835n]), contains a like provision.

Robertson, 268 U.S. at 624.

Congress continues to enact statutes authorizing nationwide, and in some cases worldwide, service. *See, e.g.*, 15 U.S.C. § 22 (providing worldwide service of process in antitrust cases); 15 U.S.C. § 23 (providing nationwide subpoena power in antitrust cases); 15 U.S.C. § 49 (granting nationwide subpoena power to the Federal Trade Commission); 18 U.S.C. § 78aa (providing for nationwide service of defendants in securities cases); 18 U.S.C. § 1965(d) (providing for nationwide service of process in RICO cases); 25 U.S.C. § 1451(d) (providing for nationwide service on defendants in ERISA actions); 28 U.S.C. § 1695 (providing that, in derivative action, process may be served nationwide upon the corporation) 28 U.S.C. § 2361 (authorizing nationwide service in actions brought under 28 U.S.C. § 1335, statutory interpleader); 28 U.S.C. § 3004(b) (authorizing nationwide service in FDCPA actions); 29 U.S.C. § 521 (granting nationwide subpoena power to the Secretary of Labor); 29 U.S.C. § 1132(e)(2) (providing nationwide service of process in ERISA enforcement actions); 29 U.S.C. § 1451(d) (providing nationwide service in ERISA civil actions); 28 U.S.C. § 1692 (authorizing nationwide service of process in actions to recover property by a receiver appointed by the court); 38 U.S.C. § 1984(c) (authorizing nationwide service of subpoenas in suits involving claims for war risk insurance); 42 U.S.C. § 9613 (authorizing nationwide service in certain CERCLA actions); 47 U.S.C. § 409(f) (granting nationwide subpoena power to the Federal Communications Commission).

These provisions have been deemed to"comport with all constitutional requirements." *Board of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1035 (7th Cir. 2000) (collecting cases); *see Combs v. Adkins & Adkins Coal Co.*, 597 F.Supp. 122, 125 (D.D.C. 1984) ("The Congress may constitutionally authorize extraterritorial service of process.");

see also Federal Trade Comm'n v. Tuttle, 244 F.2d 605 (2d Cir. 1957) (holding that Federal Trade Commission Act's nationwide service provision is "not unconstitutional" and District Court for the Southern District of New York erred in refusing to compel Boston resident to comply with subpoena duces tecum); *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 473-77 (1894) (rejecting constitutional challenge to statute authorizing Interstate Commerce Commission to invoke the aid of any court of the United States in requiring the attendance of witnesses and the production of books and papers).

Courts around the country have repeatedly rejected arguments that a district court, after issuing service pursuant to a statute providing for nationwide or worldwide service, cannot exercise personal jurisdiction over an out-of-state defendant/witness. *See Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255, 1258 (5th Cir. 1994) ("Given that the relevant sovereign is the United States, it does not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over a defendant residing within the United States."); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056 (2d Cir. 1993) ("[T]he district court has personal jurisdiction over the defendants insofar as the MPPAA includes a provision for nationwide service of process."); *see, e.g.*, *Elite Erectors*, 212 F.3d at 1037 (holding that service pursuant to nationwide service statute provided Eastern District of Virginia with personal jurisdiction over Indiana company and resident "even on the assumption that neither has any 'contacts' with Virginia"); *Application to Enforce Admin. Subpoenas Duces Tecum of S.E.C. v. Knowles*, 87 F.3d 413 (10th Cir. 1996) (holding statute providing for worldwide service valid in connection with subpoenas duces tecum served in Nassau, Bahamas); *Bellaire Gen. Hosp. v. Blue Cross Blue Shield of Michigan*, 97 F.3d 822, 825-26 (5th Cir. 1996) (holding Southern District of Texas properly exercised personal jurisdiction over defendant

corporation operating exclusively within the State of Michigan when defendant was served pursuant to statute providing for nationwide service); *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384 (7th Cir. 1940) (affirming Northern District of Illinois's order requiring Missouri plant to comply with subpoena issued pursuant to Fair Labor Standards Act); *Combs*, 597 F.Supp. at 125 (holding D.C. District Court had jurisdiction over Kentucky residents who were served pursuant to statute authorizing nationwide service of process).

There are also statutes giving certain courts nationwide jurisdiction. For example, the Court of Federal Claims has nationwide jurisdiction. *Scott Timber, Inc. v. United States*, 93 Fed. Cl. 498, 499 (Ct. Fed. Claims 2010); *see* 28 USC § 2505 ("Any judge of the United States Court of Federal Claims may sit at any place within the United States to take evidence and enter judgment."); *Union Pacific R.R.*, 98 U.S. at 603-04("The jurisdiction of the Supreme Court and the Court of Claims is not confined by geographical boundaries. Each of them, having by the law of its organization jurisdiction of the subject-matter of a suit, and of the parties thereto, can, sitting at Washington, exercise its power by appropriate process, served anywhere within the limits of the territory over which the Federal government exercises dominion."); *Sabella v. Sec'y of Dep't of Health & Human Servs.*, 86 Fed. Cl. 201, 205 n.2 (2009) ("the jurisdiction of the United States Court of Federal Claims is not limited to a particular geographic area within the United States."). "A concomitant aspect of that jurisdiction is the power to issue a subpoena requiring a witness to appear and testify at a trial to be held more, and in some instances considerably more, than 100 miles from the witness' residence." *Scott Timber,* 93 Fed. Cl. at 499.

The multidistrict litigation statute also authorizes federal courts to exercise nationwide personal jurisdiction. *Howard v. Sulzer Orthopedics, Inc.*, 382 Fed. Appx. 436, 442 (6th Cir. 2010)

("The MDL statute (28 U.S.C. § 1407) is, in fact, legislation 'authorizing the federal courts to exercise nationwide personal jurisdiction.'"); *see In re FMC Corp. Patent Litig.*, 422 F.Supp. 1163, 1165 (J.P.M.D.L. 1976) ("Transfers under Section 1407 are simply not encumbered by considerations of *in personam* jurisdiction and venue.").

Due process challenges to Section 1407 have been universally rejected. *See In re "Agent Orange" Prod.Liab.Litig. MDL No. 381*, 818 F.2d 145, 163 (2d Cir. 1987) ("Congress may, consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide personal jurisdiction. One such piece of legislation is 28 U.S.C. § 1407 (1982), the multidistrict litigation statute.") (citations omitted); *see, e.g., Howard*, 382 Fed. Appx.at 442 (6th Cir. 2010) (rejecting Oklahoma plaintiff's due process challenge to jurisdiction of Ohio court exercising jurisdiction under § 1407); *In re Sugar Indus. Antitrust Litig.*, 399 F.Supp. 1397, 1400 (J.P.M.D.L. 1975) (per curiam) (rejecting due process challenge of "Eastern Defendants" to transfer from Eastern District of Pennsylvania to Northern District of California).

B. Rules Expanding Territorial Jurisdiction.

Territorial jurisdiction may also be extended by rule. *See Coleman*, 405 F.2d at 252 ("Since Congress has power 'to provide that the process of every District Court shall run into every part of the United States,' the Supreme Court as its delegate can provide that process shall be effective if served within 100 miles of the courthouse even if a state line intervenes....") (quoting *Robertson*, 268 U.S. at 622); *McGonigle v. Penn-Central Transp. Co.*, 49 F.R.D. 58, 62 (D. Maryland 1969) ("Nor is the validity of [the 100-mile bulge provision for federal service of process] drawn into question because it was enacted as a rule of procedure rather than a statute."); *see also Resolution Trust Corp. v. McDougal*, 158 F.R.D. 1, 2 (D.D.C. 1994) ("The Court may reach parties like Tucker who live

outside the jurisdiction only if it is authorized to do so by a federal statute, the local long-arm statute, *or the Federal Rules of Civil Procedure*.") (emphasis added).

As described above, the power to expand the territorial jurisdiction by rule has been exercised from the beginning. In civil cases, a district court's territorial jurisdiction has been extended to the 100-mile-limit, or further, when provided by statute. *See* FED. R. CIV. P. 45(b). And in criminal cases, Rule 17(e) authorizes district courts to exercise nationwide subpoena power: "A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States."[1]

The validity of these rules has long been accepted. In 1833, the Circuit Court of the District of Columbia noted that a federal court has "a right to send its subpoena into another district in all cases. In criminal cases to any distance; in civil, to the extent of one hundred miles. And such has been the unquestioned practice of this court ever since its establishment in 1801." *U.S. v. Williams*, 28 F. Cas. 647, 657 (D.C. Cir. 1833).

The original, 1938, Federal Rules of Civil Procedure also provided for service of defendants located beyond the district court's territory. Federal Rule of Civil Procedure 4(f) provided that "[a]ll service other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state." Challenges to the expansion of district court jurisdiction to allow service outside of the district have been universally rejected.

For example, in *Mississippi Pub. Corp. v. Murphree*, the Supreme Court rejected the

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[1] Bankruptcy Rule 7004(d) allows national service of process of "summons and complaint and all other process except a subpoena...." Courts have concluded that nationwide service of process under Rule 7004(d) is constitutional. *See In re Federal Fountain, Inc.*, 165 F.3d 600 (8th Cir. 1999) (en banc).

argument that Rule 4(f) could not authorize a district court to serve a defendant located in another district, where defendant was located in the southern district of Mississippi and was served by the District Court of the Northern District of Mississippi pursuant to former Rule 4(f). 326 U.S. 438, 439-40, 443 (1946). The Court first decided that Rule 4(f) was not inconsistent with Rule 82 of the Federal Rules of Civil Procedure, which provides that the rules "shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." *Id.* at 443-45. The court explained:

> It is true that the service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served. But it is evident that Rule 4(f) and Rule 82 must be construed together and that the Advisory Committee, in doing so, has treated Rule 82 as referring to venue and jurisdiction of the subject matter of the district courts as defined by the statutes, ss 51 and 52 of the Judicial Code, 28 U.S.C.A. ss 112, 113, in particular, rather than the means of bringing the defendant before the court already having venue and jurisdiction of the subject matter. Rule 4(f) does not enlarge or diminish the venue of the district court, or its power to decide the issues in the suit, which is jurisdiction of the subject matter, to which Rule 82 must be taken to refer. Rule 4(f) serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained. Thus construed, the rules are consistent with each other and do not conflict with the statute fixing venue and jurisdiction of the district courts.

Id. at 444-45 (internal citation omitted); *see also Ransom v. Brennan*, 437 F.2d 513, 518 n.6 (5th Cir. 1971) ("Fed. R. Civ. P. 82 says that the Rules are not intended to affect the jurisdiction of the federal courts. But this relates only to subject matter jurisdiction rather than the means of bringing the defendant before the court."); *H & F Barge Co., Inc. v. Garber Bros., Inc.*, 65 F.R.D. 399, 405 (E.D. La. 1974) ("The term 'jurisdiction' as used in Rule 82 refers only to the subject matter jurisdiction

of the courts, not the method of exercising personal jurisdiction through service of process.").

The Court next decided that Rule 4(f) was "in harmony" with the Rules Enabling Act:

> Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 11-14, 655, 61 S.Ct. 422, 425-427, 85 L.Ed. 479. The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to 'the manner and the means by which a right to recover ... is enforced.' *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 1470. In this sense the rule is a rule of procedure and not of substantive right, and is not subject to the prohibition of the Enabling Act.

Murphree, 326 U.S. at 445-46.

Other courts have acknowledged that the Rules of Civil Procedure can constitutionally extend a district court's reach beyond state boundaries. *See Quinones v. Pa. Gen. Ins. Co.*, 804 F.2d 1167, 1169, 1176 (10th Cir. 1986) (rejecting argument that Rule 4(f) was unconstitutional if interpreted so as to extend personal jurisdiction beyond a state's boundaries); *Coleman*, 405 F.2d at 252 ("Since Congress has power to provide that the process of every District Court shall run into every part of the United States, the Supreme Court as its delegate can provide that process shall be effective if served within 100 miles of the courthouse even if a state line intervenes...."); *Jacobs v. Flight Extenders, Inc.*, 90 F.R.D. 676, 679 (E.D. Penn. 1981) ("It is clear that Congress can extend the territorial jurisdiction of a federal district court, regardless of state boundaries."); *McGonigle*, 39 F.R.D. at 61-62 ("Given the power of federal Congress to extend, nationwide, the territorial

jurisdiction of a federal district court, regardless of state boundaries ... the constitutionality of the 100-mile bulge provision for federal service of process is, *a fortiori*, unquestionable."); *see also Diamond Healthcare of Ohio, Inc. v. Humility of Mary Health Partners*, 229 F.3d 448, 450 (4th Cir. 2000) ("Congress has authority constitutionally to permit service in federal court beyond any state's boundaries."); *Sprow v. Hartford Ins. Co.*, 594 S.W.2d 412, 416 (5th Cir. 1979) ("the 100 mile bulge provision has effectively expanded the territorial jurisdiction of a federal district court beyond state lines"); *Williams*, 28 F. Cas. at 656 (Each state, "by adopting the constitution of the United States," has given permission to the court of the United States to send their process into that state, "in all cases of which the judicial power of the United States has cognizance.").

These courts permit the exercise of jurisdiction over out-of-state defendants. *See, e.g.*, *Quinones*, 804 F.2d at 1172, 1178 (reversing trial court dismissal of third party complaint where third party resided and was served process in El Paso, Texas, within 100 miles of the United States District Courthouse in Las Cruces, New Mexico); *Coleman*, 405 F.2d at 252 (reversing trial court dismissal of third-party complaint filed in Southern District of New York, where third party defendant was served at its Philadelphia office, which was within 100 miles of the Southern District of New York); *Jacobs*, 90 F.R.D. at 679 (denying third party defendant's motion to dismiss plaintiff's complaint in Pennsylvania where third party defendant had minimum contacts with the "bulge area" in New Jersey); *McGonigle*, 49 F.R.D. at 61-62 (denying third party defendant's motion to dismiss where it was served in Pennsylvania, within the "100-mile bulge area" around the situs of the Maryland District Court).

C. Enforcing Subpoenas Nationwide

When a court serves a subpoena outside of the state in which it is located pursuant to a rule

or statute authorizing nationwide service, the court has the power to enforce the subpoena. *See Williams*, 28 F. Cas. at 654 ("The subpoena would be nugatory, if it could not be followed by an attachment; and it cannot be supposed that congress intended to authorize the court to issue a command, the obedience to which it could not enforce.").

The Supreme Court explained:

> There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt. *United States v. United Mine Workers*, 330 U.S. 258, 330-332(1947) (Black and Douglas, JJ., concurring in part and dissenting in part); *United States v. Barnett*, 376 U.S. 681, 753-754 (1964) (Goldberg, J., dissenting). And it is essential that courts be able to compel the appearance and testimony of witnesses. *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950).

Shillitani v. United States, 384 U.S. 364 (1966)); *accord Spallone v. United States*, 493 U.S. 265, 276 (1990).

A subpoena is enforceable in the court which issued it. *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1495 (11th Cir. 1986); *see* FED. R. CIV. P. 45(f) ("Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued."); FED. R. CRIM. P. 17(g) ("Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate."). "Once [the court's] authority is invoked by service of the subpoena, the court under whose seal the subpoena was issued must have jurisdiction to enforce its subpoena and vindicate its own process, as Fed. R. Civ. p. 45(f) and Fed. R. Crim. P. 17(g) recognize." *In re Certain Complaints Under Investigation*, 783 F.2d at 1496.

When authorized by statute, courts other than the issuing court may enforce a subpoena even

if the enforcing court is in another state. For example, 28 U.S.C. § 1407(b) authorizes an MDL judge to "exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated proceedings.'" This includes the power to enforce a subpoena or rule on a motion to quash a subpoena. *See In re Clients & Former Clients of Baron & Budd, P.C.*, 478 F.3d 670, (5th Cir. 2007) (per curiam) (holding that MDL court in the Eastern District of Pennsylvania had power to rule on a motion to quash subpoena issued through the United States District Court for the Southern District of Texas); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litiagation*, No. 07-20156, 2009 WL 5195783, at *1 n.1 (E.D.Pa. Dec. 22, 2009) ("As the court presiding over the MDL, we have authority to enforce the subpoena issued out of the Southern District of California."); *In re Sunrise Sec. Litig*., 130 F.R.D. 560, 586 (E.D.Pa. 1989) ("[A] multidistrict judge may decide a motion to compel a non-party in other districts even if he or she is not physically situated in those districts."); *see also Howard*, 382 Fed. Appx. at 442 ("The MDL statute (28 U.S.C. sec. 1407) in, in fact, legislation 'authorizing the federal courts to exercise nationwide personal jurisdiction.'"). As one treatise explains:

> [Section 1407(b)] therefore authorizes the transferee district court to exercise the authority of a district judge in any district: The transferee court may hear and decide motions to compel or motions to quash or modify subpoenas directed to nonparties in any district. Though the statutory language refers to "pretrial depositions," the statute wisely has been interpreted to embrace document production subpoenas as well.

9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.50[4], at 45-75 through 45-77 (Matthew Bender 3d ed. 2006) (footnotes omitted). This explanation was embraced by the Fifth Circuit in *Baron & Budd*, and is also supported "by the convincing analysis of myriad district courts." *Baron & Budd*, 478 F.3d at 672 (collecting cases).

III. Due Process Limits on Exercising Nationwide Personal Jurisdiction

While rules and statutes authorizing nationwide service of process confer a basis for jurisdiction, the exercise of such jurisdiction may be subject to basic due process limitations.

The United States Supreme Court has not yet defined Fifth Amendment due process limits on personal jurisdiction. *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1211 (10th Cir. 2000); *see Omni v. Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 103 n.5 (1987) (plurality op.) (declining to address the constitutionality of the national contacts test); *Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 n.* (same). And the circuit courts considering the issue have split over the scope of the limits imposed by the Fifth Amendment when jurisdiction is established via a nationwide service of process provision – some (Second, Fifth, Sixth, Seventh, Eighth, and Ninth) apply a pure national contacts approach and hold that due process is satisfied if the party has "minimum contacts" with the United States, while others (Fourth, Tenth, and Eleventh) consider minimum contacts plus whether a party would be unduly burdened if forced to appear or defend in an inconvenient forum.[2]

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[2] While all of the cases discussing Fifth Amendment due process limits on personal jurisdiction do so in the context of determining whether the court has personal jurisdiction over an out-of-state defendant, a number of cases recognize that due process also imposes a limit on personal jurisdiction over nonparty witnesses. *See, e.g. First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20 (2d Cir. 1998) (holding that service of a subpoena on a foreign nonparty physically present in the district satisfies due process); *In re Application to Enforce Admin. Subpoenas Duces Tecum of SEC v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996) (requiring that foreign nonparty subject to an administrative agency subpoena possess minimum contacts with the United States); *Ariel v. Jones*, 693 F.2d 1058, 1061 (11th Cir. 1982) (quashing a subpoena based on the nonparty's lack of contacts with the forum); *In re Jee*, 104 B.R. 289, 293 (Bankr. C.D. Cal. 1989) (acknowledging the need for personal jurisdiction over nonparty witnesses); *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.*, 45 F.R.D. 515, 516 (S.D.N.Y. 1968) (quashing document subpoena based on lack of contacts with the forum); *see also* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 108.125 (3d ed. 2003) (stating that "[a] nonparty witness cannot be compelled to testify at a trial, hearing, or deposition unless the witness is subject to the personal jurisdiction of the court"). The burdens on a nonparty witness of testifying in a distant forum are arguably less than the burdens faced by a nonresident defendant. Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Voyage*, 74 MINN. L. REV. 37, 94-97 (1989); *see also Price Waterhouse*, 154 F.3d at 20 ("PW-UK is a non-party, but it is unclear which way that should cut; a person who is subjected to liability by service of process far from home may have better cause

A. Pure National Contacts Approach

Most circuits that have considered the issue have adopted the "pure national contacts approach" and hold that due process is satisfied when the party is served under a nationwide service of process provision and resides within the United States or has "minimum contacts" with the United States as a whole. *See, e.g.*, *Medical Mutual of Ohio v. deSoto*, 245 F.3d 561, 567 (6th Cir. 2001) (applying national contacts test); *Elite Erectors, Inc.*, 212 F.3d at 1035-36(same); *In re Federal Fountain, Inc.*, 165 F.3d 600, 601-02 (8th Cir. 1999) (en banc) (adopting national contacts test); *Bellaire General*, 97 F.3d at 825-826 (applying national contacts test); *Busch*, 11 F.3d at 1258 (holding due process satisfied when defendant resides within the United States); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993) (deciding that "minimum contacts" with United States satisfies due process); *Go-Video, Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406, 1416 (9th Cir. 1989) (applying national contacts test); *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979) (deciding that "there can be no question but that the defendant, a resident citizen of the United States, has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court"); *Mariash v. Morill*, 496 F.2d 1138, 1143 (2d Cir. 1974) (explaining that "where, as here, the defendants reside within the territorial boundaries of the United States, the 'minimal contacts,' required to justify the federal government's exercise of power over them, are present."); *see also Matter of Marc Rich & Co., A.G.*, 707 F.2d 663, 667 (2d Cir.), cert. denied, 463 U.S. 1215 (1983) (holding that authority to enforce a federal grand jury subpoena depends upon appellant's contacts with the entire United States, not simply the state of New York).

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to complain of an outrage to fair play than one similarly situated who is merely called upon to supply documents or testimony.")

These courts reason that the test that developed in state litigation – whether a defendant has adequate contacts with the forum – related to the court's jurisdictional power over non-residents and that the same concern is not present when a federal court exercises jurisdiction over a United States resident. The *Elite Erectors* court explained:

> Linking personal jurisdiction to a defendant's "contacts" with the forum developed in state litigation. Due process limitations on adjudication in state courts reflect not so much questions of convenience as of jurisdictional power. Barrow, Alaska, is farther from Juneau than Indianapolis is from Alexandria, and travel from Barrow to Juneau is much harder than is travel from Indianapolis to Alexandria (there are no highways and no scheduled air service from Barrow to anywhere), yet no one doubts that the Constitution permits Alaska to require any of its citizens to answer a complaint filed in Juneau, the state capital, just as the United States confines some kinds of federal cases to Washington, D.C., on the eastern seaboard. Conversely Kentucky's proximity to southern Indiana (Louisville would be more convenient for residents of New Albany than tribunals in Indianapolis) does not permit Kentucky to adjudicate the rights of people who have never visited that state or done business there; its sovereignty stops at the border. Limitations on sovereignty, and not the convenience of defendants, lie at the core of cases such as *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), and their many predecessors.
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> No limitations on sovereignty come into play in federal courts when all litigants are citizens. It is one sovereign, the same "judicial Power," whether the court sits in Indianapolis or Alexandria. *Peay* did not deny this. Instead it relied on the observation in *Omni Capital*, 484 U.S. at 104, 108 S.Ct. 404, that restrictions on state adjudication enable litigants to preserve their liberty and property from arbitrary confiscation. No one doubts this; Congress could violate the due process clause by requiring all federal cases to be tried in Adak (the westernmost settlement in the Aleutian Islands), because transportation costs easily could exceed the stakes and make the offer of adjudication a mirage. But this principle is unrelated to any requirement that a defendant have "contacts" with a particular federal judicial district and does not block litigation in easy-to-reach forums. A defendant who lives in Springfield, in the territory of the United States District Court for the Central District of Illinois, may be

> required to defend in Chicago (part of the Northern District) without any constitutional objection on the ground of undue inconvenience - even if the defendant has never been to Chicago and has no "contacts" with the Northern District - just as Illinois could allocate the bulk of litigation among its citizens to Chicago (or require residents of Chicago to visit Springfield, where the Supreme Court of Illinois sits).

212 F.3d at 1036; *see also Federal Fountain*, 165 F.3d at 602 ("We think, in sum, that the fairness that due process of law requires relates to the fairness or the exercise of power by a particular sovereign and there can be no question that the defendant has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court.") (internal quotations omitted); *Mariash*, 496 F.2d at 1143 ("Indeed, the 'minimal contacts' principle does not, in our view, seem particularly relevant in evaluating the constitutionality of *in personam* jurisdiction based on nationwide, but not extraterritorial, service of process. It is only the latter, quite simply, which even raises a question of the forum's power to assert control over the defendant.")

B. Considering Fairness to Defendant

In addition to minimum contacts, when determining whether due process is satisfied, the Fourth, Tenth, and Eleventh Circuits consider whether the defendant would be unduly burdened or inconvenienced if forced to defend in an inconvenient forum. *See Peay*, 205 F.3d at 1212 ("[W]e hold that in a federal question case where jurisdiction is invoked based on nationwide service of process, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant. In other words, the Fifth Amendment 'protects individual litigants against the burdens of litigation in an unduly inconvenient forum.'"); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997) ("The Fifth Amendment's Due Process Clause not only limits the extraterritorial scope of federal sovereign power, but also protects the liberty interests of individuals

against unfair burden and inconvenience."); *Republic of Panama v. BCCI Holdings (Luxembourg),* 119 F.3d 935, 947 (11th Cir. 1997) ("A defendant's "minimum contacts" with the United States do not, however, automatically satisfy the due process requirements of the Fifth Amendment. There are circumstances, although rare, in which a defendant may have sufficient contacts with the United States as a whole but still will be unduly burdened by the assertion of jurisdiction in a faraway and inconvenient forum.").

In *Republic of Panama*, the court emphasized that "it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern" because "modern means of communication and transportation have lessened the burden of defending a lawsuit in a distant forum." *Id*. at 947-48. And it placed the burden on the defendant "to demonstrate that the assertion of jurisdiction in the forum will 'make litigation so gravely difficult and inconvenient that [he] unfairly is at a severe disadvantage in comparison to his opponent.'" *Id*. at 948 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (citations omitted)). If the defendant makes this showing, "jurisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant." *Id.* "In evaluating the federal interest, courts should examine the federal policies advanced by the statute, the relationship between nationwide service of process and the advancement of these policies, the connection between the exercise of jurisdiction in the chosen forum and the plaintiff's vindication of his federal right, and concerns of judicial efficiency and economy." *Id.*

Applying these standards, the *Republic of Panama* court held that the Southern District of Florida erred in granting defendants' motion to dismiss for lack of personal jurisdiction because there was no "constitutional impediment" to jurisdiction where defendants were "large corporations providing banking services to customers in major metropolitan areas along the eastern seaboard"

who were properly served under the RICO statute authorizing nationwide service of process, despite the fact that defendants may not have had significant contacts with Florida. *Id*. at 948. In reaching this conclusion, the court noted that "the fact that discovery for the litigation would be conducted throughout the world suggests that Florida is not significantly more inconvenient than other districts in this country." *Id*.

Similarly, in *ESAB Group*, the Fourth Circuit held that the Fifth Amendment's Due Process Clause "protects the liberty interests of individuals against unfair burden and convenience," (126 F.3d at 626), but recognized that "it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern." *Id*. (quoting *Republic of Panama*, 119 F.3d at 947). The *ESAB Group* court decided that the South Carolina District Court could constitutionally exercise personal jurisdiction over a New Hampshire company and a New Hampshire/Florida resident because there was no evidence of "such extreme inconvenience or unfairness" to either defendant as would outweigh the congressional policy choice to allow nationwide service in RICO actions. *Id*. at 627.

In *Peay*, the Tenth Circuit also analyzed whether plaintiff's choice of forum would be "fair and reasonable" to defendant, so as to satisfy due process. *Peay*, 205 F.3d at 1212 ("Like the Eleventh Circuit, we discern no reason why the Fourteenth Amendment's fairness and reasonableness requirements 'should be discarded completely when jurisdiction is asserted under a federal statute.'")

Like the Fourth and Eleventh Circuits, the *Peay* court emphasized that the inconvenience would rise to a level of constitutional concern "only in highly unusual cases." *Id.* And concluded that the defendants' liberty interests would not be infringed if defendants were forced to litigate in Utah, because the *Peay* defendants (headquarted in Alabama and Georgia) were "large corporations operating throughout the southeastern United States" and administering a multi-state insurance plan

regulated by federal law who "rendered benefits in Utah." *Id*.

II INFORMATION ITEMS
A DISCOVERY: PRESERVATION AND SPOLIATION

Discovery of electronically stored information commanded great attention at the Duke Conference. In this realm, anxiety bordering on anguish arises from uncertainty as to the beginning, scope, and duration of the duty to preserve and the concomitant risk of sanctions for spoliation. The panel chaired by Gregory Joseph proposed a thoughtful list of elements to be captured in a civil rule addressing these problems. The task of translating these elements into a workable rule is formidable, perhaps impossible. But the problems are so important that it is necessary to do everything possible to explore possible solutions. The Committee and more particularly the Discovery Subcommittee began work immediately after the Conference.

Three rough sketches of possible approaches were prepared by the Discovery Subcommittee and considered by the Committee at the April meeting. The first seeks to provide specific guidance, defining preservation obligations in considerable detail. The second is similar in outline, but substitutes general obligations of reasonable behavior for detailed directions. The third focuses on sanctions, relying on backward inference to shape preservation obligations. Each sketch is designed to provoke discussion in the expectation that much more work likely will be required before the Committee can decide whether to recommend publication of a proposed rule. The Advisory Committee has approved the suggestion of the Subcommittee that a miniconference be held to pursue the work further. The conference will gather lawyers with perspectives on all sides of a variety of litigation categories, including staff attorneys in private and government organizations. It also will include technology experts in search of current information about the most efficient methods of preserving, searching, and utilizing electronically stored information. It will be held on September 9, a date chosen to enable the Subcommittee to develop new models for consideration at the November Committee meeting.

The materials considered at the April Committee meeting are set out below to illustrate the nature of the issues that must be addressed. It is not too early to provide guidance for the next steps of this work. Suggestions will be welcome.

PRESERVATION/SANCTIONS ISSUES

Since the November full Committee meeting, the Discovery Subcommittee has continued to study preservation and sanctions issues. This study has included a conference call in early February and a meeting in late February. In addition, a panel of experts discussed these issues during the January, 2011, meeting of the Standing Committee. That panel included two members of the Discovery Subcommittee and several others who were on the Duke E-Discovery Panel. The ideas discussed during the Standing Committee meeting were among those considered by the Subcommittee.

[The agenda materials included the following items in addition to this memorandum, omitted from this Report:

[Notes on Feb. 20, 2011, Subcommittee meeting

[Notes on Feb. 4, 2011, Subcommittee conference call

[Three-page summary of elements of possible preservation rule provided by Duke E-Discovery Panel

[Dec. 15, 2010, memorandum from Katharine David providing illustrative examples of preservation obligations found in a variety of federal and state statutes and ordinances. This memorandum resulted from research that also included a memorandum done by Andrea Kuperman on case law on preservation and sanctions in various circuits that was included in the agenda materials for the November, 2010, Committee meeting.]

At its meeting on Feb. 20, 2011, the Subcommittee discussed the most productive way of proceeding toward possibly recommending rule amendments to deal with preservation and sanctions issues. Although there was some initial discussion of the possibility of proceeding with a sanctions rule proposal immediately, the consensus ultimately was that it would be preferable to proceed more deliberately.

By way of background, as the Committee has discussed, there are significant rulemaking challenges for a rule that attempts overtly and solely to regulate pre-litigation preservation. A "back end" sanctions rule might not present the same difficulties that could arise with a "front end" preservation rule. But to the extent the concerns voiced by those who favor a preservation rule could be addressed in the sanctions context, it might be that such a rule could provide much benefit without raising questions about the scope of rulemaking authority. On the other hand, it could be that such a "backward looking" sanctions rule might itself raise concerns about whether it intruded too far into pre-litigation preservation decisions. As before, the significance of limitations on rulemaking authority remain somewhat uncertain.

At the same time, the Subcommittee is also quite uncertain about the real-life dynamics of preservation problems and about whether rules would really provide significant solace for those concerned with these problems. As a very general matter, it seems clear that many are concerned that preservation obligations may often seem far too broad, and that huge expense has resulted from that overbreadth, particularly because the standard for severe sanctions is unpredictable and inconsistent across the nation. But the reasons for the huge expenses, and the components of them, are less clear, as are the nature of measures that would relieve these pressures. At least some preservation-rule ideas seem initially to be quite general, and perhaps they would not provide the solace sought. Others may be so specific that they would be superseded by technological change or would be inapplicable in broad categories of cases.

Given this variety of concerns, the Subcommittee's conclusion was that it needs more knowledge, and that the way to gain that needed insight is to hold a conference before the Fall full Committee meeting so that it can report back to the Committee, building on the knowledge base the conference would provide. Ideally, therefore, this conference would occur long enough before the next full Committee meeting so that the Subcommittee can react to what it learns and present the initial fruits to the Committee. Then, based on the Committee's discussion in Fall, 2011, the Subcommittee would hope to have a rule proposal to present to the Committee during its Spring, 2012 meeting, perhaps in a form that would be ready for public comment.

The general idea for the conference is that it include an array of those experienced in preservation and general E-Discovery issues, including specialists in technical and technological issues. Well in advance of the conference, the Subcommittee would provide attendees with illustrations of rule-amendment ideas falling into three general categories. The order of these categories does not indicate their priority or any preference in the eyes of the Subcommittee:

> Category 1: Preservation proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision. Submissions the Committee has received from various interested parties provide a starting point in drafting some such specifics. A basic question is whether it is necessary (or really useful) to include such specifics in rules to make them effective in solving the problems reportedly resulting from overbroad preservation expectations. At least, they could create very specific presumptions about what preservation is necessary. Perhaps they could be equally precise about the trigger. It might be that any such precision would run the risk of being obsolete by the time that a rule became effective, or soon thereafter.
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> Category 2: A more general preservation rule could address a variety of specific concerns, but only in more general terms. It would, nonetheless, be a "front end" proposal including specifics about preservation in the form of directives about what must be preserved. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Are they too general to be helpful?
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> Category 3: This approach would address only sanctions, and would in that sense be a "back end" rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information acted reasonably. In form, however, this approach would not contain any specific directives about specific preservation issues. By articulating what would be "reasonable," it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering "carrots" to those who act reasonably, rather than relying mainly on "sticks," as a sanctions regime might be seen to do.

The conference could be educational for the Committee by explaining how preservation issues arise in real-life practice. By addressing the various categories of rules described above, it could provide insights about which category seems most promising to produce helpful

consequences, and about the specific features of rules that seem likely to produce helpful or harmful consequences.

Against that background, the remainder of this memorandum introduces an initial set of drafts of the three categories of rule exemplars. These drafts are provided for illustrative purposes only -- they do not represent the Subcommittee's considered views, and are offered only for purposes of fostering discussion. These exemplars build in part on an early set of possible amendment ideas included in the agenda materials for the November, 2010, full Committee meeting. Some provisions in the Category 1 sketch closely resemble those in the Category 2 sketch because they are in some ways parallel. Footnotes raise a number of questions, but should be included only once even though they focus on rule-amendment ideas that recur later in the package.

Before turning to the specific exemplars, it seems worthwhile to reiterate the Subcommittee has reached no conclusion on whether rule amendments would be a productive way of dealing with preservation/sanctions concerns, much less what amendment proposals would be useful. The purpose of the proposed conference is to provide a basis for making such judgments.

CATEGORY 1

Detailed and specific rule provisions

The concept behind this category is that rules with specifics would be beneficial. A key consequence of having such rules is that they can apprise parties about what they must do in ways that are very specific, providing a level of guidance that more general rules would not. But at the same time, this specificity may produce serious costs if it means that anything not specifically provided for is either beyond regulation or never required. Coupled with these concerns are concerns about transitory terms and technologies. To the extent the specifics are likely not to be important in five or ten years, or that other factors will be equally or more important, they may not be reasonable choices for rules that could not go into effect until the end of 2014 and that cannot be amended in less than three years.

Rule 26.1. Duty to Preserve Discoverable Information

(a) General Duty to Preserve. [In addition to any duty to preserve information provided by other law,][2] every person who reasonably expects [is reasonably certain][3] to be a party[4] to

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[2] The goal of this rule is not to supersede any existing duty to preserve information. A Committee Note would probably illustrate some of the kinds of sources of law that may bear on particular situations but also say that the illustrative listing was just that, and not complete.

An alternative could be to prescribe a duty to preserve and then assert that it supersedes all other duties. But those duties are numerous and emanate from many sources, both state and federal. Purportedly nullifying them would be a difficult business, particularly since much litigation does not end up in federal court, and in some instances could not constitutionally end up in federal court.

Indeed, the entire notion of supersession may strain the limits of the Rules Enabling Act process. Could a rule supersede state law on preservation as asserted in litigation in state courts, or by state administrative agencies? Even with regard to litigation in the federal courts, it may be that a Civil Rules cannot limit remedies provided by state law for violation of a state preservation requirements.

Given these uncertainties about the effect of a Civil Rules, it is not clear whether such a rule could provide the sort of reassurance about preservation that some hope it could provide.

[3] Would the bracketed phrase be preferable?

[4] Should this be limited to prospective parties? Could a Civil Rule impose a preservation duty on a third-party witness to an accident? Some states have recognized a tort of "spoliation" under some circumstances, but that suggests Enabling Act issues. On the other hand, we probably would

an action cognizable in a United States court[5] must preserve discoverable [electronically stored][6] information as follows.

(b) Trigger for Duty to Preserve. The duty to preserve discoverable information under Rule 26.1(a) arises only if a person becomes aware of one of the following facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court]:[7] [8]

(1) Service of a pleading or other document asserting a claim;[9] or

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say that, after service with a federal-court subpoena for specified information, such a third-party witness would have a duty to preserve the material requested by the subpoena even if it objected to producing it. The federal court's power to enforce subpoenas should reach that far.

[5] This formulation is modeled on Rule 27(a), which speaks of a petitioner who "expects to be a party to an action cognizable in a United States court" and of "persons whom the petitioner expects to be adverse parties."

[6] One question is whether this duty to preserve should be limited to electronically stored information. On the one hand, that appears to be the main focus of current concerns emphasized to the Committee. On the other hand, other material remains very important in much litigation, and many recent sanctions cases involve more traditional sources of information.

[7] At least one problem with this formulation is that it includes awareness that the action might be in a federal court. Since subdivision (a) imposes a duty only on those who reasonably expect to be a party of an action in federal court, saying that again here may be harmful; the only duty we are talking about here is the one in (a). For actions brought in state court, it seems fair to assume that some preservation duty would arise also, even though not based on this rule.

[8] The whole thrust of this approach is that it can identify in advance, at least by fairly specific category, all the events that would justify imposing a preservation duty. As noted below, including a "catch-all" final category may seem desirable because it would build in some flexibility, but that would seem to undermine the basic purpose of the rule. Absent that, however, one might expect fierce litigation about whether given events actually fall into one of the listed categories.

[9] This need not be a claim against this person, presumably. Under Rule 15(c)(1)(C), relation back may apply to a claim later asserted against an original nonparty who "should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." See Krupski v. Costa Crociere, S.p.A., 130 S.Ct. 2485 (2010) (applying Rule 15(c)(1)(C) to uphold relation back of claim against added defendant). Indeed, in this situation the need to preserve may arise after the commencement of the action but long before the formal assertion of a

(2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or

(3) Service of a subpoena or similar demand for information; or

(4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim[10] or taking any other action in anticipation of litigation;[11] or

(5) Receipt by the person of a notice or demand to preserve discoverable information;[12] or

(6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or knowledge of an event that calls for preservation

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claim against this party.

But the Rule 15(c)(1)(C) analogy is far from perfect. That rule is concerned primarily with limitations policies, not evidence preservation. Relation back does not involve a "duty" to preserve; it only preserves claims that would otherwise be barred by the passage of time when the party who could assert the limitations defense had adequate notice so that it should have taken precautions such as preserving its evidence. Put differently, the party who succeeds in obtaining relation back for an amended claim does not thereby also acquire a right under Rule 15(c) to argue that the other side therefore should have preserved the evidence it wants to use to support its added claim.

[10] This terminology is meant to track Evidence Rule 408.

[11] This provision draws on Rule 26(b)(3) for the general notion of "anticipation of litigation." It is worth noting that this is the one most likely to be important to plaintiffs, who do not usually await notice of a claim by others since they are the claimants. But whether the duty to preserve should arise at the same moment Rule 26(b)(3) protection attaches might be debated. Equating the inception of work product protection with the trigger for the preservation duty may mix two very different things.

[12] This is very open-ended. It does not purport to address the scope of the obligation to preserve, but only the trigger. It does not focus on the form of this notice, but does focus upon "receipt," which presumably means the demand is directed to the person to whom the duty will thereupon apply. It is worth noting, however, that delivery of such a notice to *A* might be regarded as sufficient to notify *B* of the need to preserve. At the same time, it could be that only a specific demand to preserve would be covered.

under the person's own retention program.[13]

[**(7)** Any other [extraordinary] circumstance that would make a reasonable person aware of the need to preserve information.][14]

(c) Scope of Duty to Preserve. A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take actions that are reasonable under the circumstances to preserve discoverable information [taking into account the proportionality

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[13] Including this provision might be said somewhat to undercut subdivision (a) above, for that provision was designed to specify a duty to preserve imposed by the rules without regard to what other sources of law require. Yet it may well be that failure to comply with other legal requirements would be a legitimate consideration for a preservation requirement imposed by the rules. To the extent subdivision (c) below is the sole definition of the scope of the duty to preserve, making another law (which may have a different scope) the trigger could cause difficulties. Would that trigger also determine the resulting scope of preservation?

The reference to the person's own retention program was not suggested by the Duke panel, but does appear in cases. See Kerkendall v. Department of the Army, 573 F.2d 1318, 1325-27 (Fed. Cir. 2009) (upholding adverse inference for destruction of documents by government agency in violation of its own retention program).

Whether this category of triggers should be included is debatable on its merits. Would including it tend to deter parties from adopting preservation rules of their own? If the sole focus of this rule is on the preservation obligation that flows from the prospect of litigation, why does an entirely unrelated preservation obligation -- even if imposed by rule or statute -- matter? At least arguably, it would seem odd that a party who violates a statutory or regulatory obligation and as a result deprives the opposing party if material evidence, can claim that it had no pertinent duty to preserve.

[14] Because this rule is designed as an all-encompassing catalog of the triggers that invoke the rule's preservation obligation, it may be important to include such a "catch-all" provision to cover situations that did not occur to the drafters. But to the extent the catch-all is really flexible, it may rob the entire rule of its supposed value in protecting the party that does not preserve. How is the potential litigant to know whether something that occurs fits into this provision?

Would it be helpful to add the word "extraordinary"? Without the qualifier, item (7) could swallow the others. But does the qualifier really help? Can the person possibly subject to a preservation duty determine what a court will later regard as satisfying this standard? And how about the sloppy manufacturer whose goods often fail. Is it "ordinary" for another failure to occur, leading to serious personal injury? If so, does that mean these events are not really "extraordinary"?

criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}[15] as follows:

(1) ***Subject matter***. *[Alternative 1]* The person must preserve information relevant to any claim or defense that might be asserted in the action to which the person might become a party or to a defense to such a claim;[16]

(1) ***Subject matter***. *[Alternative 2]* The person must preserve any information that constitutes evidence of a claim or of a defense to a claim;[17]

(1) ***Subject matter***. *[Alternative 3]* The person must preserve any information that is relevant to a subject on which a potential claimant has demanded preservation;[18]

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[15] The bracketed provision is intended to raise the issue of proportionality. Many agree that proportionality concepts should be crucial in determining what is a reasonable preservation regime. But merely saying that preservation should be "proportional" may not be very useful to a potential litigant who may have only the haziest notion what the claim involves and whether serious damages have occurred.

Assuming one wants to invoke proportionality, one could simply say the preservation must be "proportional." To add some specificity, however, the alternatives in text either invoke Rule 26(b)(2)(C) or paraphrase the criteria in Rule 26(b)(2)(C)(iii).

[16] The notion here is to invoke the scope of discovery or right under Rule 26(b)(1). Note that this scope may include such things as other similar incidents, impeaching material, and additional items that may not, on their face, relate to the claim raised.

[17] The effort here is to narrow the scope to what the rulemakers were trying to identify as "core information" in 1991 when initial disclosure was first proposed. This phraseology is different, and raises difficulties about deciding what is "evidence." For example, does that exclude hearsay? In general, hearsay is discoverable under Rule 26(b)(1) whether or not admissible.

[18] This would impose a very narrow requirement to preserve; unless a party giving notice of a claim has said something about preserving information there would be no duty. This sort of provision would seem to encourage broad demands to preserve in advance of litigation, probably not a desirable thing. Among other things, the person who receives such a demand has no immediate way to challenge the demand, as could happen in regard to undue demands during a Rule

(1) ***Subject matter***. *[Alternative 4]* The person must preserve information that a reasonable person would appreciate should be preserved under the circumstances;[19]

(2) ***Sources of information to be preserved***. *[Alternative 1]* The duty to preserve under Rule 26.1(a) extends to information in the person's possession, custody or control[20] that is reasonably accessible to the person;[21]

26(f) conference, for those can be submitted to the judge for resolution if needed. Perhaps more significantly, it would impose no duty to preserve unless a demand to preserve were made, seemingly disadvantaging those who don't have lawyers. A lesser point on that score is that it would cause uncertainty about whether there had been such a demand.

[19] This alternative invokes one of the suggestions of the Duke Panel. It may be circular, and seems to provide very little guidance to the party subject to the duty to preserve.

[20] This invokes Rule 34(a)(1)'s definition of the scope of the duty to produce in response to a Rule 34 request.

[21] The last clause invokes a version of Rule 26(b)(1)(B)'s exemption from initial discovery of electronically stored information that is "not reasonably accessible because of undue burden or cost."

It is debatable whether any such limitation should be included in a preservation rule. In the Committee Notes to Rules 26(b)(2)(B) and 37(e) in 2006, an effort was made to distinguish between the duty to preserve such information and the duty to provide it in response to discovery. The notion is that preservation imposes a smaller burden than restoration, and ensures that the material will be there if the court later orders production.

Another issue here (already mentioned above) is the question of preserving allegedly privileged material. To the extent that the trigger for the duty to preserve under Rule 26.1 corresponds to the "in anticipation of litigation" criterion of Rule 26(b)(3), for example, much material generated in trial preparation activity might fall within the duty to preserve. Does the fact that a party claims it need not produce this material exempt it from preservation? Ordinarily, as emphasized in Rule 26(b)(5), the decision whether a claim of privilege is valid is for the court, not the party; if the court cannot examine the material because it no longer exists, that is a problem.

Another issue has to do with whether it is desirable to expand the Rule 26(b)(2)(B) standard (at least as to preservation) to discoverable information that is not electronically stored. Hard copy information may be difficult to access or locate, but Rule 26(b)(2)(B) does not provide any exemption from providing it in response to a discovery request. Should preservation be treated differently?

(2) ***Sources of information to be preserved***. *[Alternative 2]* The duty to preserve under Rule 26.1(a) extends to information in the person's possession, custody or control that is routinely accessed in the usual course of business of the person;[22] the following types of information are presumptively excluded from the preservation duty unless otherwise agreed by the parties or ordered by the court:

(A) Deleted, slack, fragmented or unallocated data on hard drives;

(B) Random access memory (RAM) or other ephemeral data;

(C) On-line access data such as temporary internet files;[23]

(D) Data in metadata fields that are frequently updated, such as last opened dates;

(E) Information whose retrieval cannot be accomplished without substantial additional programming, or without transferring it into another form before search and retrieval can be achieved;

(F) Backup data that substantially duplicate more accessible data available elsewhere;

(G) Physical damaged media;

(H) Legacy data remaining from obsolete systems that is unintelligible on

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[22] The idea here is to invoke something that was frequently discussed in relation to preservation around a decade ago -- limiting duties to provide discovery to that electronically stored information that is regularly used by the party. The phrasing used here is borrowed from Rule 34(b)(2)(E)(i) regarding production of electronically stored information.

A different issue is how this duty should be phrased for individual nonbusiness litigants, such as individual plaintiffs. The idea should probably be to look to what they access and use on a regular basis, such as their active email accounts. But what if they have a cache for discarded items. Should that be included?

[23] This provision would not preclude a court order that such information must be preserved. See, e.g., Columbia Pictures Indus. v. Bunnell, 245 F.R.D. 443 (C.D. Cal. 2007) (order directing defendant to preserve server access data on downloading of material protected by plaintiff's copyright that would otherwise not be preserved).

successor systems [and otherwise inaccessible to the person]; or

(I) Other forms of electronically stored information that require extraordinary affirmative measures not utilized in the ordinary course of business;[24]

(3) ***Types of information to be preserved***. The duty to preserve under Rule 26.1(a) extends to documents, electronically stored information, or tangible things within Rule 34(a)(1).[25]

(4) ***Form for preserving electronically stored information***. A person under a Rule 26.1(a) duty to preserve electronically stored information must preserve that information in a form or forms in which it is ordinarily maintained.[26] The person need not preserve the same electronically stored information in more than one form.[27]

(5) ***Time frame for preservation of information***. The duty to preserve under Rule 26.1(a) is limited to information [created during] {that relates to events occurring during}

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[24] This specific listing is taken from submissions to the Advisory Committee. Besides asking whether it is sensible and complete, one might also ask whether a list this specific is likely to remain current for years.

[25] The Duke panel suggested including a provision about types of information to be preserved. It did not suggest limitations on the Rule 34(a)(1) scope of the duty to produce, and this initial effort therefore uses that provision as a guide. One possibility mentioned above is that backup tapes or the like could be excluded. But it may be that the scope of the duty provision already suffices for that purpose, and also that excluding backup materials may be unwise.

In a related vein, should preservation duties extend to "land or other property possessed or controlled" by the person, which is subject to discovery under Rule 34(a)(2)? Although that form of discovery is probably much rarer than document discovery, when it does matter preservation may be important.

[26] This provision is borrowed from Rule 34(b)(2)(E)(ii). If "ordinarily maintained" includes the form in which information is preserved for litigation purposes, this could be circular.

[27] This provision corresponds to Rule 34(b)(2)(E)(iii).

[Alternative 1] __ years prior to the date of the trigger under Rule 26.1(b)[28]

[Alternative 2] the period of the statute of limitations prior to the date of the trigger under Rule 26.1(b)[29]

[Alternative 3] a reasonable period under the circumstances.[30]

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[28] This provision has at least two problems. One is that it tracks backward from the date of the triggering event. It is not necessarily obvious that this should be the pertinent event, but in one sense it seems logical -- ordinarily preservation can't be expected to occur until that triggering event occurs. Of course, there might be multiple triggers, which would probably present additional complications.

A second difficulty is that it calls for the rules to specify a time period for this duty. Statutes of limitation vary considerably for different kinds of claims, and from jurisdiction to jurisdiction. That variability suggests the difficulty that might attend an effort to set a specific all-encompassing limitation here. In addition, some cases -- such as a groundwater contamination case -- may concern events that occurred decades ago. A lawsuit for breach of an old contract likewise could require discovery regarding events that occurred many years in the past. Suggesting that information about such events need not be preserved because they are beyond a rule-specified time frame would present obvious problems. A time-period limitation also might foster arguments about the limits of the rulemaking power.

[29] This approach might be preferred to setting a specific limit in a rule because it would borrow from other sources of law. But the borrowing experience for limitations periods has sometimes been an unhappy one. For limitations periods for federal claims lacking congressionally-set limitations, the task produced much disarray and finally Congress adopted the four-year limit in 28 U.S.C. § 1658. But that statute applies only to federal claims created by Congress after its effective date; for those already in existence, borrowing of limitations periods remains the rule.

An additional difficulty here is that the person subject to the duty to preserve must make predictions to use this approach. One is to determine what claim would be asserted; a pre-litigation notice may suggest a variety of claims that have different limitations periods. And the limitations period for a given claim may differ significantly in different jurisdictions, so there is a potential choice-of-law guess involved in the forecast. Beyond determining the pertinent limitations period there is also the possibility that a court would rule that the limitations period was tolled until prospective plaintiffs discovered their claims, or on grounds of estoppel or fraudulent concealment. Predicting how a court might resolve those issues would be very difficult.

[30] Given the difficulties mentioned in relation to the other two approaches, this might be preferred. But one could object that it provides limited or no guidance.

(6) ***Number of key custodians whose information must be preserved***.[31] The duty to preserve under Rule 26.1(a) is limited to information [possessed by] {under the control of} the [number] {a reasonable number of} key custodians in the person's organization who are [most likely to possess] {best positioned to identify} information subject to preservation under Rule 26.1(c).[32]

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[31] This sort of provision was suggested by the Duke Panel. It is not clear that "key custodian" is a definite enough term, but it is the one proposed by our panelists. If we want to adopt something along this line, there should be careful consideration about what term to use. The Committee Note could elaborate on what is meant. For one court's use of the "custodian" term, see Edelen v. Campbell Soup Co., 265 F.R.D. 676, 684 (N.D.Ga. 2010) ("Plaintiff then proposed a request that encompasses 55 custodians and 55 search terms over a three-year period.").

[32] This provision is a very halting first effort that bristles with issues. The question of how to define "key custodian" has already been mentioned. The question whether we are talking about "possession" or "control" of the information or something else seems somewhat tricky.

Choosing a number is another challenge. Shouldn't that depend on the size and makeup of the organization? In addition, might it not depend on the type of information involved? Isn't there always a risk that 20/20 hindsight will suggest that somebody else is an obvious choice who was overlooked? The alternative of saying "a reasonable number" may be more reasonable but not reassuring to the person seeking certainty about what to do to satisfy preservation obligations. How is the person to make this determination with confidence? Perhaps the answer is to designate twice as many as are minimally necessary. But even then there is the argument that somebody really important was overlooked.

A different question is whether this should excuse preservation by anyone who is not a "key custodian." Are those the individuals who were most involved in the events that matter in the suit, or the individuals who are officially designated as "custodians" in the organization? If the latter, could it be that there is no need to preserve information possessed by the people most involved? Does that bear on what is an adequate litigation hold?

It seems that what we are talking about is the whole scope of information to be preserved pursuant to Rule 26.1(c). Are there likely to be different custodians for different types of information?

This topic seems to relate to the time factor identified in Rule 26.1(c)(5). Are we talking about holders of specified positions in the organization, or the specific individuals? If the former (more likely), how should we deal with the hiring, promotion, and firing of specific holders of these positions, and with revisions in the organizational structure during the pertinent period?

(d) Ongoing duty. *[Alternative 1]* The person must take reasonable measures to continue to preserve information subject to preservation under Rule 26.1(c) from the date the obligation to preserve is triggered under Rule 26.1(b) until [the expiration of the statute of limitations if no suit is filed by that date] {the termination of litigation if a suit is filed}.[33]

(d) Ongoing duty. *[Alternative 2]* The person must take reasonable measures to preserve information received after the trigger date specified in Rule 26.1(c) unless it notifies [the person requesting preservation] {all reasonably identifiable interested persons} that it is not engaged in ongoing preservation.[34]

(e) Remedies for failure to preserve. The sole remedy for failure to preserve information is under Rule 37(e).[35]

Another question has to do with a litigation hold. Does the listing in this rule identify the only people who should be directed to retain information in a litigation hold? Our sense is that normally the notice of a hold should be directed to a larger group, but perhaps the goal here is to guard against requiring that effort.

Finally, how would this provision apply to parties that are not organizations? Are family members of individual litigants also custodians?

[33] The need to specify how long the duty to preserve remains in effect would seem to arise in situations where litigation is not filed. Where litigation is filed, the duration of the duty is more clear. And yet, as noted above, determining when the statue of limitations expires presents difficult issues about which limitations period to apply and whether it has been tolled.

[34] This alternative attempts to provide an out for those who wish to curtail the ongoing burden. But one serious difficulty is determining who should be notified that preservation is not ongoing. Does it apply only when the trigger is a demand for preservation? It does not seem to answer the question what the preserving person must do when the person who is notified objects to cessation of preservation. If anyone can dispense with preservation by giving notice, would everyone (who is advised by a lawyer) immediately give such notice?

[35] This hypothetical provision is designed as a bridge to possible amendments to Rule 37, as explored more fully below. The goal is to make clear that Rule 26.1 does not purport to do more than set ground rules in relation to litigation that actually occurs in federal court. Thus, one could not argue for any adverse consequence due to failure to preserve except in a pending case in federal court. By the time that argument occurs, there is no big problem with the authority of a federal court to address the problem. And there seems to be no problem with the idea that it may apply federal

Rule 37. Failure to Make Disclosures

or to Cooperate in Discovery; Sanctions

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(e) Sanctions for failure to preserve [electronically stored] {discoverable} information. A court may not impose sanctions[36] [under these rules][37] on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:[38]

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legal principles in determining whether a person has failed to preserve. So Rule 26.1 becomes more an advance warning that may limit federal principles of preservation than an all-purpose intrusion into the already crowded realm of preservation.

[36] A perennial question is to determine what is a "sanction." For example, to what extent is a directive to restore backup tapes to locate materials that were inappropriately deleted a "sanction." To many, it might seem a curative measure. For a thoughtful examination of such issues under the current rule, consider Major Tours, Inc. v. Colorel, 720 F.supp.2d 587 (D.N.J. 2010), in which Judge Simandle was presented with plaintiffs' argument that because defendants had failed to preserve emails they had to restore all backup tapes to see if some of the lost emails could be found on the tapes. Judge Simandle rejected this argument that failure to preserve is dispositive on the question under Rule 26(b)(2)(B) whether to order restoration of backup tapes. Instead, that is just one of many factors, and he declined to make such an order in this case, upholding the magistrate judge's decision that good cause did not exist for restoring the tapes despite the failure to preserve. Turning the situation around, would the conclusion that the preservation rule was not violated preclude ever ordering restoration of backup tapes?

[37] This phrase was inserted in Rule 37(e) by the Standing Committee in 2004, and permits sanctions pursuant to "inherent authority" or based on other sources of law while limiting sanctions under Rule 37(b) or other Civil Rules. Whether that limitation should endure if the rules themselves include a more expansive (and affirmative) set of preservation provisions, like hypothetical Rule 26.1, is not certain.

[38] Note that including a provision like this could obviate reliance on "inherent authority" to support sanctions like those listed in Rule 37(b) in cases in which failure to preserve did not violate any court order. A Committee Note could presumably say something like: "Given the introduction of a specific basis in Rule 37 for imposition of sanctions, and specific provisions in Rule 26.1 regarding the scope of the preservation duty, there should no longer be occasion for courts to rely on inherent authority to support sanctions in cases in which a party has failed to preserve discoverable information."

(1) ***Burden of proof***. The party seeking sanctions has the burden of proving that:

(A) a violation of Rule 26.1 has occurred;

(B) as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];[39]

(C) no alternative source exists for the specified electronically stored information [documents or tangible things];[40]

(D) the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401}

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[39] This criterion was suggested by the Duke Panel. The abiding problem is that one does not know what was there before the inappropriate deletion occurred; that makes it rather difficult for the party seeking sanctions (which has presumably not breached its responsibilities under the rules) to specify what it lost.

This factor seems to address the same thing as the harmlessness provision in current Rule 37(c)(1), but to put the burden with regard to that issue on the party seeking sanctions. Perhaps harmlessness is a better way of putting it; doing so would presumably shift the burden of proof to the party resisting sanctions.

Relatedly, it might be noted that this factor can cut differently for parties with and without the burden of proof. In at least some instances, parties with the burden of proof may lose *because* they no longer have evidence they lost. True, parties without the burden of proof may find their cases weakened due to loss of evidence that would have been helpful to them, but in at least some instances there may be an important difference between parties depending on who has the burden of proof.

[40] This resembles the current harmlessness criterion, and seems an important focus; to the extent alternative sources of information (or sources of alternative information) exist, there seems little reason for the sorts of sanctions listed in Rule 37(b)(2)(A). As noted above, however, measures designed to extract such information from those sources (e.g., backup tapes) might be called "sanctions" by some. Moreover, since the exact contours of the lost information are usually unknowable, it may be impossible to determine whether there is an alternative source of that information.

[material] to the claim or defense of the party seeking sanctions;[41]

(E) the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.[42]

(2) ***Selection of sanction***. If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:

(A) the court may employ any sanction listed in Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information,[43] but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;[44]

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[41] Again, the moving party's difficulty in specifying what was lost presents something of a conundrum on this subject.

It is not clear that this provision adds usefully to (B), which focuses on the harm to the party seeking sanctions.

[42] This provision does not call for initial attempts to confer with the other side to obtain the nonjudicial solution to the problem. It might be said in a Committee Note that informal communication seems like a good way to explore the availability of other sources of information, but given that hypothetical subdivision (e) is only about sanctions of a rather serious sort, it may be that the time for conferring has passed.

[43] As noted, an adverse inference instruction is not included in the Rule 37(b)(2) listing. It is therefore addressed separately, but that does not explain how it should be ranked among the others in terms of "severity." Another issue might be the extent to which Fed. R. Evid. 301 (on presumptions) affects the use of this sanction.

In the same vein, one could consider listing other possible "sanctions" in this new provision. No effort has yet been made to chart these waters.

[44] This is a first effort to stratify sanctions. It seems from the ordering in Rule 37(b)(2)(A) that the list there goes from less severe to more severe. It is worth re-emphasizing, however, that an adverse inference instruction is not explicitly included on the list in Rule 37(b). Presumably that sanction is available also. Should sanctions be limited to those listed in Rule 37(b)?

Calibrating the severity of sanctions might sometimes be difficult. Consider, for example, Judge Gershon's reaction to arguments against using an adverse inference instruction:

(B) *[Alternative 1]* the court may not impose a sanction listed in Rule

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> In its papers, defendant repeatedly refers to adverse inferences and deemed findings as "severe" sanctions, but the case law is clear that these sanctions are not properly considered "severe." In this context, the term "severe" refers to sanctions of dismissal and contempt, not to the more limited sanctions imposed here.

Linde v. Arab Bank, Inc. 269 F.R.D. 186, 199 n.11 (S.D.N.Y. 2010).

Another point with regard to adverse inferences is that they are not all the same. Some may command the jury to find certain facts established, or even to find certain claims established. Others may be entirely permissive, simply telling the jury that if they find that a party lost something it should have retained the jury may infer that this lost item would help the other side if it concludes that the party was trying to get rid of harmful evidence. Even without an instruction, a lawyer could make that argument to the jury; having the judge endorse the possibility with a jury instruction is no doubt important to the lawyer but very different from a "severe" adverse inference instruction.

In re Oracle Corp. Securities Litig., 627 F.3d 376 (9th Cir. 2010), illustrates the range of adverse inferences possible, and also points out that they can be important at the summary judgment stage, not just in jury instructions. Plaintiffs in that securities fraud suit established that defendants willfully failed to preserve the email and other materials from Larry Ellison, Oracle's CEO. When defendants moved for summary judgment, the district court therefore gave the plaintiffs the benefit of an adverse inference that the lost materials would have proved Ellison's knowledge of any material facts plaintiffs were able to establish. But plaintiffs did not persuade Judge Illston that there were any material factual disputes, and she granted defendants' summary-judgment motion.

On appeal, plaintiffs urged that the district court should have used an adverse inference sufficient to establish their prima facie case and therefore to defeat the summary-judgment motion. The 9th Circuit disagreed (id. at 386):

> Over 2.1 million documents were produced during discovery. Although Ellison's email account files were not produced, the documents that were produced contained numerous email chains in which Ellison's correspondence was contained. If there were material issues of fact supporting securities fraud, Plaintiffs should have been able to glean them from the documents actually produced, the extensive deposition testimony, and the written discovery between the parties. An adverse inference would then properly apply to establish that Ellison must have known of those damaging material facts. Plaintiffs' problem here lies in the dearth of admissible evidence to show fraud.

The court added that an adverse inference sanctions "should be carefully fashioned to deny the wrongdoer the fruits of its misconduct yet not interfere with that party's right to produce other evidence." Id. at 386-87.

37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information unless the party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as evidence];[45]

(B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;[46]

(C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the level of culpability[47] of the party to be sanctioned.

(3) ***Payment of Expenses***. Instead of or in addition to imposing a sanction, the court must order the party in violation of Rule 26.1, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the violation was substantially justified or other circumstances make an award of expenses unjust.

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[45] This is an effort to incorporate a showing of state of mind into the criteria for sanctions. Either here or in a Committee Note, one could address the significance of a litigation hold. That is not included in the draft rule language in part because it seems so difficult to determine what a "litigation hold" is, and also because the question whether adequate follow-up occurred could often be important.

The Duke panel urged that "[t]he state of mind necessary to warrant each identified sanction should be specified." Doing that seems quite difficult -- given the range of sanctions listed in Rule 37(b)(2)(A), the range of states of mind identified above, and the variety of facts arising in different cases.

[46] This is an effort to shift the state-of-mind inquiry from being a matter to be proven to support sanctions into being a matter of defense for the party resisting sanctions.

[47] This phrase is far from ideal, but attempts to capture what is meant.

CATEGORY 2

The concept behind this category is that it may be desirable and possible to devise more general rules regarding preservation. A key consideration here is whether rules of such generality will actually be useful to parties making preservation decisions, particularly before litigation begins. (After litigation begins, they can at least apply to the court for clarification about what they should be doing.)

Rule 26.1. Duty to Preserve Discoverable Information

(a) General Duty to Preserve. [In addition to any duty to preserve information provided by other law,] every person who reasonably expects [is reasonably certain] to be a party to an action cognizable in a United States court must preserve discoverable [electronically stored] information in as follows.

(b) Trigger for Duty to Preserve. *[Alternative 1]* The duty to preserve discoverable information under Rule 26.1(a) arises when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court].

(b) Trigger for Duty to Preserve. *[Alternative 2]* The duty to preserve discoverable information arises when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court] such as:

(1) Service of a pleading or other document asserting a claim; or

(2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or

(3) Service of a subpoena or similar demand for information; or

(4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim or taking any other action in anticipation of litigation; or

(5) Receipt of a notice or demand to preserve discoverable information; or

(6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or the person's own retention program.

(c) Scope of Duty to Preserve. A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take actions reasonable under the circumstances to preserve [discoverable information][48] in regard to the potential claim of which the person is or should be aware, [taking into account the proportionality criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}.[49]

(d) Ongoing duty. The person must take reasonable measures to continue to preserve information subject to preservation under Rule 26.1(c) for a reasonable period after the date the obligation to preserve is triggered under Rule 26.1(b).

(e) Remedies for failure to preserve. The sole remedy for failure to preserve information is under Rule 37(e).

Rule 37. Failure to Make Disclosures

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[48] One suggestion from the Duke panel was to specify a different preservation duty for parties and nonparties. In the pre-litigation context, this seems particularly challenging since nobody is yet a party. Whether there should be a distinction on this ground is debatable in any event. For example, should it matter if, under Rule 15(c), the nonparty is one that should have realized it would have been sued?

[49] The idea here is to invoke the concept of relevance as a defining factor for the duty to preserve. Using it might raise several problems. For one thing, the claim involved has not been made in a formal way. For another, relevance is a very broad concept. Indeed, one might need to address whether this means relevant to the claim or defense or to the subject matter, topics last addressed in the 2000 amendments to Rule 26(b)(1).

Another question that might arise at this point is whether allegedly privileged materials must be preserved. Those are not within the scope of discovery, but the court can't pass on whether discarded materials were indeed privileged. This problem will be mentioned again below.

or to Cooperate in Discovery; Sanctions

* * * * *

(e) Sanctions for failure to preserve [electronically stored] {discoverable} information. A court may not impose sanctions [under these rules] on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:

(1) ***Burden of proof***. The party seeking sanctions has the burden of proving that:

(A) a violation of Rule 26.1 has occurred;

(B) as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];

(C) no alternative source exists for the specified electronically stored information [documents or tangible things];

(D) the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401} [material] to the claim or defense of the party seeking sanctions;

(E) the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.

(2) ***Selection of sanction***. If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:

(A) the court may employ any sanction under Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;

(B) *[Alternative 1]* the court may not impose a sanction under Rule

37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information unless the party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as evidence];

(B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;

(C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the level of culpability of the party to be sanctioned.

(3) ***Payment of Expenses***. Instead of or in addition to imposing a sanction, the court must order the party in violation of Rule 26.1, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the violation was substantially justified or other circumstances make an award of expenses unjust.

CATEGORY 3

This approach relies entirely on a "back end" rule provision and has no specific preservation provisions. It is intended to authorize Rule 37(b) sanctions whenever a party does not reasonably preserve, and so should generally make reliance on inherent authority unimportant.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

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(g) FAILURE TO PRESERVE DISCOVERABLE INFORMATION; REMEDIES

(1) If a party fails to preserve discoverable information that reasonably should be preserved in the anticipation or conduct of litigation, the court may[, when necessary][50]:

(A) permit additional discovery;

(B) order the party to undertake curative[51] measures; or

(C) require the party to pay the reasonable expenses, including attorney's fees,[52] caused by the failure.

(2) Absent extraordinary circumstances [irreparable prejudice],[53] the court may not impose

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[50] Whether this qualification is helpful could be debated. The idea is to authorize various responses to the loss of data that would not be characterized as "sanctions." Saying they may be used only "when necessary" might suggest that discovery orders more generally are subject to that limitation. Even Rule 26(b)(2)(B) would not necessarily condition an order to restore inaccessible sources on a showing of "necessity," much as that consideration could matter to judges considering what to do about backup tapes and the like.

[51] Does "curative" have a commonly understood meaning? Would "other remedial" give greater flexibility? The goal here is to emphasize that orders that otherwise not be made are justified due to the loss of data. Again, this is not a "sanction," but an effort by the court to minimize the possible harm to a litigant's case resulting from another party's loss of data.

[52] Would this possibility tend to encourage claims of spoliation? It might be that one could, by succeeding on a spoliation argument, get a "free ride" for discovery one would otherwise be doing at one's own expense. Hopefully, it should be clear that discovery is made necessary by the loss of data, and not something that would happen in the ordinary course. But will there be many instances in which that is not clear?

[53] This proviso is designed to authorize sanctions in the absence of fault in cases like Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001), where the loss of the data essentially preclude effective litigation by the innocent party. One question is whether such instances are truly extraordinary. If they happen with some frequency, this may be the wrong phrase.

any of the sanctions listed in Rule 37(b)(2) or give an adverse-inference jury instruction[54] unless the party's failure to preserve discoverable information was willful or in bad faith and caused [substantial] prejudice in the litigation.

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith,[55] the court may consider all relevant factors, including:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;[56]

(B) the reasonableness of the party's efforts to preserve the information, including the use of a litigation hold and the scope of the preservation efforts;[57]

(C) whether the party received a request that information be preserved, the clarity

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The term irreparable prejudice may be preferable to focus on the real concern here. It would be important, however, to ensure that this be limited to extremely severe prejudice. Most or all sanctions depend on some showing of prejudice. Often that will be irreparable unless the "curative" measures identified in (g)(1) above clearly solve the whole problem. The focus should be on whether the lost data are so central to the case that no cure can be found.

[54] Is this too broad? Adverse inference instructions can vary greatly. General jury instructions, for example, might tell the jury that it could infer that evidence not produced by a party even though it should have had access to the evidence supports an inference that the evidence would have weakened the party's case. Is that sort of general instruction, not focusing on any specific topic, forbidden? How about the judge's "comment on the evidence" concerning lost evidence but not in the form of a jury instruction? Would this rule forbid attorney argument to the jury inviting to make an adverse inference if there were no instruction at all on the subject?

[55] Combining an evaluation of reasonableness and willfulness or bad faith in one set of factors is attractive. Often the circumstances that bear on reasonableness also will bear on intent. Would it help to add other factors that bear directly on intent, but also may bear on reasonableness? Examples might include departure from independent legal requirements to preserve, departure from the party's own regular preservation practices, or deliberate destruction.

[56] Is this treatment sufficient to substitute for provisions about "trigger" like the ones in Category I or Category II. If those provide useful detail, would it be desirable to add similar detail here?

[57] The use of "scope" is designed to permit consideration of a variety of factors. The Committee Note would elaborate about breadth of subject matter, sources searched (including "key custodians:), form of preservation, retrospective reach in time, and so on. Cases are likely to differ from one another, and "scope" will hopefully permit sensible assessment of an array of circumstances.

and reasonableness[58] of the request, and — if a request was made — whether the person who made the request or the party offered to engage in good-faith consultation regarding the scope of preservation;

(D) the party's resources and sophistication in matters of litigation;[59]

(E) the proportionality of the preservation efforts to any[60] anticipated or ongoing litigation; and

(F) whether the party sought timely guidance from the court[61] regarding any unresolved disputes concerning the preservation of discoverable information.

* * * * *

Besides the footnoted questions, the Category 3 approach is intended generally to permit consideration of the extent to which the backwards shadow of such a rule would reassure and give direction to those making preservation decisions. Would it only do so if it absolutely precluded sanctions (absent "irreparable prejudice") in the absence of proof of bad faith or willfulness? Would it adequately ensure a uniform treatment of these issues nationwide, or possibly be interpreted in keeping with the existing (and seemingly inconsistent) precedents in the area?

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[58] Does this mean that an unreasonable request imposes a lesser duty than a reasonable request? Should clarity be the test here, since reasonableness of preservation efforts is already addressed in (B)?

[59] This consideration seems important to address the potential problem of spoliation by potential plaintiffs who may realize that they could have a claim, but not that they should keep their notes, etc. for the potential litigation. Are resources a useful consideration here? A wealthy individual might be quite unfamiliar with litigation. Is this somewhat at war with considering whether the party obeyed its own preservation standards? Making those relevant to the question of whether preservation should have occurred may be seen to deter organizations from having preservation standards. It is unclear how many organizational litigants -- corporate or governmental -- actually have such standards. Does the fact they exist prove that this litigant is "sophisticated"?

[60] This is broad, but probably the right choice. If the party reasonably anticipates multiple actions, proportionality is measured in contemplating all of them. A party to any individual action should be able to invoke the duty of preservation that is owed to the entire set of reasonably anticipated parties.

[61] This implicitly applies only when there is an ongoing action. Do we need anything more than a Committee Note to recognize that it is difficult to seek guidance from a court before there is a pending action? What if there is a pending action, and the party reasonably should anticipate further actions — is it fair to consult with one court (perhaps chosen from among many), pointing to the overall mass of pending and anticipated actions, and then invoke that court's guidance when addressing other courts?

B PLEADING STANDARDS

Lower courts continue to respond to the Supreme Court's rulings on pleading standards in the Twombly and Iqbal opinions. The memorandum prepared by Andrea Kuperman, Chief Counsel to the Rules Committee Support Office, continues to grow. More than 500 pages of case summaries, focused primarily on the more interesting published opinions of the courts of appeals, suggest that what once seemed a shifting target may be stabilizing.

Recent observations about pleading standards in Supreme Court opinions may reinforce the sense of convergence. *Skinner v. Switzer*, 2011 WL 767703 (March 7, 2011), upheld a state prisoner's complaint claiming a denial of due process in the district attorney's refusal to allow access to biological evidence for purposes of DNA forensic testing. The Court stated that on a motion to dismiss for failure to state a claim, the test is not whether the plaintiff will ultimately prevail, "but whether his complaint was sufficient to cross the federal court's threshold, see Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 * * * (2002). * * * [A] complaint need not pin plaintiff's claim for relief to a precise legal theory. Rule 8(a)(2) * * * generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." This passage seems to reinvigorate the Swierkiewicz rejection of "heightened pleading," and to apply it outside the employment-discrimination context.

Two weeks later the Court decided *Matrixx Initiatives, Inc. v. Siracusano*, 2011 WL 977060 (March 22, 2011). The sufficiency of the complaint claiming securities fraud was challenged on two issues: whether the facts not disclosed by the defendant were material, and whether the defendant's failure to disclose involved the required scienter. The defendant sold a cold remedy. It had reports suggesting that use of its product can cause loss of the sense of smell. The information did not amount to a statistically significant showing of causation. The question of materiality was whether investors might think the information important even if not statistically significant. The Court found reasonable investors might fear that consumers would switch to other cold remedies when confronted with the risk of losing the sense of smell. Quoting Twombly, the Court thought the allegations "'raise a reasonable expectation that discovery will reveal evidence'" satisfying the materiality standard. Quoting Iqbal, the allegations sufficed to "'allo[w] the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.'" Turning to scienter, the Court invoked the Tellabs decision. The inference that Matrixx acted recklessly (or intentionally) "is at least as compelling, if not more compelling, than the inference that it simply thought the reports did not indicate anything meaningful about adverse reactions." Scienter was adequately pleaded; whether plaintiffs "can ultimately prove their allegations and establish scienter is an altogether different question."

These two Supreme court opinions do not clearly reset the rhetoric of the Twombly and Iqbal decisions. But they do reinforce the belief that context matters. How much fact is required to support a reasonable inference of liability varies with context, and in many types of action can be rather scant.

Taken together, moreover, the lower-court decisions may suggest that not much has changed in actual practice. That hypothesis finds support in the first detailed study done by the Federal

Judicial Center, although a follow-up study has been undertaken in the hope of providing additional important information. Still, there is ample reason to evaluate ongoing pleading practices with an eye to possible rules responses. The prospect of even subtle or subject-specific changes is viewed with fear by some observers and with hope by others. The Committee continues its close study of pleading standards and related discovery rules.

The FJC Study is attached. Joe Cecil will present it at this meeting, as he presented it to the Advisory Committee. The study sought to compare disposition of Rule 12(b)(6) motions to dismiss complaints before the Twombly decision and after the Iqbal decision, focusing not only on overall rates of motions and dismissals but also on the rates in broad categories of cases. The study proved complicated because of the need to make statistical adjustments to compensate for other developments occurring in the same time period that affect the raw count of motions and dispositions. "A lot changed between 2006 and 2010 that was unrelated to Twombly and Iqbal." A succinct but potentially misleading statement of the central finding would be that the rate of filing 12(b)(6) motions has increased, while the rate of granting the motions as held constant. A natural conclusion would be that a constant rate of granting an increased number of motions means that more cases are dismissed for failure to state a claim. But the comparison is made between two data sets, and it is difficult to confirm or deny this possible conclusion.

One major complication is an increase in the percentage of orders that grant a 12(b)(6) motion, but with leave to amend. This study did not undertake to determine what happens after leave to amend is granted — whether an amended complaint is filed, whether the amended complaint is challenged by a renewed motion to dismiss, whether discovery continues while any renewed motion remains pending, and whether any renewed motion is eventually granted. All of these questions need be answered to develop a better picture. The next study will attempt to answer them.

Other questions elude the capacities of even the most careful docket studies. It is not possible to identify cases that would have been filed under earlier understandings of pleading standards but were not filed for fear of heightened pleading standards. (Removal rates were studied; no differences were found.) It is not possible to determine whether cases were dismissed for want of pleading facts that could be known only by discovering information available only by discovery from the defendant. It would be difficult to assess the quality of the differences between initially unsuccessful complaints and successful amended complaints, or to measure the advantages of an amended complaint in working toward ultimate resolution. And it is similarly difficult to distinguish pleadings that fail for want of factual sufficiency alone and those that fail in whole or in part for advancing an untenable legal theory.

The FJC study — and the promise of its next study — combines with the review of judicial decisions to suggest there is no urgent need for immediate action on pleading standards. The courts are still sorting things out. There is reason to hope that the common-law process of responding to and refining the Supreme Court's invitation to reconsider pleading practices will arrive at good practices. An attempt to anticipate the process and capture it in reworded pleading rules might easily prove less effective. The first challenge that must be met whenever rule text is drafted is to determine whether there has been any significant change in practice, and whether any changed standards are too high, too low, or just about right. If the standards seem about right, there would

be little point in courting disruption by attempting to capture them in new rule text; Rule 8(a)(2), the subject of the Supreme Court's interpretation, would be doing good work. If the standards seem too high or too low, the array of possible drafting responses will be enormous.

Rather than revise general pleading standards, it might prove desirable to adopt specific standards for particular categories of cases. Since 1993 the Committee has periodically considered the possibility of adding more claims to the list of matters that must be pleaded with particularity under Rule 9(b). An alternative might be to list categories of claims that can be pleaded with less detail than most claims. Either approach would demand careful definitions. Either would raise potentially troubling questions of favor or disfavor for substantive, not procedural, reasons.

Other pleading approaches might be taken. One possibility, seriously considered but put aside shortly before the Twombly decision, would be to carry on with general notice pleading but reinvigorate the motion for a more definite statement.

Affirmative defenses may also become a subject for pleading reform. Why not expressly require a "short and plain statement" of an affirmative defense?

Apart from pleading standards, it may be desirable to integrate discovery more closely with pleading practice. Those who oppose heightened pleading requirements constantly point to circumstances of "information asymmetry," in which facts needed to plead the context that makes a claim plausible are known only to the defendant. Major variations are possible. Provision could be made for pre-filing discovery in aid of framing a complaint. Or discovery could be made available to a plaintiff who files an initial complaint together with a request for identified discovery to support an amended complaint. Or discovery could be made available — perhaps on terms similar to the summary-judgment practice in Rule 56(d) — to facilitate response to a motion to dismiss. If dismissals on the pleadings come to be a subject for rules revisions, these discovery possibilities will deserve serious development.

For all of these intriguing possibilities, the approach to pleading practice remains what it has been since 2007. The Committee will closely monitor developing practice, it will encourage and heed further rigorous empirical work, and it will listen carefully to the voices of bench, bar, and academy. Procedural ferment is exciting, but it does not justify an excited response.

Motions to Dismiss for Failure to State a Claim After *Iqbal*

Report to the Judicial Conference
Advisory Committee
on Civil Rules

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Executive Summary

This report presents the findings of a Federal Judicial Center study on the filing and resolution of motions to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The study was requested by the Judicial Conference Advisory Committee on Civil Rules. The study compared motion activity in 23 federal district courts in 2006 and 2010 and included an assessment of the outcome of motions in orders that do not appear in the computerized legal reference systems such as Westlaw. Statistical models were used to control for such factors as differences in levels of motion activity in individual federal district courts and types of cases.

After excluding cases filed by prisoners and pro se parties, and after controlling for differences in motion activity across federal district courts and across types of cases and for the presence of an amended complaint, we found the following:

- There was a general increase from 2006 to 2010 in the rate of filing of motions to dismiss for failure to state a claim (see *infra* section III.A).
- In general, there was no increase in the rate of grants of motions to dismiss without leave to amend. There was, in particular, no increase in the rate of grants of motions to dismiss without leave to amend in civil rights cases and employment discrimination cases (see *infra* section III.B.1).
- Only in cases challenging mortgage loans on both federal and state law grounds did we find an increase in the rate of grants of motions to dismiss without leave to amend. Many of these cases were removed from state to federal court. This category of cases tripled in number during the relevant period in response to events in the housing market (see *infra* section III.B.1). There is no reason to believe that the rate of dismissals without leave to amend would have been lower in 2006 had such cases existed then.
- There was no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case (see *infra* section III.B.1).

I. Origin of the Study

In October 2009, the Judicial Conference Advisory Committee on Civil Rules asked the Federal Judicial Center to undertake an analysis of changes in the filing and resolution of motions to dismiss filed under authority of Federal Rule of Civil Procedure 12(b)(6). This request was prompted by two recent Supreme Court decisions—*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. _, 129 S. Ct. 1937 (2009)—that interpreted Rule 8(a) by stating that a plaintiff must present a "plausible" claim for relief. A number of commentators expressed concern about whether lower courts would apply *Twombly* and *Iqbal* to dismiss claims that, had discovery proceeded, would have been shown to be meritorious.[1]

This study was designed to assess changes in motions to dismiss and decisions on such motions over time in broad categories of civil cases. Of course, this study could not fully capture all of the factors affecting motions to dismiss. In particular, it could not fully reflect the appellate court case law that continues to develop and that provides specific guidance for district courts.

At the request of the Advisory Committee, the Administrative Office of the U.S. Courts (AO) developed a series of tables that track the numbers of motions to dismiss filed and decided across all federal courts.[2] These tables do not indicate a clear change in filing patterns or disposition patterns after *Twombly* or *Iqbal*. But they include all types of motions to dismiss[3] and do not permit a precise assessment of Rule 12(b)(6) motions to dismiss for failure to state a claim. They also do not distinguish between orders granting motions to dismiss with leave to amend and orders granting motions without leave to amend.

Three scholars have undertaken four empirical studies to assess changes in pleading practice following the *Twombly* and *Iqbal* Supreme Court decisions.[4]

1. *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 Notre Dame L. Rev. 849, 878–79 (2010) (expressing concern that plaintiffs will be unable to survive the pleading stage and have access to discovery when the defendant has critical information, especially in civil rights cases); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 14, 34 (2010) (*Twombly* and *Iqbal* may well have come at the expense of access to the courts and the ability of citizens to obtain adjudication of their claims' merits).

2. Statistical Information on Motions to Dismiss re *Twombly/Iqbal* (Rev. 12/3/10), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/NOS-Motions Quarterly December 031611.pdf. These tables are discussed in William M. Janssen, Iqbal *"Plausibility" in Pharmaceutical and Medical Device Litigation*, 71 La. L. Rev. 541, 575 (2011).

3. In addition to Rule 12(b)(6) motions to dismiss, the tables include other Rule 12(b) motions and Rule 12(c) motions. We are presently exploring the differences in the AO database and the databases developed for our study.

4. Kendall Hannon compared orders responding to motions to dismiss for failure to state a claim immediately before and soon after the *Twombly* decision. He found that such motions were more likely to be granted following *Twombly* in civil rights cases (41.7% prior to *Twombly*, 52.9% after *Twombly*), and that there was little change in other types of cases. *See* Kendall W. Hannon, *Much Ado About* Twombly, 83 Notre Dame L. Rev. 1811 (2008). This study did not distinguish between motions granted with leave to amend the complaint and those granted without leave to amend.

These four studies share two characteristics that limit their findings. First, each study was based on opinions appearing in the Westlaw database, which is likely to overrepresent orders granting motions to dismiss when compared with orders appearing on docket sheets.[5] Second, each of these studies reviewed district court orders decided soon after the Supreme Court decisions and before interpretation of the decisions by the courts of appeals. The courts of appeals have since reversed a number of the early district court decisions[6] and have issued a growing

Joseph Seiner has published two studies focusing on the outcome of motions to dismiss for failure to state a claim in civil rights litigation. His first study examined employment discrimination cases before and after *Twombly* and found increases in the rate at which motions were granted that did not reach levels of statistical significance. *See* Joseph A. Seiner, *The Trouble With Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011, 1032. Seiner's study of motions to dismiss was based on searches for cases appearing in the Westlaw database. Seiner's second study examined motions in cases alleging discrimination under Title 1 of the Americans with Disabilities Act. Again, he found an increase in motions granted that did not meet standards of statistical significance. *See* Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. Rev. 95 (2010).

Patricia Hatamyar examined orders responding to motions to dismiss for failure to state a claim two years before *Twombly*, two years after *Twombly*¸ and immediately after *Iqbal*; she found an increase in motions granted (46% to 48% to 56%, respectively). The greatest increases were in motions granted with leave to amend. Orders granting motions in civil rights cases also increased during the three periods (50% to 53% to 58%, respectively, without distinguishing leave to amend). *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 Am. U. L. Rev. 553, 607 (2010). Hatamyar also presented a series of multinomial regression models that appear to confirm this increase over time in the rate at which motions are granted with leave to amend while controlling for pro se status, circuit, and type of case.

In addition to these four studies, there have been a number of empirical studies of motions to dismiss that are not directly related to an assessment of the effects of *Twombly* and *Iqbal*. Alexander Reinert examined cases from the 1990s in which grants of Rule 12(b)(6) motions have been reversed by the courts of appeals. Reinert regards such cases as similar to cases that would be dismissed and affirmed on appeal after *Iqbal.* He determined that after remand, these cases were as likely to succeed as all civil cases terminated during that period. *See* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind. L.J. 119 (2011). The strength of this analysis rests on the assumption that cases with motions reversed on appeal are comparable to all civil cases, including those in which a motion to dismiss was never filed. Adam Pritchard and Hillary Sale have examined the effects of the Private Securities Litigation Reform Act on motions to dismiss. *See generally* Adam C. Pritchard & Hillary A. Sale, *What Counts as Fraud? An Empirical Study of Motions to Dismiss Under the Private Securities Litigation Reform Act*, 2 J. Empirical Legal Stud. 125, 128 (2005).

5. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?* 1 J. Empirical Legal Stud. 591, 604 (2004) (asserting that reliance on published cases alone results in a distorted assessment of case activity); Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 Wis. L. Rev. 107, 130 (reporting differences in published and unpublished orders granting summary judgment motions). A preliminary assessment found some evidence that orders granting motions to dismiss may be overrepresented in orders appearing in the Westlaw database. *Infra* note 47.

6. *See, e.g.*, Gonzalez v. Kay, 577 F.3d 600 (5th Cir. 2009) (reversing dismissal of claimed violation of the Fair Debt Collection Practices Act), *cert. denied*, 130 S. Ct. 1505 (2010); Siracusano v. Matrixx Initiatives, Inc., 585 F.3d 1167 (9th Cir. 2009) (reversing dismissal of complaint alleging violation of federal security laws), *aff'd*, ___ S. Ct. ___, No. 09-1156, 2011 WL 977060,

body of case law that requires district courts to be cautious and context-specific in applying *Twombly* and *Iqbal*.[7] Both recent Supreme Court decisions[8] and emerging appellate case law may reassure those concerned about the impact of *Twombly* and *Iqbal*.

at *12 (March 22, 2011); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585 (8th Cir. 2009) (reversing dismissal of claim that defendants violated fiduciary duties imposed by the Employee Retirement Income Security Act (ERISA)); Sanchez v. Pereira-Castillo, 590 F.3d 31 (1st Cir. 2009) (reversing the dismissal of the Fourth Amendment claims by a prisoner against two correctional officers and a doctor); Swanson v. Citibank, N.A., 614 F.3d 400 (7th Cir. 2010) (reversing in part, finding that plaintiff stated a claim for racial discrimination); DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104 (2d Cir. 2010) (reversing in part, finding that plaintiff stated a claim for breach of contract and defamation); Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention, 623 F.3d 1371 (11th Cir. 2010) (reversing dismissal of claims under the Privacy Act); West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85 (3d Cir. 2010) (reversing dismissal of antitrust claims); Gee v. Pacheco, 627 F.3d 1178 (10th Cir. 2010) (reversing dismissal of pro se prisoner's claims of violations under 42 U.S.C. § 1983). These cases and others are summarized in Memorandum from Andrea Kuperman to Civil Rules Comm. and Standing Rules Comm., Review of Case Law Applying Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal (December 15, 2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_121510.pdf (last visited February 25, 2011).

7. *See Kuperman*, *supra* note 6.

8. *See* Skinner v. Switzer, ___ S. Ct. ___, No. 09-9000, 2011 WL 767703, at *6 (March 7, 2011) ("Because this case was resolved on a motion to dismiss for failure to state a claim, the question below was 'not whether [Skinner] will ultimately prevail' on his procedural due process claim, but whether his complaint was sufficient to cross the federal court's threshold, see Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). Skinner's complaint is not a model of the careful drafter's art, but under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory. Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." (alteration in original) (internal citations omitted)); *see also* Matrixx Initiatives, Inc. v. Siracusano, ___ S. Ct. ___, No. 09-1156, 2011 WL 977060, at *12 (March 22, 2011) (unanimously affirming the circuit court's reversal of dismissal at the pleadings stage of a securities fraud class action).

II. Methodology

This study examined motion activity in 2006 and 2010. Using these periods allows an assessment that neither anticipates the decision in *Bell Atlantic Corp. v. Twombly* nor responds to the decision in *Ashcroft v. Iqbal* in the absence of appellate court guidance. This study also assessed changes in orders using records of the federal district courts rather than opinions published in computerized legal reference systems. We used the courts' CM/ECF codes indicating the filing of motions to dismiss and related orders to identify electronic documents with relevant motions and orders that were in PDF format and were linked to the civil case docket sheets. We then translated these documents into text format and searched electronically for terms that identified Rule 12(b)(6) motions and orders that respond to the merits of such motions.[9] This procedure is intended to be equivalent to identifying motions and orders through docket sheet entries and then reviewing documents linked to the docket entries. It provides a more complete assessment of motion activity than reliance on computerized legal reference systems.

We selected the 23 federal district courts to be included in the study by identifying the 2 districts in each of the 11 circuits with the largest number of civil cases filed in 2009. We also included the U.S. District Court for the District of Columbia. On occasion we were unable to obtain access to some of the courts' codes necessary to identify all of the relevant motions. In such cases, we chose the court in the circuit with the next greatest number of civil filings. These 23 district courts account for 51% of all federal civil cases filed during this period.

Two data sets were developed using these methods. To assess changes in filing patterns, we identified those cases with motions to dismiss for failure to state a claim filed in the first 90 days from among all civil cases filed in the selected districts from October 2005 through June 2006, and October 2009 through June 2010. To assess the changes in the outcomes of motions to dismiss for failure to state a claim, we identified orders responding to motions decided in January through June of 2006 and 2010. We coded these orders to identify the nature of the parties, whether the motion responded to an amended complaint, the presence of other Rule 12 motions, and judicial action taken in response to the motion. We indicated whether a motion was denied, was granted as to all relief requested by the motion, or was granted as to some but not all of the relief requested by the motion. These last two categories were often combined in the analyses and we simply noted that the motion was granted. In those instances in which the court granted at least some of the relief requested by the motion, we also coded whether the plaintiff was allowed to amend the complaint, and whether the motion eliminated only some claims or all claims of one or more plaintiffs.

9. We performed text searches using the following terms: "facts sufficient"; "sufficient facts"; "plausible claim"; "fails to state a claim"; "failed to state a claim"; and "failing to state a claim". We also searched for the phrase "12(b)(6)" with and without spaces separating the three elements of the phrase.

We excluded from these analyses all prisoner cases and cases with pro se parties.[10] We also excluded motions responding to counterclaims and affirmative defenses from the analysis of judicial actions on motions. The methodology and coding standards used in this study are described in greater detail in Appendices B and C.

10. We excluded prisoner cases because of the distinctive characteristics and procedural requirements of such litigation, and because they were concentrated in only 4 of the 23 districts included in this study. We also excluded pro se cases, which are governed by standards other than *Twombly* and *Iqbal*. Pro se pleadings are to be liberally construed, "however inartfully pleaded." Hughes v. Rowe, 449 U.S. 5, 9 (1980). The Supreme Court reaffirmed this standard soon after the *Twombly* decision. *See* Erickson v. Pardus, 551 U.S. 89 (2007). We were also concerned that our method for identifying motions to dismiss for failure to state a claim based on text searches would miss motions saved as static images in PDF format, which we suspect may be more likely to appear in prisoner and pro se filings. *See infra* note 46.

III. Results

Our assessment of the effect of *Twombly* and *Iqbal* on the filing and outcome of motions to dismiss was complicated by many changes that affected civil litigation between 2006 and 2010 in addition to the Supreme Court decisions. In 2008, the economy experienced a marked downturn that affected the housing market in particular. This change, along with many others, resulted in a shift in the case mix over this period. There was a general increase in cases challenging mortgages and other forms of financial debt instruments. Individual courts also experienced changes in filing patterns: most courts showed an overall increase in case filings. The courts in this study vary in size and contribute differently to the overall differences in activity from 2006 to 2010. We also found that the orders decided after *Iqbal* were different in nature from the orders decided before *Twombly*. Multiple motions to dismiss were resolved in 20% of the 2010 orders, down from 26% of the 2006 orders.[11] Previously amended complaints were considered in 48% of the 2010 motions, up from 38% of the 2006 orders.[12]

11. The resolution of multiple motions to dismiss for failure to state a claim by a single order is difficult to interpret, since the motions themselves are highly variable. One motion may be filed by multiple defendants and directed at multiple claims by one or more plaintiffs. Multiple motions may be filed by a single defendant, or multiple defendants may file separate motions attacking the same claim. For these reasons, we placed little weight on the drop in orders resolving multiple motions in 2010, and coded all motions resolved by a single order as though they were a single motion.

12. These differences achieved conventional levels of statistical significance ($p \leq 0.05$). Plaintiffs are likely to amend a complaint soon after a substantive change in pleading standards. Courts may be more likely to dismiss without leave to amend when a complaint has been amended to take new standards into account. Both before *Twombly* and after *Iqbal*, the number of times a plaintiff has amended the complaint is a factor a court considers in deciding whether to dismiss with prejudice. *See In re* Vantive Corp. Sec. Litig., 283 F.3d 1079, 1098 (9th Cir. 2002) ("In this case, the plaintiffs had three opportunities to plead their best possible case. It was therefore not unreasonable for the district court to conclude that it would be pointless to give the plaintiffs yet another chance to amend."), *abrogation on other grounds recognized by* South Ferry LP, No. 2 v. Killinger, 542 F.3d 776, 784 (9th Cir. 2008); Chudnovsky v. Leviton Mfg. Co., 158 F. App'x 312, 314 (2d Cir. 2005) ("Chudnovsky already has had one opportunity to amend his complaint. Moreover, in his motion for leave to amend below, Chudnovsky did not indicate that he could allege additional facts that would cure the deficiencies in his already-amended complaint. Therefore the complaint should be dismissed with prejudice."); Prasad v. City of New York, 370 F. App'x 163, 165 (2d Cir. 2010) (finding that the district court acted within its discretion in denying leave to amend after the plaintiffs had already amended once); Mann v. Brenner, 375 F. App'x 232, 240 n.9 (3d Cir. 2010) ("Mann suggests that the District Court should have granted him leave to amend his complaint. Because Mann was permitted to do so twice before the present motions to dismiss were filed, we think the District Court was well within its discretion in finding that allowing Mann a fourth bite at the apple would be futile."); Atkins v. City of Chicago, 631 F.3d 823, 832 (7th Cir. 2011) ("The plaintiff's lawyer has had four bites at the apple. Enough is enough."); Destfino v. Reiswig, 630 F.3d 952, 958–59 (9th Cir. 2011) ("Plaintiffs had three bites at the apple, and the court acted well within its discretion in disallowing a fourth."). In addition, a court's action on a motion responding to an unamended complaint soon after a substantive change in pleading standards may not provide a reliable indication of how courts will respond in the future. For these reasons, our statistical models control for the presence of an amended complaint.

These factors can affect the filing and resolution of motions to dismiss for reasons that are unrelated to the Supreme Court decisions themselves. To assess the effects of the Supreme Court decisions apart from these other factors, we developed a series of statistical models, presented in Appendix A, that attempt to control for these unrelated factors and identify those effects that may properly be attributed to reactions to the Supreme Court decisions. In this section we first present the straightforward comparisons of motion practice in 2006 and 2010. These comparisons reflect not only the effects of the Supreme Court decisions, but also changes in types of cases and the presence of an amended complaint. We then present the adjusted estimates of changes over time after controlling for factors unrelated to the Supreme Court decisions, as indicated by the statistical models in Appendix A. These later estimates offer the more accurate assessment of the federal district courts' reactions to the Supreme Court decisions.

A. Filing Rates for Motions to Dismiss for Failure to State a Claim

Motions to dismiss for failure to state a claim were more common in cases filed in late 2009 and 2010, after *Iqbal*, than in cases filed in late 2005 and 2006, before *Twombly*.[13] We identified motions filed within the first 90 days in cases either filed originally in federal court or removed from state court during the two nine-month periods ending in June 2006 and June 2010.[14] As indicated in Table 1, motions to dismiss for failure to state a claim were filed in 6.2% of all cases in 2009–2010, an increase of 2.2 percentage points over the filing rate for such motions in cases in 2005–2006.[15] This increase is especially notable in cases challenging financial instruments, which increased by more than five percentage points.[16]

In civil rights cases other than employment discrimination cases, the likelihood of a motion to dismiss increased 0.4% from 2005–2006 to 2009–2010. This increase did not reach conventional levels of statistical significance. Three-fourths of the cases in the civil rights category were designated on the cover sheet as

13. Our unit of analysis for this study of filing rates is an individual case. The figures resulting from our analysis understate the overall likelihood of motions to dismiss, since multiple motions may have been filed during this period and motions may be filed after the 90-day cutoff used in this study, often in response to amended complaints. We were limited to considering those motions filed within the first 90 days by our data collection timetable, which ended 90 days after the last case was filed on June 30, 2010. No meaningful differences were found in the length of time that elapsed from the filing of the case to filing of the motion to dismiss within the first 90 days; in 2009–2010, such motions were filed on average 40 days after the cases were filed or removed from state court, 2 days less than in 2005–2006.

14. This restriction excluded cases remanded from the courts of appeals, cases reopened or transferred from another district, and cases consolidated within the district as part of a multidistrict litigation proceeding. This restriction applied only to the study of motion filing rates.

15. Unless otherwise noted, the effects mentioned in this discussion are statistically significant at less than the 0.05 level using a two-tailed Goodman and Kruskal *tau*-b directional test with judicial action taken on the motion or motions as the dependent variable.

16. As indicated in Table 1, total case filings in these districts increased by 3,482 cases in 2010, and filings of financial instrument cases alone increased by 3,266 cases. Filings of contract cases also increased during this period, while filings of torts cases, civil rights cases, and "other" cases decreased. Filings of employment discrimination cases remained about the same.

"Other Civil Rights." We know from past research that many of these cases are brought under 28 U.S.C. § 1983, alleging constitutional violations. This narrower category of "Other Civil Rights" cases showed a statistically significant increase in the likelihood that a motion to dismiss for failure to state a claim would be filed, up from 10.5% of cases in 2006 to 12.4% of cases in 2010.[17]

The "Other" category includes the greatest number of cases. It combines a wide range of cases, typically based on statutory causes of action. Employee Retirement Income Security Act (ERISA) cases constitute 20% of the cases in this category. Other common types of cases include Social Security cases (14%), Fair Labor Standards Act cases (8%), trademark cases (6%), and copyright cases (6%). The remaining cases are scattered across a wide range of statutory actions.[18]

Table 1: Percentage of Civil Cases with a Motion to Dismiss for Failure to State a Claim Filed Within 90 Days of the Filing of the Case (Excluding Prisoner and Pro Se Cases)

	2005–2006 Percentage (and Number) of Cases	2009–2010 Percentage (and Number) of Cases	Difference
Total	4.0% (49,443)	6.2% (52,925)	+2.2%*
Contract	5.6% (8,651)	8.3% (9,139)	+2.7%*
Torts	2.3% (10,604)	4.1% (9,947)	+1.8%*
Employment Discrimination	6.9% (3,795)	9.0% (3,871)	+2.1%*
Civil Rights	9.7% (4,214)	10.1% (4,976)	+0.4%
Financial Instrument	4.3% (1,524)	9.6% (4,790)	+5.3%*
Other	2.5% (20,657)	4.1% (20,202)	+1.6%*

*$p < 0.01$.

Table 2 presents the adjusted estimates of changes in filing rates. The multivariate statistical models presented in Appendix A confirm an increase in the rate at which Rule 12(b)(6) motions were filed while controlling for overall differences

17. This difference just meets the conventional level of statistical significance ($p \leq 0.05$). Other types of cases in the civil rights category included cases brought under the Americans with Disabilities Act designated as "other" (14%) or designated as "employment" (7%). The remaining cases raised civil rights issues concerning accommodations (3.5%), voting (0.6%), and welfare (0.2%). None of these separate types of civil rights cases showed a statistically significant increase in filing rate from 2006 to 2010.

18. Another 14% of these cases were designated as "Other Statutory Action." No other specific case type constituted more than 5% of this category. A complete listing of case types that this category comprises is presented in Appendix B.

in filing rates across federal districts and across types of cases.[19] These adjusted estimates indicate that the probability of a motion to dismiss being filed in an individual case increased from a baseline of 2.9% of the cases in 2006 to 5.8% of the cases in 2010.[20] The table also shows a wide range of probabilities across types of cases.

Table 2: Adjusted Estimates of the Likelihood that a Motion to Dismiss for Failure to State a Claim Will Be Filed Within the First 90 Days

Type of Case	2006	2010
Torts	0.029	0.058
Contract	0.071	0.101
Civil Rights	0.117	0.127
Other	0.029[a]	0.046
Financial Instrument	0.053	0.104
Employment Discrimination	0.077	0.101

a. Estimated as the base rate in the absence of a significant effect for type of case.

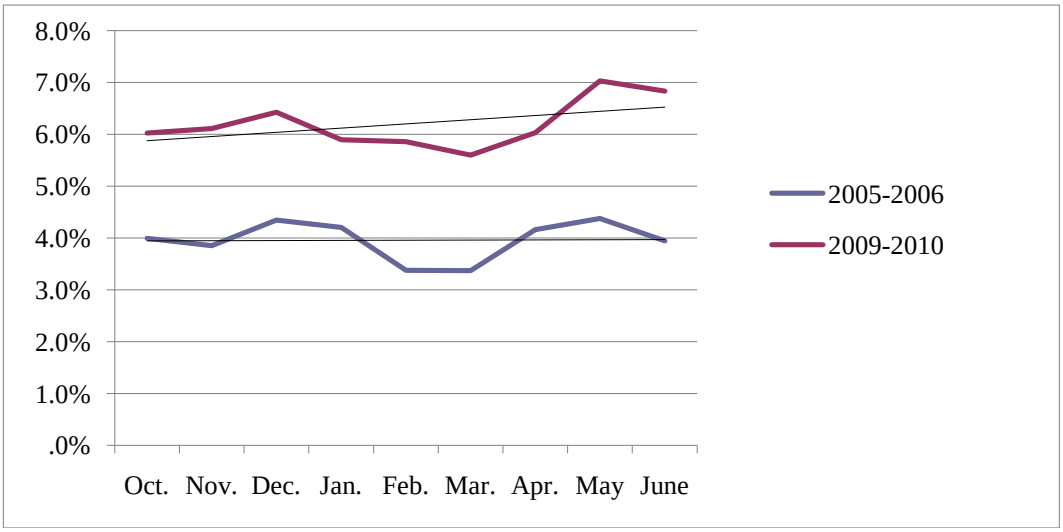
Confirmation of the increase in the rate at which motions were filed is also evident in the monthly trend in the percentage of cases with such motions. As indicated in Figure 1, the percentage of cases with one or more motions to dismiss for failure to state a claim was higher in each month of 2009–2010 than in each month of 2005–2006. Moreover, in 2009–2010 there appeared to be a modest increase over time in the percentage of cases with such motions. The trend line for the percentage of cases in 2005–2006 with motions to dismiss was flat over time at just under 4%.[21]

19. The results in Table 2 are based on the statistical model presented in Table A-1 in Appendix A. This model shows considerable variations in filing rates across federal district courts, controlling for year and type of case.

20. The baseline serves as an initial reference point for assessing changes over time and across types of cases in these statistical models. The baseline is distinct from the percentages listed in Table 1. This particular model uses as a baseline the likelihood that a motion is filed in a tort case in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006 (i.e., 2.9%). We chose torts cases for the baseline because of the low likelihood of a motion to dismiss. We chose to combine these three districts because they had few motions to dismiss. We chose 2006 so that increases over time would appear as a positive effect. The baseline rate was substituted for effect estimates where the model indicated that the case type did not depart from that rate. The adjusted estimate for torts cases in Table 2, which takes district and the presence of an amended complaint into account, shows an increase from 2.9% in 2006 to 5.8% in 2010. The effect of the statistical adjustment can be seen by comparing these figures with the unadjusted estimate for torts cases in Table 1, which shows an increase from 4.0% in 2006 to 6.2% in 2010.

21. These filing rates are lower than rates indicated by previous studies of federal courts that considered motions to dismiss filed after the 90-day period used in this study. *See* Paul Connolly & Patricia Lombard, Judicial Controls and the Civil Litigative Process: Motions (Federal Judicial Center 1980) (finding that around 15% of civil cases terminated in 1975 included motions to dis-

Figure 1. Trend in Cases Filed with Motions to Dismiss Filed Within 90 Days



Motions to dismiss were more likely to be filed in cases removed from state court to federal court. As indicated in Table 3, motions to dismiss were more common in cases removed from state courts than in cases originally filed in federal courts both before *Twombly* and after *Iqbal*. This difference was greater in cases filed in 2009–2010 than in cases filed in 2005–2006. But a supplemental analysis of removal rates from January 2005 through December 2009 found no increase in rates of removal to federal courts in states with notice pleading standards in comparison with rates of removal in states using fact pleading.[22]

Table 3: Cases with Motions to Dismiss for Failure to State a Claim in Original and Removed Filings

	2005–2006	2009–2010	Difference
Original Filing	3.4% (41,698)	5.0% (44,298)	+1.6%*
Removed Filing	7.2% (7,745)	12.4% (8,627)	+5.2%*

* $p < 0.01$.

miss for failure to state a claim); Thomas E. Willging, Use of Rule 12(b)(6) in Two Federal District Courts 8 (Federal Judicial Center 1989) (finding that around 13% of the cases terminated in two federal districts courts included motions to dismiss for failure to state a claim).

22. We have no way of determining if cases that would have been filed in the federal courts before *Twombly* have been diverted to state courts because of concern over pleading standards. However, a supplemental study failed to find evidence of an increased rate of removal of cases to federal court after *Twombly* and *Iqbal* from states with notice pleading standards, compared with the rate of removal from states with fact pleading standards. Memorandum from Jill Curry and Matthew Ward to James Eaglin, Comparing Rates by States: Are *Twombly* and *Iqbal* Affecting Where Plaintiffs File? (February 14, 2011) (on file with the authors).

Finally, we note the distinctive nature and marked changes over time in cases challenging financial instruments. The "financial instrument" category of cases combines nature-of-suit codes indicating case categories for negotiable instruments, foreclosure, truth in lending, consumer credit, and "other real property." The great majority of these cases involve claims by individuals suing lenders and/or loan servicing companies over the terms of either an initial residential mortgage or a refinance of an existing residential mortgage. These cases include federal claims under statutes such as the Truth in Lending Act, the Real Estate Settlement Procedures Act, and the Fair Debt Collection Practices Act. These cases typically also raise a number of state law claims, often including fraud, negligence, unfair business practices, breach of fiduciary duty, and wrongful foreclosure. Plaintiffs generally seek rescission of the mortgage or loan, damages, and declaratory or injunctive relief.

Cases challenging financial instruments increased by 214%, from 1,524 cases in 2006 to 4,790 cases in 2010, apparently due in large part to the economic downturn in the housing market.[23] Such cases were especially likely to be removed from state court, increasing from 12% of all such cases in 2006 to 16% in 2010. Those cases that were removed from state court showed an increase in the percentage of cases with motions to dismiss, rising from 9.1% of such cases in 2005–2006 to 27.7% of such cases in 2009–2010, the largest increase in filing rates detected.

B. Outcome of Motions to Dismiss for Failure to State a Claim

1. Motions Granted with Leave to Amend

We assessed the outcome of motions to dismiss for failure to state a claim by identifying and coding court orders responding to the merits of such motions filed in January through June of 2006 and 2010 in the same 23 federal district courts.[24] We recorded whether an order denied the motion to dismiss in its entirety, granted all of the relief requested by the motion, or granted some but not all relief requested by the motion.[25] A single order resolving motions to dismiss filed by dif-

23. This downturn was especially sharp in some of the districts included in this study, such as districts in California, Florida, Georgia, Illinois, and Michigan, which are among the top 10 states with the highest number of residential mortgage foreclosures. *See* http://www.statehealthfacts.org/comparetable.jsp?cat=1&ind=649 (last visited February 22, 2010).

24. Ideally, the database of motions that was discussed in the previous section would have been followed over time through the motions' resolution. Time constraints did not permit an adequate opportunity to obtain the orders resolving those motions. This second database of orders was developed instead.

25. The unit of analysis for our study of outcomes of motions is a written judicial opinion or order disposing of the merits of at least one motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Of course, a single motion to dismiss may be directed at multiple claims, and an order may resolve multiple motions. Coding conventions for multiple motions and motions in which only some of the relief was granted are discussed in Appendix C. In addition to excluding pro se cases and prisoner cases, for this analysis we excluded motions to dismiss for failure to state a claim filed in response to counterclaims and affirmative defenses. We implemented this limitation by excluding the 70 orders responding to motions filed by a party other than a defendant or directed toward claims raised by a party other than the plaintiff. Scholars are

ferent parties was coded as resolving a single motion. If the court allowed amendment of the complaint with regard to at least one claim that was dismissed, we coded the motion as granted with leave to amend.

As indicated in Table 4, it first appears that motions to dismiss for failure to state a claim were more likely to grant all or some of the relief requested in 2010 than in 2006. In 2010, 75% of the orders responding to such motions granted all or some of the relief requested by the motion, compared with almost 66% of the orders in 2006.[26] But closer inspection reveals that the increase extends only to motions granted with leave to amend. No increase was found in motions granted without leave to amend.

As indicated above, it would be misleading to attribute this overall change only to the Supreme Court decisions. The rate at which motions were granted differs by type of case, and the mix of types of cases changed from 2006 to 2010. For example, cases challenging financial instruments were far more common in 2010, and motions to dismiss in such cases were more likely to be granted. The rate at which motions were granted also varied by district court, and some of the districts with the highest grant rates were also the districts that showed the greatest increase in the number of orders. Orders in 2010 were also more likely to respond to motions directed toward amended complaints. Courts are generally more willing to grant motions to dismiss after a plaintiff has already amended the complaint. All of these factors may contribute to differences over time that are unrelated to the Supreme Court decisions.

An important reason for caution in interpreting these differences is that in 2010, orders granting motions to dismiss were far more likely to allow the plaintiff to amend the complaint, leaving open the possibility that the plaintiff might cure the defect in the complaint and the case might proceed to discovery. In 2010, 35% of the orders granted motions to dismiss with leave to amend at least some of the claims in the complaint, compared with 21% of the orders in 2006.[27] The percentage of orders granting the motion without an opportunity to amend the complaint declined in 2010 in all types of cases other than those challenging financial instruments. This shift toward an increase in grants with an opportunity to amend and a decrease in grants with no opportunity to amend suggests that these two outcomes should be assessed separately.

only beginning to consider the effect of *Twombly* and *Iqbal* in such circumstances. *See, e.g.*, Melanie A. Goff & Richard A. Bales, *A "Plausible" Defense: Applying* Twombly *and* Iqbal *to Affirmative Defenses*, 34 Am. J. Trial Advoc. ___ (forthcoming Spring 2011); Joseph A. Seiner, Twombly, Iqbal, *and the Affirmative Defense*, available at http://ssrn. com/abstract=1721062 (last visited February 8, 2011).

26. This increase was due primarily to orders granting all relief sought by the motion, which increased from 36% of the orders in 2006 to 46% of the orders in 2010. Orders granting motions with regard to only part of the relief sought remained stable over time, constituting 30% of the orders in 2006 and 29% of the orders in 2010. Differences in the rates at which motions were denied were not entered into the table, but are the inverse of the rates at which motions were granted.

27. The increase in opportunity to amend complaints was almost entirely in orders granting all the relief requested by the motion (i.e., 19% in 2010 vs. 9% in 2006). This increase is especially notable, since, as indicated above, in 2010 the orders were more likely to respond to previously amended complaints.

Table 4: Outcome of Motions to Dismiss for Failure to State a Claim

	Action on Motion	2006	No. of Orders	2010	No. of Orders	Difference
Total	Denied	34.1%	(239)	25.0%	(305)	
	Granted All or Some Relief	65.9%	(461)	75.0%	(916)	+9.1%*
	With Amendment	20.9%	(146)	35.3%	(431)	+14.4%†
	Without Amendment	45.0%	(315)	39.7%	(485)	-5.3%
Contract	Denied	35.1%	(65)	33.6%	(81)	
	Granted All or Some Relief	64.9%	(120)	66.4%	(160)	+1.5%
	With Amendment	21.1%	(39)	30.3%	(73)	+9.2%†
	Without Amendment	43.8%	(81)	36.1%	(87)	-7.7%
Torts	Denied	30.0%	(21)	28.2%	(31)	
	Granted All or Some Relief	70.0%	(49)	71.8%	(79)	+1.8%
	With Amendment	21.4%	(15)	29.1%	(32)	+7.7%
	Without Amendment	48.6%	(34)	42.7%	(47)	-5.9%
Civil Rights	Denied	27.9%	(51)	22.0%	(51)	
	Granted All or Some Relief	70.3%	(121)	78.0%	(181)	+7.7%
	With Amendment	21.1%	(38)	32.8%	(76)	+11.7%
	Without Amendment	48.3%	(83)	45.3%	(105)	-3.0%
Employment Discrimination	Denied	32.6%	(31)	29.4%	(35)	
	Granted All or Some Relief	67.4%	(64)	70.6%	(84)	+3.2%
	With Amendment	17.9%	(17)	23.5%	(28)	+5.6%
	Without Amendment	49.5%	(47)	47.1%	(56)	-2.4%
Financial Instruments	Denied	52.9%	(9)	8.1%	(19)	
	Granted All or Some Relief	47.1%	(8)	91.9%	(216)	+44.8%*
	With Amendment	24.4%	(5)	54.9%	(129)	+30.5%
	Without Amendment	17.6%	(3)	37.0%	(87)	+19.4%
Other	Denied	38.5%	(62)	31.0%	(88)	
	Granted All or Some Relief	61.5%	(99)	69.0%	(196)	+7.5%
	With Amendment	19.9%	(32)	32.7%	(93)	+12.8%†
	Without Amendment	41.6%	(67)	36.3%	(103)	-5.3%

* $p \leq 0.01$, relative to the likelihood that the motion will be denied.
† $p \leq 0.05$, relative to the likelihood that the motion will be granted without leave to amend.

Motions granted with leave to amend leave open the questions whether the complaints were, in fact, amended; whether there were subsequent motions to dismiss; whether action was taken in response to the subsequent motions; and the extent to which these cases proceeded to discovery. We are presently undertaking a supplemental study to answer these questions.

Table 5 presents statistical estimates for the probability that Rule 12(b)(6) motions to dismiss would be granted in an individual case while controlling for factors unrelated to the Supreme Court decisions.[28] The baseline indicates that around 56% of the motions would be granted without leave to amend the complaint in torts cases in 2006 in the baseline districts.[29] The table lists only those districts in which the rate at which motions were granted, with or without the opportunity to amend the complaint, show a statistically significant difference from the baseline districts, as indicated in Table A-2 in Appendix A. Marked differences in grant rates and the opportunity to amend the complaint were found across the individual courts. Such motions were more likely to be granted with leave to amend in the Eastern and Northern Districts of California, and granted without leave to amend in the Eastern and Southern Districts of New York.[30]

Table 5: Estimated Values for Statistically Significant Variables in Multinomial Model Describing Whether a Motion Would Be Granted With or Without an Opportunity to Amend the Complaint

Variable	Deny	Grant and Amend	Grant and No Amend
Baseline	**0.298**	**0.145**	**0.557**
Districts			
Eastern District of California	0.149	0.613	0.238
Northern District of California	0.158	0.614	0.229
Middle District of Florida	0.358	0.449	0.193
Northern District of Illinois	0.409	0.266	0.324
Eastern District of New York	0.211	0.289	0.500
Southern District of New York	0.183	0.280	0.537
Eastern District of Pennsylvania	0.404	0.227	0.369
Northern District of Texas	0.461	0.254	0.285
Presence of Amended Complaint	0.244	0.115	0.641
Financial Instrument Cases in 2010	0.040	0.068	0.892

28. As indicated in Appendix A, we used multinomial logit and probit models to assess changes over time in the likelihood that motions to dismiss would be denied, granted with leave to amend, or granted without leave to amend. These models also allowed us to control for the differences across individual courts, for differences across types of cases, and for the presence of an amended complaint. Using the techniques described in the appendix, we then computed the adjusted estimates of effects presented in the table.

29. The baseline for the model is the outcome of an order deciding one or more Rule 12(b)(6) motions to dismiss filed in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006 in a tort case, responding to an unamended complaint.

30. The Eastern and Southern Districts of New York also had very low filing rates for motions to dismiss. A number of judges in these districts have procedures calling for premotion conferences at which the judges discuss with attorneys whether a motion will be appropriate.

Some of the significant differences over time indicated in Table 4 can be accounted for by controlling for differences across districts and the presence of an amended complaint. As shown in the last line of Table 5, we found that only in cases challenging financial instruments did the adjusted rate at which motions were granted without leave to amend increase in 2010. In such cases, the adjusted estimate indicates 90% of the motions were granted with regard to at least some of the relief requested, controlling for the effects of the other variables. We found no other significant increase over time in other types of cases in the adjusted rate at which motions were granted.[31]

The fact that cases with motions to dismiss granted with leave to amend remain unresolved is also reflected in the absence of a statistically significant increase in 2010 in the rate at which such cases terminated. We examined the percentage of cases that terminated after 30 days, 60 days, or 90 days following an order granting all or some of the relief requested by the motion to dismiss. Such orders may not address all of the claims in the litigation. Nevertheless, if the district courts were interpreting *Twombly* and *Iqbal* to significantly foreclose the opportunity for further litigation in the case, we would expect to see an increase in cases terminated soon after the order. However, as indicated in Table 6, we found no statistically significant increase in 2010 in the percentage of cases terminated in 30 days, 60 days, or 90 days after the order granting the motion. Nor did we find differences in termination rates across individual types of cases.

Table 6: Percentage of Cases Terminated 30, 60, and 90 Days After an Order Granting All or Some of the Relief Requested by a Motion to Dismiss

Percentage of Cases Terminated After:	**2006**	**2010**
30 days	26.6%	27.5%
60 days	30.6%	33.1%
90 days	34.2%	37.7%
Total orders	448 orders	897 orders

31. We also found that the presence of an amended complaint increased the likelihood that a motion would be granted without leave to amend. The details of the analysis are presented in Appendix A. Such an effect existed both before *Twombly* and after *Iqbal. See supra* note 12.

2. Motions Granted on All Claims Asserted by One or More Plaintiffs

Although we found no broad increase over time in the likelihood that a motion to dismiss would be granted without leave to amend, we also explored the possibility that, when granted, motions to dismiss may be more likely to exclude all claims by one or more plaintiffs, even if the litigation continues with claims by other plaintiffs.[32] As indicated in Table 7, in 2010, approximately 31% of the orders granting motions to dismiss appeared to eliminate all claims by one or more plaintiffs from the litigation, compared with approximately 23% of such orders in 2006.[33] The rate at which the grant of motions to dismiss eliminated some claims, but not all, by one or more plaintiffs increased by only one percentage point during this period. Of course, these figures include the effects of factors unrelated to the Supreme Court cases, such as differences across district courts, differences across types of cases, and differences in the presence of an amended complaint.

32. There was also a greater opportunity in 2010 to amend the complaint after the motion to dismiss was granted as to all claims by one or more plaintiffs (22% in 2006; 46% in 2010). We initially attempted to determine if the grant of a motion to dismiss had the effect of removing a defendant from the litigation, thereby limiting the opportunity for further discovery of that defendant under the standards of Rule 26. However, we had difficulty developing a reliable coding practice, especially in cases with multiple plaintiffs and defendants. Instead, we decided to focus on the effect of the motion on the ability of plaintiffs to continue in the litigation, which proved easier to study.

33. These figures include the effects of orders granted both with and without leave to amend the complaint. If the financial instrument cases are removed from the analysis, orders granting motions to dismiss that eliminate all claims by one or more plaintiffs increase to 28% in 2010. Unfortunately, we cannot determine what percentage of this increase is due to cases that involved only one plaintiff, thereby ending the case. Determining that a grant of a motion to dismiss for failure to state a claim excluded all claims by a plaintiff can be a difficult task. A plaintiff may have raised claims that were not challenged by the motion to dismiss and therefore not addressed by the order. Since our knowledge of the cases is limited to the single order that was included in the study, we must make a series of assumptions when determining that a grant of a motion to dismiss for failure to state a claim excludes all claims. Unless otherwise indicated in the order, we assumed that the motion to dismiss addressed all claims by a plaintiff, and that granting a motion as to all claims by a plaintiff would terminate the plaintiff's role in the litigation unless the plaintiff was permitted to amend the complaint. As a result, our analysis may overestimate the number of cases in which an order eliminates all claims by a plaintiff.

Table 7: Extent of Exclusion of Plaintiff Claims

	Action on Motion	2006	No. of Orders	2010	No. of Orders	Difference
Total	Denied	34.1%	(239)	25.0%	(305)	
	Granted All or Some Relief	65.9%	(461)	75.0%	(916)	+9.2%*
	Some Claims	43.3%	(303)	44.5%	(543)	+1.2%
	All Claims	22.6%	(158)	30.5%	(373)	+8.0%†
Contract	Denied	35.1%	(65)	33.6%	(81)	
	Granted All or Some Relief	64.9%	(120)	66.4%	(160)	+1.5%
	Some Claims	44.3%	(82)	40.7%	(98)	-3.7%
	All Claims	20.5%	(38)	25.7%	(62)	+5.2%
Torts	Denied	30.0%	(21)	28.2%	(31)	
	Granted All or Some Relief	70.0%	(49)	71.8%	(79)	+1.8%
	Some Claims	50.0%	(35)	47.3%	(52)	-2.7%
	All Claims	20.0%	(14)	24.5%	(27)	+4.5%
Civil Rights	Denied	27.9%	(51)	22.0%	(51)	
	Granted All or Some Relief	70.3%	(121)	78.0%	(181)	+6.2%
	Some Claims	44.2%	(69)	46.4%	(111)	+2.2%
	All Claims	25.1%	(52)	29.1%	(70)	+4.0%
Employment Discrimination	Denied	32.6%	(31)	29.4%	(35)	
	Granted All or Some Relief	67.4%	(64)	70.6%	(84)	+3.2%
	Some Claims	51.6%	(49)	43.7%	(52)	-7.9%
	All Claims	15.8%	(15)	26.9%	(32)	+11.1%
Financial Instruments	Denied	52.9%	(9)	8.1%	(19)	
	Granted All or Some Relief	47.1%	(8)	91.9%	(216)	+44.9%*
	Some Claims	29.4%	(5)	48.5%	(114)	+19.1%
	All Claims	17.6%	(3)	43.4%	(102)	+25.8%
Other	Denied	38.5%	(62)	31.0%	(88)	
	Granted All or Some Relief	61.5%	(99)	69.0%	(196)	+7.5%
	Some Claims	39.1%	(63)	40.8%	(116)	+1.7%
	All Claims	22.4%	(36)	28.2%	(80)	+5.8%

* $p \leq 0.01$, relative to the likelihood that the motion will be denied.
† $p \leq 0.05$, relative to the likelihood that the motion will be granted without leave to amend.

Table 8 presents statistical estimates for the rates at which granted motions dismiss some claims or all claims by a plaintiff (with or without leave to amend), while controlling for factors unrelated to the Supreme Court decisions. As indicated in Appendix B, we again used a similar multinomial probit model to control for other factors while assessing differences in the likelihood that motions to dismiss would be denied, granted to eliminate one or more plaintiffs/respondents

from the litigation,[34] or granted to eliminate only some claims while leaving all of the plaintiffs to pursue the remaining claims.

After using the multinomial probit model to control for differences across districts, types of case, and the presence of an amended complaint, we found that in 2010, only orders responding to motions in cases challenging financial instruments were more likely to be granted, both with respect to all claims by at least one plaintiff and with respect to only some claims, all else being equal. No statistically significant increase in the likelihood that motions would be granted was found for other types of cases. These results are consistent with the results in Table 7. There are differences across federal districts: the Northern and Eastern Districts of California were more likely to grant motions with regard to some claims, and the Southern District of New York was more likely to grant motions with regard to all claims by at least one plaintiff. Finally, responding to an amended complaint increased the likelihood of granting a motion with respect to some claims only, relative to those motions not based on an amended complaint.

Table 8: Estimated Values for Statistically Significant Variables in Multinomial Model of Whether a Motion Would Be Granted with Regard to Some or All Claims by At Least One Plaintiff

Variable	Deny	Grant as to Some Claims	Grant as to All Claims by at Least One Plaintiff
Baseline	**0.289**	**0.400**	**0.311**
Districts			
Eastern District of Arkansas	0.435	0.439	0.126
Eastern District of California	0.162	0.539	0.299
Northern District of California	0.171	0.494	0.335
Middle District of Florida	0.377	0.409	0.214
Southern District of New York	0.178	0.329	0.493
Eastern District of Pennsylvania	0.404	0.420	0.175
District of South Carolina	0.489	0.351	0.160
Northern District of Texas	0.464	0.343	0.193
Presence of Amended Complaint	0.246	0.493	0.261
Financial Instrument Cases in 2010	0.052	0.496	0.451

34. Such orders indicated that all claims raised by one or more plaintiffs were dismissed. We interpret this as dismissing all claims by the plaintiffs, but it is possible that the plaintiffs raised other claims that were not the subject of the motion to dismiss.

IV. Discussion and Conclusion

Assessing changes in the outcomes of motions that are attributable to *Twombly* and *Iqbal* is complicated. A thorough assessment must consider those cases that do not appear in computerized legal reference systems, since such databases may underrepresent cases in which motions have been denied. It is also necessary to take into account increases in case filings and changes in types of cases, which may vary across the federal district courts. Civil case filings themselves increased in the 23 federal district courts examined in this study by 7% in the past four years; more motions will be reported even without changes in motion practice. Changes in the case mix affect the types, numbers, and likely outcomes of motions to dismiss.

The data show a general increase in the rate at which motions to dismiss for failure to state a claim were filed in the first 90 days of the case. We found that motions were more likely to be filed across a wide range of case types, though the size of the increase depended on the type of case. We found the largest increase in filing rates of motions to dismiss in cases challenging financial instruments, such as mortgages and other loan documents. Such cases were rare in 2006, and this increase is most likely related to changes in the housing market and the increasing rate of foreclosure actions. We found no increase in filing rates over time in civil rights cases.

After controlling for identifiable effects unrelated to the Supreme Court decisions, such as differences in caseload across individual districts, we found a statistically significant increase in the rate at which motions to dismiss for failure to state a claim were granted only in cases challenging financial instruments. More specifically, we found an increase in this category of cases in motions to dismiss granted without leave to amend. We found no increase in the rate at which motions to dismiss were granted, with or without opportunity to amend, in other types of cases. We also found no increase in the rate at which motions to dismiss for failure to state a claim eliminated plaintiffs in other types of cases.

Again, the rise of cases challenging financial instruments and the increase in the rate at which motions were filed and granted in such cases appear to be due to changing economic conditions involving the housing market and are unrelated to the recent Supreme Court decisions. The prevalence of motions to dismiss in such cases and the high rate at which such motions are granted is often due to a failure to meet the pleading requirements established by federal statutes, not a failure to plead sufficient facts.[35] If such cases had existed in 2006, it is likely that such mo-

35. Courts in every circuit have dismissed homeowners' claims under the Truth in Lending Act (TILA), 15 U.S.C. § 1691 *et seq.*, and the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601, under Rule 12(b)(6) for various reasons unrelated to *Twombly* and *Iqbal*. *See, e.g.*, Jones v. ABN Amro Mortg. Grp., 606 F.3d 119, 125 (3d Cir. 2010) (affirming 12(b)(6) dismissal of a RESPA claim because the defendant was not subject to RESPA); Taggart v. Chase Bank USA, N.A., 375 F. App'x 266, 268–69 (3d Cir. 2010) (affirming dismissal of a TILA claim on *res judicata* grounds after a 12(b)(6) dismissal on limitations grounds in a previous case filed by the plaintiff); Heil v. Wells Fargo Bank, N.A., 298 F. App'x 703, 705–07 (10th Cir. 2008) (affirming dismissal of TILA claims on limitations grounds); Frazile v. EMC Mortg. Corp., 382 F. App'x

tions would have been filed and granted in such cases at rates similar to those in 2010.

We also found that motions were more likely to be granted without leave to amend when they were directed at an amended complaint. This was true both before and after the Supreme Court decisions. This finding is unsurprising; courts take earlier amendments into account in deciding motions to dismiss. Motions directed to amended complaints were more common in 2010 than in 2006.

Even if the rate at which motions are granted remains unchanged over time, the total number of cases with motions granted may still increase. The 7% increase in case filings combined with the increase in the rate at which motions are filed in 2010 may result in more cases in recent years with motions granted, even though the rate at which motions are granted has remained the same. Such cases are especially likely to find their way into computerized legal reference systems and published reports, resulting in the impression that the rate at which motions are granted is increasing. But these increases can be largely a result of increases in filing rates for cases and motions, and not due to an increase in the rate at which courts are granting motions after *Twombly* and *Iqbal*.

This study has several limitations worth noting. Most important, our study did not examine the substantive law that formed the basis of the court orders resolving the motions. This study must be interpreted in the context of ongoing development of the case law in both the Supreme Court and the lower courts.[36]

This study did not take into account changes in pleading practice. Survey data indicate that plaintiffs may be including more factual allegations in their com-

833, 838–39 (11th Cir. 2010) (approving 12(b)(6) dismissal of some, but not all, TILA claims on limitations grounds); Wienke v. Indymac Bank FSB, No. CV 10-4082, 2011 WL 871749, at *7–8 (N.D. Cal. Mar. 14, 2011); Franz v. BAC Home Loans Servicing, LP, Civ. No. 10-2025, 2011 WL 846835, at *2–4 (D. Minn. Mar. 8, 2011) (dismissing under 12(b)(6) because the RESPA defendant was not a "servicer" under the Act, because the finance charges complied with TILA, and because TILA does not allow offensive assertion of a recoupment claim); Gordon v. Home Lone Ctr., LLC, No. 10-10508, 2011 WL 795037, at *3 (E.D. Mich. Feb. 28, 2011); Koehler v. Wells Fargo Bank, No. 10-1903, 2011 WL 691583, at *2 (D. Md. Feb. 18, 2011) (dismissing TILA and RESPA claims on limitations grounds); Davis v. GMAC Mortg., LLC, No. H-11-09, 2011 WL 677359, at *3 (S.D. Tex. Feb. 16, 2011) (dismissing a TILA claim based on limitations); Obi v. Chase Home Fin., LLC, No. 10 C. 5747, 2011 WL 529481, at *3–4 (N.D. Ill. Feb. 8, 2011); Cebrun v. HSBC Bank USA, N.A., No. C10-5742BHS, 2011 WL 321992, at *2 (W.D. Wash. Feb. 2, 2011) (dismissing RESPA claim because the defendant was the trustee, not the servicer); Morris v. Bank of Am., No. C 09-02849 SBA, 2011 WL 250325, at *5 (N.D. Cal. Jan. 26, 2011) (dismissing RESPA claim because the allegations showed that the defendant timely responded to the plaintiff's qualified written letter); Mantz v. Wells Fargo Bank, N.A., Civ. A. No. 09-12010-JLT, 2011 WL 196915, at *3–4 (D. Mass. Jan. 19, 2011); Wheatley v. Reconstruct Co. NA, No. 3:10CV00242 JLH, 2010 WL 4916372, at *4 (E.D. Ark. Nov. 23, 2010) (dismissing TILA claims on limitations grounds and dismissing a RESPA claim because the defendant was not subject to the Act); Hughes v. Abell, __ F. Supp. 2d __, 2010 WL 4630227, at *10–11 (D.D.C. 2010) (dismissing TILA claims on limitations grounds); Done v. HSBC Bank USA, No. 09-CV-4878 (JFB) (ARL), 2010 WL 3824142, at *1–2 & n.5 (E.D.N.Y. Sept. 23, 2010) (dismissing TILA and RESPA claims on limitations grounds).

36. *See* Kuperman, *supra* note 6, at 4.

plaints, at least in employment discrimination cases.[37] We examined motions only if they were filed within the first 90 days of a case, and we cannot determine if the increase in motions filed during this period would be sustained throughout the duration of the cases. We were not able to study certain case types. For example, our study found only 21 orders involving antitrust litigation, and we were not able to develop a statistical model that would test for changes in so few cases. Our study included motions that challenged claims for reasons other than the sufficiency of the factual pleadings, and a more focused study of these types of cases may reveal changes that our study failed to detect.

Finally, the prevalence of motions granted with leave to amend requires further study. Our follow-up on the outcome of cases in which the plaintiff had an opportunity to amend the complaint has just begun. This effort may provide a more precise assessment of the extent to which complaints that are amended are challenged by subsequent motions to dismiss, and the extent to which those motions are granted without leave to amend.

37. Emery G. Lee III & Thomas E. Willging, Attorney Satisfaction with the Federal Rules of Civil Procedure: Report to the Judicial Conference Advisory Committee on Civil Rules 12 (Federal Judicial Center March 2010) (Seventy percent of plaintiffs' attorneys who had filed employment discrimination cases after *Twombly* indicated that they have changed the way they structure complaints in employment discrimination cases. Almost all of those attorneys (94%) indicated that they include more factual allegations in the complaint than they did prior to *Twombly*. Seventy-five percent indicated that they have had to "respond to motions to dismiss that might not have been filed prior to *Twombly*/*Iqbal*." Seven percent of those attorneys indicated that they had cases dismissed for failure to state a claim under the standard announced in *Twombly* and *Iqbal*.

Appendix A: Multivariate Statistical Models

In order to understand the impact of the *Twombly* and *Iqbal* decisions on the filing and outcome of Rule 12(b)(6) motions for failure to state a claim, we developed two separate data sets, both of which excluded all prisoner cases and cases with pro se parties. The means by which we developed these two data sets are described in Appendices B and C.

A. Filing of Motion to Dismiss for Failure to State a Claim

The first data set examined civil cases filed in 23 federal district courts in the months October 2005 through June 2006, and October 2009 through June 2010. From among these we identified cases with one or more Rule 12(b)(6) motions to dismiss for failure to state a claim filed within the first 90 days after the case was either filed originally in federal court or removed from state court.

Table A-1 presents the results of a logit model predicting the presence of a motion to dismiss given the year the case was filed, the district, and the type of case. As indicated in the table, there is great variation in motion activity across federal district courts and across types of cases. For the combined two periods, the Northern District of California, the District of Columbia, and the Northern District of Illinois all have higher filing rates than the baseline districts (Rhode Island, Eastern Michigan, and Maryland combined). The districts in the baseline are a combination of typical districts and those with too few cases to merit a separate variable. A number of courts have lower combined filing rates; the Eastern and Southern Districts of New York have especially low filing rates.[38]

As indicated by the predicted probabilities, motions to dismiss were more likely to be filed in 2010, when we controlled for type of case and federal district; these motions doubled from an adjusted estimate of 2.9% in 2006 to 5.8% in 2010. Filing rates also differed greatly across types of cases. Contract cases were more than twice as likely as torts cases to have motions filed; torts cases set the baseline for case types. Civil rights cases had the highest level of filing activity, with an overall adjusted estimate of 11.7%. In 2010, this rate rose to 12.7%, which suggests a leveling off in the rate of filing of motions in civil rights cases. Motions in employment discrimination cases increased from 7.7% to 10.1%.

38. While the filing rates in the Eastern and Southern Districts of New York are very low, the likelihood that motions would be granted without leave to amend in these districts was among the highest of the districts. We believe this may be due to pretrial practices in these districts, in which the judges confer with the attorneys early in the case and provide an indication of the likelihood of success of a motion to dismiss. Such a practice would be similar to the practices of many judges in these districts who require a pretrial conference prior to the filing of a motion for summary judgment. *See, e.g.*, Individual Practices of Judge John G. Koeltl 2, http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=385 (last visited February 22, 2011) (requiring a premotion conference before making a motion for summary judgment).

Table A-1: Presence of a Motion to Dismiss for Failure to State a Claim Within 90 Days of Case Filing

Variable	Coefficient	Standard Error	Predicted Probability
			Baseline = 0.029
Eastern District of Arkansas	**-0.489**	0.153	0.018
Northern District of California	**0.163**	0.069	0.033
Eastern District of California	0.024	0.083	0.029
District of Colorado	-0.044	0.092	0.029
District of the District of Columbia	**0.704**	0.086	0.056
Middle District of Florida	0.058	0.067	0.029
Northern District of Georgia	-0.081	0.082	0.029
Northern District of Illinois	**0.185**	0.060	0.034
Southern District of Indiana	**-0.342**	0.108	0.021
District of Kansas	**-0.254**	0.129	0.022
District of Massachusetts	0.092	0.086	0.029
District of Minnesota	**-0.703**	0.092	0.014
District of New Jersey	**-0.626**	0.080	0.016
Eastern District of New York	**-2.001**	0.134	0.004
Southern District of New York	**-1.258**	0.082	0.008
Southern District of Ohio	0.093	0.089	0.029
Eastern District of Pennsylvania	0.106	0.065	0.029
District of South Carolina	0.070	0.089	0.029
Northern District of Texas	**-0.291**	0.093	0.022
Southern District of Texas	**-0.247**	0.077	0.022
Year 2010	**0.740**	0.083	0.058
Contract	**0.956**	0.081	0.071
Civil Rights	**1.507**	0.085	0.117
Other	0.029	0.080	0.029
Financial Instrument	**0.635**	0.144	0.053
Employment Discrimination	**1.050**	0.093	0.077
Contract x 2010	**-0.354**	0.103	0.101
Civil Rights x 2010	**-0.647**	0.109	0.127
Other x 2010	**-0.262**	0.101	0.046
Financial Instrument x 2010	0.090	0.161	0.104
Employment Discrimination x 2010	**-0.442**	0.120	0.101
Constant	-3.533	0.079	0.029

Note: N = 102,368; PCP = 95%. Statistically significant effects ($p < 0.05$) appear in bold print. The baseline for the model is a tort case filed in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006. The baseline probability sets all variables to zero. PCP is the percentage correctly predicted by the model and is an estimate of model fit. Where the variables were not statistically significant we list the predicted probability as the same as the value for the baseline, with one exception. For financial instruments in 2010, the predicted probability includes the main effect for these two significant variables. We also employed a rare event analysis, and the results were unchanged.

B. Outcome of Motions to Dismiss for Failure to State a Claim

The second data set examined the outcome of motions to dismiss for failure to state a claim as indicated by court orders responding to the merits of such motions issued from January through June in 2006 and 2010. Again, we removed all orders in cases involving prisoners and pro se parties. We also removed orders responding to Rule 12(b)(6) motions in which the movant and respondent were not the original defendant and plaintiff, respectively, which resulted in the elimination of orders involving counterclaims and affirmative defenses.

We modeled the outcome of the order in two ways. First, we modeled the choice of granting some or all of the relief requested by the motion, either with or without leave to amend. Second, we modeled the choice of granting all or some of the relief requested by the motion with respect to either some but not all claims by one or more plaintiffs, or all claims by one or more plaintiffs.

1. Motions Granted With or Without Leave to Amend

These models implicitly assume that judges are making decisions from among three outcomes. In this first model, the judges are choosing from among denying the motion, granting the motion with leave to amend, and granting the motion without leave to amend. Using a multinomial probit model, we predicted the outcome of the motion given the year in which the order was filed, the district, the type of case, and if the motion responded to an amended complaint. The multinomial probit model allows us to assume that the introduction of a third choice does not draw judges proportionately from the other two choices (i.e., giving the judges the choice of granting the motion with leave to amend does not draw evenly from those who would grant with no leave to amend and those who would deny the motion). Judges choose whether to grant or deny the motion, and if they choose to grant, then they decide whether to allow leave to amend the complaint or not. The two choices of granting the motion are clearly similar to each other, and substantially different from denying the motion. Multinomial probit models account for those differences. In fact, statistical tests show that this is the appropriate model for these data.[39]

As indicated in Table A-2, there was great variation across districts in the probability of granting the motion with leave to amend. The Eastern District of California, the Northern District of California, the Middle District of Florida, the Eastern District of New York, and the Southern District of New York all had a higher probability of granting *with* leave to amend than the baseline districts did, all else being equal. On the other hand, the Middle District of Florida, the Northern District of Illinois, the Eastern District of Pennsylvania, and the Northern Dis-

39. One might also think of this decision making as a nested or conditional process. Judges make the decision to grant or deny, and then if they decide to grant, they decide the issue of giving leave to amend. While this model is certainly possible, its estimation requires some difference in the independent variables used in the analysis. Here the variables are the same, making multinomial probit the appropriate model for this analysis. We also ran logit models on subsets of variables and obtained the same results.

trict of Texas were all less likely than the baseline districts to grant *without* leave to amend, all else being equal.

Additionally, we found that orders filed in 2010 responding to motions in cases challenging financial instruments had a higher probability of being granted without leave to amend than those filed in 2006, all else being equal. We found no significant difference in the outcomes of motions in other types of cases and no other significant interactions between type of case and year of order. Finally, responding to an amended complaint increased the probability that the motion would be granted without leave to amend, all else being equal.

Table A-2: Multinomial Probit Model of Granting All or Some of the Relief Requested by the Motion With and Without Opportunity to Amend the Complaint

Variable	Grant and Amend		Grant and No Amend	
	Coefficient	**Std. Error**	**Coefficient**	**Std. Error**
Eastern District of Arkansas	-0.068	0.469	-0.668	0.391
Northern District of California	**1.625**	0.274	-0.191	0.243
Eastern District of California	**1.589**	0.250	-0.260	0.212
District of Colorado	-0.300	0.436	-0.519	0.329
District of the District of Columbia	-0.657	0.663	0.146	0.405
Middle District of Florida	**0.704**	0.256	**-0.983**	0.221
Northern District of Georgia	0.639	0.359	-0.054	0.304
Northern District of Illinois	0.179	0.283	**-0.709**	0.238
Southern District of Indiana	-0.363	0.420	-0.266	0.306
District of Kansas	0.274	0.357	-0.500	0.303
District of Massachusetts	0.160	0.467	0.251	0.364
District of Minnesota	0.206	0.400	-0.063	0.324
District of New Jersey	0.269	0.305	0.060	0.245
Eastern District of New York	**0.748**	0.329	0.157	0.279
Southern District of New York	**0.825**	0.376	0.324	0.324
Southern District of Ohio	0.217	0.333	-0.064	0.270
Eastern District of Pennsylvania	0.072	0.318	**-0.596**	0.261
District of South Carolina	-1.085	0.651	-0.626	0.395
Northern District of Texas	0.044	0.376	**-0.909**	0.333
Southern District of Texas	-0.200	0.416	-0.318	0.322
Year 2010	0.235	0.337	-0.115	0.300
Contract	-0.223	0.313	-0.289	0.272
Other	-0.545	0.320	-0.346	0.275
Civil Rights	-0.066	0.314	0.008	0.273
Financial Instrument	-0.163	0.540	-1.075	0.556
Employment Discrimination	-0.202	0.354	-0.049	0.303
Amended Complaint	-0.006	0.102	**0.283**	0.095
Contract x 2010	0.040	0.396	0.005	0.354
Other x 2010	0.335	0.397	0.077	0.353
Civil Rights x 2010	0.190	0.401	0.225	0.358
Financial Instrument x 2010	0.836	0.604	**1.828**	0.615
Employment Discrimination x 2010	0.104	0.454	0.126	0.399
Constant	**-0.752**	0.345	**0.636**	0.286

Note: N = 1,915. Statistically significant effects ($p < 0.05$) appear in bold print. The baseline for the model is an order deciding one or more Rule 12(b)(6) motions to dismiss filed in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006 in a tort case, responding to an un-amended complaint.

To understand the substantive impact of these factors, we estimated marginal effects. Table A-3 shows the results of these effects.

Table A-3: Marginal Effects Estimates for Multinomial Probit Model (Deny vs. Grant with Leave to Amend vs. Grant Without Leave to Amend)

Variable	Deny	Grant and Amend	Grant and No Amend
Baseline	**0.298**	**0.145**	**0.557**
Districts			
Eastern District of California	-0.149	0.468	-0.319
Northern District of California	-0.140	0.469	-0.328
Middle District of Florida	0.060	0.304	-0.364
Northern District of Illinois	0.111	0.121	-0.233
Eastern District of New York	-0.087	0.144	-0.057
Southern District of New York	-0.115	0.135	-0.020
Eastern District of Pennsylvania	0.106	0.082	-0.188
Northern District of Texas	0.163	0.109	-0.272
Amended Complaint	-0.054	-0.030	0.084
Financial Instrument x 2010	-0.258	-0.077	0.335

Table A-3 indicates the marginal effects of individual variables when other variables were held constant. These effects estimates allow for an assessment of the impact of each of the variables by adding the baseline probability of each outcome and the effects estimate for each variable that was statistically significant. For example, while the probability of orders granting a motion with leave to amend was only 15% (i.e., 0.145) in the baseline districts, the probability of orders granting motions with leave to amend in the Eastern and Northern Districts of California was 61% (0.145 + 0.468 in the Eastern District of California and 0.145 + 0.469 in the Northern District of California), when other variables were held constant. While granting motions without leave to amend was the most likely outcome (56% adjusted baseline probability), orders responding to motions challenging financial instruments had an 89% adjusted probability of being granted without leave to amend in 2010 (0.557 + 0.335). Responding to an amended complaint increased the adjusted probability of granting a motion without leave to amend to 64% (0.557 + 0.084).

2. Motions Granted with Respect to Only Some or All of the Claims of a Plaintiff

Motions may also be granted with respect to only some claims by plaintiffs, or with respect to all claims by at least one plaintiff, thereby eliminating one or more plaintiffs from the case (at least with respect to the issues addressed by the order). Table A-4 shows the results of the model estimating these two outcomes.

Table A-4: Multinomial Probit Model of Granting Motion with Respect to Some or All Claims by a Plaintiff

Variable	Grant with Respect to Claims Only		Grant with Respect to All Claims of at Least One Plaintiff	
	Coefficient	Std. Error	Coefficient	Std. Error
Eastern District of Arkansas	-0.251	0.389	**-0.974**	0.480
Eastern District of California	**0.675**	0.241	0.387	0.252
Northern District of California	**0.559**	0.212	**0.438**	0.221
District of Colorado	-0.429	0.340	-0.431	0.364
District of the District of Columbia	0.062	0.417	-0.053	0.440
Middle District of Florida	-0.193	0.218	**-0.489**	0.234
Northern District of Georgia	0.267	0.307	-0.001	0.330
Northern District of Illinois	-0.397	0.241	-0.453	0.255
Southern District of Indiana	-0.140	0.312	-0.454	0.345
District of Kansas	-0.375	0.314	-0.140	0.321
District of Massachusetts	0.315	0.371	0.110	0.393
District of Minnesota	0.074	0.332	-0.073	0.352
District of New Jersey	0.031	0.253	0.194	0.260
Eastern District of New York	0.343	0.284	0.308	0.296
Southern District of New York	0.198	0.337	**0.733**	0.335
Southern District of Ohio	0.088	0.277	-0.123	0.294
Eastern District of Pennsylvania	-0.226	0.264	**-0.687**	0.295
District of South Carolina	-0.535	0.406	**-0.911**	0.465
Northern District of Texas	-0.508	0.333	**-0.737**	0.363
Southern District of Texas	-0.120	0.327	-0.486	0.361
Year 2010	-0.044	0.298	0.138	0.328
Contract	-0.251	0.271	-0.247	0.304
Other	-0.504	0.276	-0.278	0.307
Civil Rights	-0.204	0.275	0.256	0.301
Financial Instrument	-0.796	0.520	-0.439	0.564
Employment Discrimination	0.002	0.302	-0.278	0.347
Amended Complaint	**0.297**	0.093	-0.015	0.100
Contract x 2010	0.002	0.351	0.041	0.387
Other x 2010	0.186	0.351	0.138	0.385
Civil Rights x 2010	0.330	0.357	0.019	0.387
Financial Instrument x 2010	**1.311**	0.580	**1.429**	0.624
Employment Discrimination x 2010	-0.010	0.397	0.327	0.443
Constant	0.302	0.289	-0.082	0.315

Note: N = 1,916. Statistically significant effects ($p < 0.05$) appear in bold print. The baseline for the model is an order deciding one or more Rule 12(b)(6) motions to dismiss filed in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006 in a tort case, responding to an un-amended complaint.

Using the same baseline discussed above, we found that the Eastern and Northern Districts of California were again more likely than the baseline districts to grant motions with respect to some of the claims by a plaintiff. The Northern District of California and the Southern District of New York were also more likely than the baseline districts to grant one or more motions with respect to all claims by one or more plaintiffs. On the other hand, the Eastern District of Arkansas, the Middle District of Florida, the Eastern District of Pennsylvania, the District of South Carolina, and the Northern District of Texas were less likely than the baseline districts to grant motions with respect to all claims by one or more plaintiffs.

Similarly, in 2010, orders responding to motions in cases challenging financial instruments were more likely to be granted, both with respect to all claims by at least one plaintiff and with respect to only some claims, all else being equal. As before, we found no statistically significant increase in the likelihood that motions were granted for other types of cases. Finally, responding to an amended complaint increased the likelihood of granting a motion with respect to claims only.

Table A-5 shows the marginal effects of these models. While granting a motion with respect to claims only was the most likely of the three outcomes overall, none of the baseline outcomes had a probability over 50%. Again, this effect varies by district. In the Eastern and Northern Districts of California, the probability of granting a motion with respect to claims only was approximately 50% (0.399 + 0.137 in the Eastern District of California, and 0.399 + 0.095 in the Northern District of California). Granting motions with respect to claims was also a more likely outcome in the Middle District of Florida and the Eastern District of Pennsylvania, though still not as likely as it was in the Eastern and Northern Districts of California. In the Northern District of Texas, denials of motions were more common than the other two outcomes. Orders filed in 2010 responding to motions challenging financial instruments had a higher probability of being granted in both categories, all else being equal. Finally, responding to an amended complaint increased the probability of granting a motion with respect to claims by approximately 49%.

Table A-5: Marginal Effects Multinomial Probit Model (Deny vs. Grant of Motion Dismissing Claims Only vs. Grant of Motion Dismissing All Claims of At Least One Plaintiff)

Variable	Deny	Only Claims	All Claims by a Plaintiff
Baseline	**0.289**	**0.400**	**0.311**
Districts			
Eastern District of Arkansas	0.146	0.039	-0.185
Eastern District of California	-0.127	0.139	-0.012
Northern District of California	-0.118	0.094	0.024
Middle District of Florida	0.088	0.009	-0.097
Southern District of New York	-0.111	-0.071	0.182
Eastern District of Pennsylvania	0.115	0.020	-0.136
District of South Carolina	0.200	-0.049	-0.151
Northern District of Texas	0.175	-0.057	-0.118
Amended Complaint	-0.043	0.093	-0.050
Financial x 2010	-0.237	0.096	0.140

C. Summary

Together these three analyses indicate that the likelihood of a motion to dismiss for failure to state a claim being filed has increased since 2006 across a wide range of types of cases. After controlling for differences across districts and the presence of an amended complaint, we found that motions to dismiss were more likely to be granted without an opportunity to amend the complaint in cases challenging financial instruments. Motions in such cases were rarely denied in 2010, and were split almost evenly between motions granted with respect to all claims by at least one plaintiff and motions granted with respect to only some claims by plaintiffs. We found no increase in the likelihood that motions to dismiss for failure to state a claim would be granted across other broad case types. The presence of an amended complaint also increased the likelihood that the motion would be granted without an opportunity to amend the complaint, and granted with regard to only some claims by a plaintiff.

Appendix B: Identification of Cases and Designation of Case Types

This study examined the filing and resolution of Rule 12(b)(6) motions to dismiss for failure to state a claim as revealed in orders filed in 23 federal district courts in January through June of 2006 and 2010. The courts included in this study represent each of the 12 federal circuits, often including the 2 districts in the circuits with the greatest number of civil filings in 2009.[40] The districts included in this study are listed in Table B-1.

Table B-1: Orders Resolving the Merits of Rule 12(b)(6) Motions

District	Order Year		Total
	2006	2010	
Eastern District of Arkansas	14	13	27
Eastern District of California	33	204	237
Northern District of California	100	238	338
District of Colorado	23	19	42
District of the District of Columbia	9	17	26
Middle District of Florida	84	124	208
Northern District of Georgia	47	13	60
Northern District of Illinois	44	86	130
Southern District of Indiana	24	28	52
District of Kansas	26	29	55
District of Massachusetts	14	23	37
District of Maryland	8	13	21
Eastern District of Michigan	38	58	96
District of Minnesota	16	31	47
District of New Jersey	45	71	116
Eastern District of New York	35	47	82
Southern District of New York	16	38	54
Southern District of Ohio	27	55	82
Eastern District of Pennsylvania	58	31	89
District of Rhode Island	0	7	7
District of South Carolina	9	18	27
Northern District of Texas	14	30	44
Southern District of Texas	16	29	45
Total	700	1,222	1,922

40. Several of the largest districts in some of the circuits were excluded because of problems in collecting the data necessary to conduct the study. Characteristics of the districts are found in the Administrative Office of the U.S. Courts publication Federal Court Management Statistics, http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx (last visited February 6, 2011).

We wanted to examine motion practice during periods that neither anticipated a change in pleading practice nor reacted to the Supreme Court opinions in the absence of appellate court guidance. January through June of 2006 was selected as a period of stable motion practice before the Supreme Court decision in *Bell Atlantic Corp. v. Twombly* in May 2007. January through June of 2010 was selected as a period after which each of the circuits had had a chance to publish at least one appellate court opinion interpreting *Ashcroft v. Iqbal* and offering guidance to the district courts. This analysis does not address motion activity in the interim period from July 2006 through December 2009.

This study is unlike other recent studies of motions to dismiss for failure to state a claim that rely on cases that appear in the computerized legal reference systems.[41] This study identified judicial orders resolving the merits of such motions in each of the selected districts by first identifying orders responding to one or more general motions to dismiss, as indicated by codes entered by the court clerks of the individual districts into the CM/ECF database.[42] These codes relate to the entries on the docket sheets of individual cases and point to documents related to the docket entry. Using a Structured Query Language (SQL) program, we identified all orders responding to all motions to dismiss filed in the selected district courts for the designated dates.[43] Next, we ran a Practical Extraction and Report Language (PERL) program to identify text indicating that the order resolved at least one Rule 12(b)(6) motion to dismiss for failure to state a claim.[44] This process identified 4,725 orders that included variations on the search terms and that were included in the coding task.[45] The PERL program was unable to convert certain types of non-text documents, such as PDF documents stored as static images, and we were unable to identify orders resolving motions to dismiss in such documents.[46] We believe this procedure is equivalent to identifying motions to dismiss on the docket sheets, then searching the text of the motions and responding orders to identify motions to dismiss for failure to state a claim.

A variation on this methodology was used to identify Rule 12(b)(6) motions to determine changes in filing rates. We expanded the case selection window to include cases filed as early as October 1, 2005, for the 2006 cohort, and as early as October 1, 2009, for the 2010 cohort. Again, we used the CM/ECF codes and an SQL program to identify motions to dismiss filed within three months of the case

41. *See supra* note 4 and accompanying text.

42. Our study relied on data in a backup database in order to avoid disrupting CM/ECF service.

43. We excluded all sealed records and other documents that were unavailable on the courts' electronic public access system (PACER).

44. *See supra* note 8.

45. As a result of an early error in framing the search request, a few hundred of these were cases that included only the term "pro se" without other terms indicating the presence of a Rule 12(b)(6) motion. These cases were identified and removed from the sample.

46. We presently do not know the extent to which motions and orders are stored as static images, and are not able to estimate the extent to which we may have failed to identify such motions and orders in our text search. However, we believe such images are more common in motions than in orders, and are more common in submissions by prisoners and pro se parties than in other cases.

being filed in federal court. We then used a PERL program to identify text indicating that the motion was brought under authority of Rule 12(b)(6).

This is the first time we are aware of that this particular research methodology has been used. We believe this methodology for identifying Rule 12(b)(6) motions and related orders represents an improvement over methods that rely on computerized legal reference systems, since this method relies on data prepared by the district courts to identify all orders responding to all motions to dismiss in all cases, and thereby includes cases that do not appear in the computerized legal reference systems.[47] We believe this methodology is also an improvement over methods that identify such motions on the basis of only the text of docket entries, since such docket entries often combine all Rule 12 motions and motions for voluntary dismissal under a single general docket entry.

However, this technique also has some disadvantages. These programs cannot convert motions and orders that appear as a non-text scanned image into searchable text. Also, the programs that convert the PDF formatted motions and orders into searchable text on occasion have difficulty recognizing relevant text, especially where the quality of the PDF document is poor. For example, we found a few instances in which the program overlooked a relevant motion or order because it read the text "12(b)(6)" as "12(b1(6)." We have not estimated the extent of these problems, but we believe they do not affect the accuracy of these results, since the text misinterpretations would not be related to the outcome of the motions. In other words, we believe such errors would be equally likely in orders granting motions and orders denying motions; in contrast, computerized legal reference systems are less likely to include a routine order denying a motion to dismiss.[48]

47. We found that the presence of 12(b)(6) orders in the Westlaw database varied greatly across federal districts. We searched in the Westlaw "allfeds" database for 30 to 40 Rule 12(b)(6) orders in each of three federal district courts: the Eastern District of Arkansas, the District of Colorado, and the District of Kansas. For the Eastern District of Arkansas, we found 87% of the orders on Westlaw, and for the District of Colorado, we found 82% of the orders. However, for the District of Kansas, we found only about 18% of the orders on Westlaw. These findings suggest that Westlaw may publish the majority of orders for some districts, but far less than the majority for other districts. In addition, whether an order was granted or denied may be related to its likelihood of publication. In the Eastern District of Arkansas, 65% of published orders were granted, and 100% of unpublished orders were granted (though there were only 4 unpublished orders). In the District of Colorado, 86% of published orders were granted, while only 62% of unpublished orders were granted. In the District of Kansas, about 71% of published and unpublished orders were granted. A search of Westlaw for a particular term or type of order may not present an accurate picture of the number or disposition of those cases in the district. We interpret these differences in publication rates and differences in grant rates as indicating a need for caution in basing conclusions regarding court practices on studies of orders appearing in the Westlaw federal court databases.

48. *See supra* note 5.

We linked the cases we identified with records from the Administrative Office of the U.S. Courts[49] to allow further specification of the origin and type of case. These origin codes allowed us to restrict our analyses to cases filed as an original proceeding or removed from the state court to the district court. In doing so, we excluded from our analyses cases remanded from the courts of appeals, reopened or reinstated for additional action, transferred from another federal district court, or transferred as part of a multidistrict litigation proceeding, as well as appeals from a magistrate judge's decision.

We also relied on data from the Administrative Office to identify types of cases. The AO data include a "Nature of Suit" code that is designated by the party filing the case or removing the case to federal court. We then combined these codes into seven categories for purposes of analysis. Table B-2 presents the number and types of cases included in each of the categories for the full database.

49. *See* Administrative Office of the U.S. Courts, Federal Court Cases: Integrated Database Series, available at http://www.icpsr.umich.edu/icpsrweb/NACJD/series/00072. These are administrative data prepared by the clerks in the individual federal district courts. For critiques of the usefulness of this data set for research purposes, see Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 Notre Dame L. Rev. 1455, 1460 (2003) (finding errors in recorded award amounts in torts and prisoner civil rights cases); Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 Stan. L. Rev. 1275, 1309–11 (2005) (problems with codes indicating voluntary and other dismissals); and Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Non-Trial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. Empirical Legal Stud. 705 (2004) (finding other coding errors).

Table B-2: Classification of Nature of Suit Codes into Broad Case Types

Case Types		2006	2010	Total
Contract	Insurance	37	43	80
	Marine Contract Actions	0	3	3
	Miller Act	1	0	1
	Stockholders Suits	5	5	10
	Other Contract Actions	100	152	252
	Contract Product Liability	1	6	7
	Franchise	2	3	5
	Securities, Commodities, Exchange	39	29	68
	Total	185	241	426
Torts	Torts to Land	2	5	7
	Airplane Product Liability	0	3	3
	Assault, Libel, and Slander	4	6	10
	Federal Employers Liability	0	1	1
	Marine Personal Injury	2	2	4
	Motor Vehicle Personal Injury	1	3	4
	Motor Vehicle Product Liability	1	1	2
	Other Personal Injury	16	24	40
	Medical Malpractice	2	1	3
	Personal Injury—Product Liability	9	27	36
	Other Fraud	29	19	48
	Other Personal Property Damage	3	12	15
	Property Damage—Product Liability	1	7	8
	Total	70	111	181
Civil Rights	Other Civil Rights	150	209	359
	Civil Rights Voting	1	1	2
	Civil Rights Accommodations	8	3	11
	Americans with Disabilities Act Employment	4	10	14
	Americans with Disabilities Act Other	9	9	18
	Total	172	232	404

Table B-2: Classification of Nature of Suit Codes into Broad Case Types (continued)

Case Types		2006	2010	Total
Employment Discrimination	Civil Rights Jobs	95	119	214
	Total	95	119	214
Financial Instrument	Negotiable Instruments	0	64	64
	Foreclosure	2	49	51
	Other Real Property Actions	3	35	38
	Truth in Lending	5	34	39
	Consumer Credit	7	53	60
	Total	17	235	252
Other	Overpayments & Enforcement of Judgment	2	2	4
	Overpayments Under the Medicare Act	0	1	1
	Recovery of Overpayments of Vet Benefits	2	0	2
	Rent, Lease, Ejectment	0	2	2
	Antitrust	7	9	16
	Bankruptcy Withdrawal 28 U.S.C. § 157	0	6	6
	Banks and Banking	2	9	11
	Interstate Commerce	2	1	3
	Other Immigration Action	0	1	1
	Civil (RICO)	15	25	40
	Cable and Satellite TV	1	4	5
	Other Forfeiture and Penalty Suits	0	1	1
	Fair Labor Standards Act	4	15	19
	Labor/Management Relations Act	4	7	11
	Railway Labor Act	2	0	2
	Other Labor Litigation	7	13	20
	Employee Retirement Income Security Act	28	42	70
	Copyright	11	11	22
	Patent	7	19	26
	Trademark	8	16	24
	Social Security Disability Claim	0	1	1
	Tax Suits	2	2	4
	Other Statutory Actions	49	79	128
	Agricultural Acts	1	0	1
	Environmental Matters	6	13	19
	Freedom of Information Act of 1974	1	1	2
	Constitutionality of State Statutes	0	4	4
	Total	161	284	445
Grand Total		700	1,222	1,922

Appendix C: Coding and Analysis of Motions and Orders

We loaded relevant orders resolving Rule 12(b)(6) motions to dismiss for failure to state a claim into a FileMaker Pro database, along with identifying information and Administrative Office data related to the case. We assigned the cases random numbers, then sorted the cases by those numbers to ensure that coding assignments would be randomly assigned to coders across groups and districts. On two occasions we added additional cases to the database following the same randomization procedure.

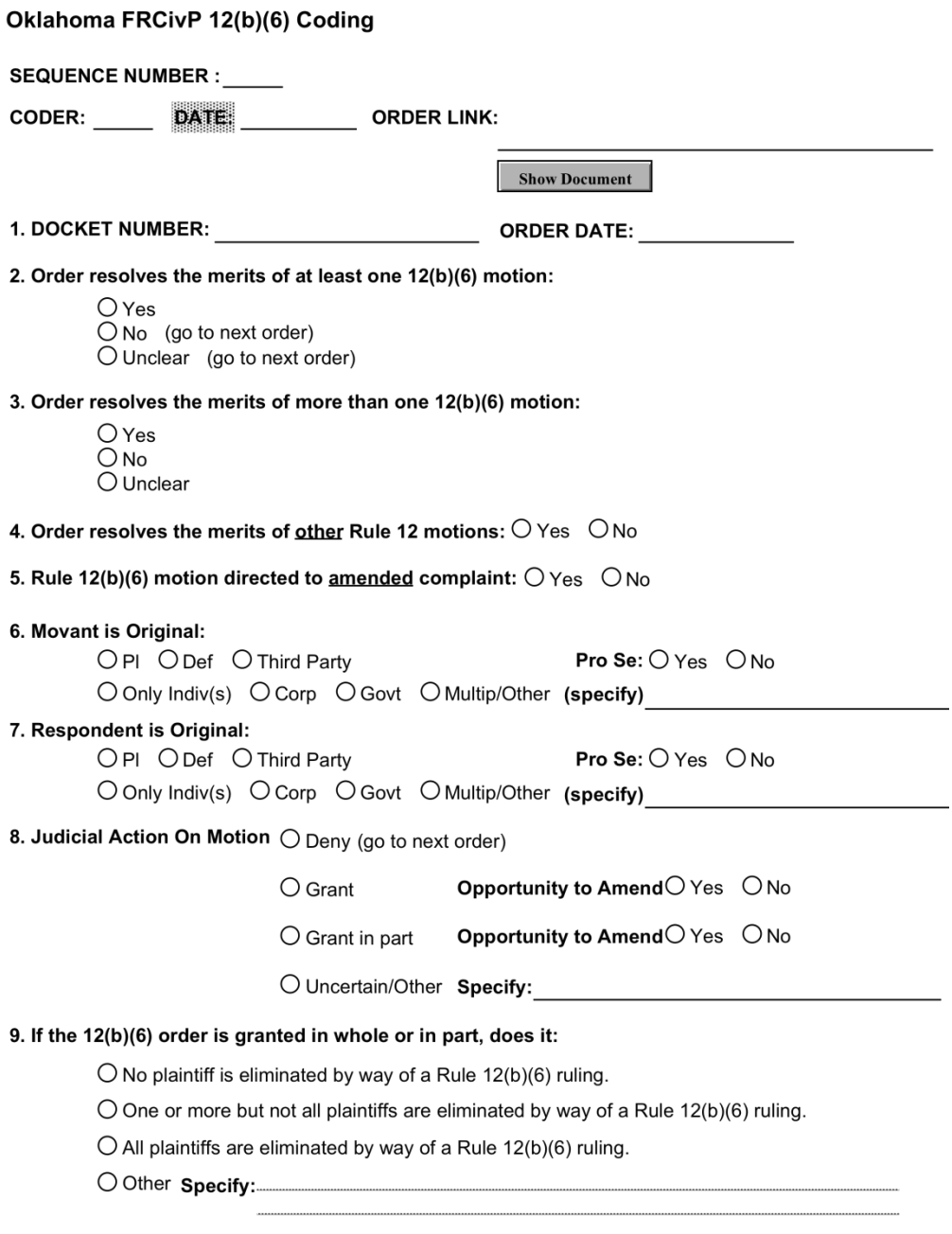
A team of 10 recent law school graduates reviewed the judicial orders. Relying on remote access to the FileMaker Pro database, they coded information contained in the order indicating the nature and resolution of the motion.[50] The FileMaker Pro database allowed the coder to link to the relevant document and directly enter codes into the database. In reviewing the motions, the coders first confirmed that the order resolved the merits of at least one motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), noted characteristics of the movant and respondent, and indicated judicial action taken in response to the motion. If the order granted all or some of the relief requested by the motion, the coder indicated whether the order appeared to exclude all claims by one or more plaintiffs, and whether the order indicated that the respondent would have an opportunity to amend the complaint. Intercoder reliability checks for 25 orders revealed that the coders agreed on 89% to 97% of the coding choices, depending on the nature of the specific question. A copy of the code sheet appears as Figure C-1.

The coding instructions resolved a number of difficult questions. We excluded a number of cases in which Rule 12(b)(6) motions were granted for reasons other than a failure to state a claim. For example, we excluded cases in which motions were granted on the basis of sovereign or qualified immunity, which we regarded as a jurisdictional issue and which was usually raised as an affirmative defense. When a respondent failed to file a timely response and the court granted the Rule 12(b)(6) motion, thereby dismissing the claim, we coded the order as resolving the merits of the Rule 12(b)(6) motion, since we regarded the failure to respond in a timely manner as an admission that the respondent was unable to state a claim.

Coders often encountered circumstances in which a single order resolved more than one motion, or a single motion was directed at multiple claims. We also found multiple motions by multiple defendants directed at a single claim. For our purposes, we counted *all* Rule 12(b)(6) motions resolved by a single order as resolving a single 12(b)(6) motion addressing multiple claims.

50. The coders were former law review students who had recently graduated from the University of Oklahoma School of Law. The coders underwent a three-hour training program, and used a 12-page coding manual to aid in the process. E-mail exchanges, with copies to all members of the group, allowed coders to raise questions and seek clarification throughout the process. Steven Gensler, a professor of the University of Oklahoma School of Law and a member of the Judicial Conference Advisory Committee on Civil Rules, participated in the orientation program and supervised the coding process on-site.

Figure C-1: Code Sheet for Recording Action on Rule 12(b)(6) Motion



Oklahoma FRCivP 12(b)(6) Coding

SEQUENCE NUMBER : _____

CODER: _____ **DATE:** _____ **ORDER LINK:** _____

Show Document

1. DOCKET NUMBER: _____ **ORDER DATE:** _____

2. Order resolves the merits of at least one 12(b)(6) motion:

- ○ Yes
- ○ No (go to next order)
- ○ Unclear (go to next order)

3. Order resolves the merits of more than one 12(b)(6) motion:

- ○ Yes
- ○ No
- ○ Unclear

4. Order resolves the merits of <u>other</u> Rule 12 motions: ○ Yes ○ No

5. Rule 12(b)(6) motion directed to <u>amended</u> complaint: ○ Yes ○ No

6. Movant is Original:

○ Pl ○ Def ○ Third Party **Pro Se:** ○ Yes ○ No

○ Only Indiv(s) ○ Corp ○ Govt ○ Multip/Other **(specify)** _____

7. Respondent is Original:

○ Pl ○ Def ○ Third Party **Pro Se:** ○ Yes ○ No

○ Only Indiv(s) ○ Corp ○ Govt ○ Multip/Other **(specify)** _____

8. Judicial Action On Motion ○ Deny (go to next order)

○ Grant **Opportunity to Amend** ○ Yes ○ No

○ Grant in part **Opportunity to Amend** ○ Yes ○ No

○ Uncertain/Other **Specify:** _____

9. If the 12(b)(6) order is granted in whole or in part, does it:

- ○ No plaintiff is eliminated by way of a Rule 12(b)(6) ruling.
- ○ One or more but not all plaintiffs are eliminated by way of a Rule 12(b)(6) ruling.
- ○ All plaintiffs are eliminated by way of a Rule 12(b)(6) ruling.
- ○ Other **Specify:** .....

.....

Rule 12(b)(6) motions directed toward multiple claims often were granted as to some claims and denied as to others. If an order granted any relief requested by the motion, we coded the motion as being granted as to some claims and then determined whether the order indicated an opportunity to amend the complaint with regard to the dismissed claims. Similarly, if the order resolved multiple Rule 12(b)(6) motions by granting some motions and denying others, the multiple motions were regarded as a single Rule 12(b)(6) motion for our purposes and coded as granting some of the relief requested. If an order granting any relief requested by a motion allowed an opportunity to amend the complaint, we coded the order as allowing an opportunity to amend.

If the order granted any relief sought by the Rule 12(b)(6) motion, the coder indicated whether the grant appeared to eliminate all claims by one or more plaintiffs, thereby excluding those plaintiffs from the litigation. If an order dismissed some but not all claims by a plaintiff, then the coder indicated that no plaintiff was eliminated by way of the ruling. This coding was somewhat imprecise, since the breadth of the litigation was sometimes difficult to interpret in the context of the order alone. The categories listed as responses in Question 9 on the code sheet were developed after pilot work revealed inconsistencies in our attempt to code for the effect of the motion on defendants. Unfortunately, after we changed the response categories, the language of the question no longer fit the revised categories. This fact was called to the attention of the coders, and we agreed that the question would be interpreted as asking how an order that granted at least some of the relief requested would affect the role of one or more plaintiffs.

Coding was reviewed by Center staff for completeness and consistency on an ongoing basis. Responses designated as “unclear,” “uncertain,” and “other” were reviewed and resolved in discussion with the coder. Data were then loaded into the SPSS (version 17) statistical analysis program. Multivariate statistical models were analyzed using STATA 11 SE. CLARIFY was used to estimate the predicted probabilities for the logit models.

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C RULE 84 FORMS

The Forms in the Civil Rules Appendix are venerable, familiar, and often useful. They have the imprimatur of the full Enabling Act process. It may seem startling to suggest that the time has come to consider basic changes in the means of generating and maintaining the Forms. But the Civil Rules Committee plans to undertake this chore. And because other advisory committees have followed different practices in respect to forms, it may prove useful to establish a joint project under the Standing Committee's guidance. The reasons for taking on the Forms are sketched below.

Rule 84 demonstrates in a single sentence the virtues it hopes to illustrate through the Forms:

> The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.

The Forms cover a variety of topics. Many of them serve useful purposes. Forms 1 and 2 provide a uniform caption and signature line. Form 3 is a summons. Form 5 provides a notice of a lawsuit and request to waive service — this form was developed with great care to implement Rule 4(d), and was thought so important that Rule 4(d)(1)(D) requires that the text prescribed in Form 5 be used to inform the defendant of the consequences of waiving and not waiving service. The Form 52 Report of the Parties' Planning Meeting was drafted with equal care, and was amended in 2010, to guide parties through the topics that should be considered in a Rule 26(f) conference. Form 80, the Notice of a Magistrate Judge's Availability, includes a paragraph designed to avoid any hint of pressure to consent to trial before a magistrate judge. Other forms are similarly useful or even important.

Forms 10 through 21 and 61 are complaints. They were revised, but not much revised, in the Style Project. The original purpose was to translate the abstract pleading standard of Rule 8(a)(2) into "pictures" showing that a remarkably short and plain statement can show the pleader is entitled to relief. The Form negligence complaint, then Form 9 and now Form 11, won honorable mention in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1970 n. 10 (2007): "A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer."

The form complaints have gained prominence in the wake of the Twombly and Iqbal decisions. This increased visibility brings conflicting pressures to bear on any project to reconsider the Forms. Caution is supported by the considerations that counsel delay in any project to adjust pleading, discovery, or yet other rules to respond to the Twombly and Iqbal decisions. Rule 84 commits the courts to the proposition that these Forms suffice. Lower courts, however, are often puzzled about the contrast between this much "simplicity and brevity" and the seemingly elevated levels of contextual pleading described by the Supreme Court. A succinct statement was provided in *Tyco Fire Products, LP v. Victualic Company*, Civil Action 10-4645 (E.D.Pa. April 12, 2011), slip p. 26. In ruling that a counterclaim to declare a patent invalid must be more detailed than the "conclusory complaints of direct infringement" contemplated by Form 18, Judge Robreno said this:

> Put simply, the forms purporting to illustrate what level of pleading is required do not reflect the sea change of Twombly and Iqbal. Rule 84, however, instructs that the forms "suffice" such that pleaders who plead in accordance with the forms are

> subject to a safe harbor. * * * This inconsistency between the Supreme Court's interpretation of Rule 8(a) and the forms Rule 84 validates should be remedied: either by modifying or eliminating Rule 84 or by updating the forms to clearly comply with existing law.

Although the Forms cover only a small fraction of the varieties of claims that can be brought to a federal court, the backward implications of these pictures could have an important bearing on pleading standards across the board. Acting on the Forms now, without yet beginning a broader consideration of pleading, could easily be seen as an indirect or even covert attempt to set more general pleading standards.

The increased prominence of the pleading Forms, on the other hand, also prompts a fresh look at them. They do not all look good. The Form 18 complaint for patent infringement is a clear example. It does not even designate which claims are alleged to be infringed, nor the features of the defendant's acts that correspond to the claim limitations.

If there are persuasive reasons to believe a better form could be developed for patent-infringement complaints, there are powerful reasons to doubt the capacities of the Enabling Act process to devise a suitable form. A deep knowledge of the opportunities and challenges of pleading an infringement claim is required. The question is not merely one of substantive patent law. Imagine patents on a simple mechanical device, a complex biological process, an intricate computer system, or a design. Consider the possibility that several patents may bear on a single course of alleged infringement. Add in the prospect that the plaintiff may face a problem common in other kinds of litigation — it seems highly improbable the defendant could produce a particular product without infringing the plaintiff's process patent, but only access to the defendant's operations can provide the information.

One more illustration confirms the point. How could a Committee draft a form complaint that would adequately plead a "contract, combination, * * * or conspiracy" among the defendants in the Twombly case? If the form were devised, would it be useful for any other plaintiff, defendant, or court?

Apart from the form complaints, the Forms cover some parts of the Rules, but far from all. Forms 50 and 51 illustrate requests to produce documents under Rule 34 and to make admissions under Rule 36; there are no forms for a deposition notice, a subpoena to produce, an interrogatory (nor when a multiple question becomes a discrete subpart), or a motion to compel a physical examination. It may be possible to construct reasons for this pattern, but the same question could be asked throughout the Forms.

Of course the answer could be that the Forms are important, and the Rules Committees are obliged to generate and maintain more Forms, with greater care. But this answer prompts a counter-answer.

The historic fact is that the Committees have not devoted sustained attention to the Forms. Until the revisions effected in the Style Project, effective in 2007, many of the forms marked their pristine originality by using illustrative dates ranging from 1934 to 1936. In the Style Project itself,

the Forms received much less attention than the rules texts. This neglect does not reflect callous indifference. It reflects the continuing press of more important business. There is little reason to hope that the future will bring a period of relative calm, when the settled satisfactory operation of all the Civil Rules affords time to tend to the Forms in a comprehensive way.

It is not inevitable that the Forms be generated through the Enabling Act process. The statutes do not mention Forms. The Criminal Rules forms are generated by the Administrative Office, with advice from the Criminal Rules Committee but without invoking the Enabling Act process. The Administrative Office generates and maintains a large number of forms for civil actions that do not become Rule 84 Enabling Act Forms. These processes seem to have worked well.

Reliance on the Administrative Office is not the only possible alternative to full Enabling Act treatment. Other systems can be devised, and the alternatives should be explored.

If the Forms come to be separated from the Enabling Act process, it will be necessary to reconsider Rule 84. It does not seem wise to delegate authority to adopt forms that "suffice under these rules," even if the Enabling Act permits delegation. Rule 84 might be recast to tout the virtues of a set of "official" forms, by whatever process created, without endorsing them as sufficient under the rules. It might be better to withdraw Rule 84.

All of these considerations combine to make the Rule 84 Forms ripe for review. The outcome is not clear, nor is it clear that the same process is suitable for each Advisory Committee. Bankruptcy Forms may well require a unique process. But much can be learned by considering all of the rules, and all of the different Committees' processes, together.

D DUKE CONFERENCE

Rules amendments are but one of several paths to pursue in working to implement the many important lessons learned at the 2010 Litigation Review Conference. The theme that reappeared constantly was that the most important needs are for utilizing procedural opportunities in proportion to the reasonable demands of the case, for cooperation among lawyers, and for active and hands-on judicial management. Most participants believed that the basic framework of the Civil Rules can work well without drastic changes if, under active judicial guidance, lawyers cooperate in proportional litigation activity. Education of the bench and bar, best-practices guides, empirical research — often in conjunction with carefully planned and supervised pilot projects — can accomplish a great deal. The Federal Judicial Center is actively engaged in working with the Advisory Committee to pursue these goals. Much of the Subcommittee's work will lie in this area.

This optimistic view of the Civil Rules was not universal. The Duke Conference Subcommittee and the Advisory Committee have considered the possibility that dramatic reform, even drastic reform, is needed now. Some Committee members believe that work should begin to develop important changes in the Civil Rules. Whatever may be the lot of "average" actions in federal court, a significant number encounter forbidding, even prohibitive, costs and delay. On this view, the Committee is required to determine whether meaningful improvement is possible, and is responsible to recommend whatever seems possible. Potential projects may be identified to begin this work. But many have little enthusiasm for beginning now a task so difficult and contentious. One obstacle is the lack of persuasive alternative models that might prove acceptable within our traditions of open access, adversary litigation, jury trial, and reliance on private actors to enforce basic social policies through the courts. Another is the sense that present rules work reasonably well for most actions brought to federal court. The median figures on the cost and duration of civil actions reported by the FJC study for the Conference are reassuring. The cases that generate severe problems command attention and vigorous efforts toward improvement, but they are a relatively small portion of all cases. It is important to work as well toward improving procedures for all types of litigation, but many of these efforts will be made within the basic structure established in 1938. These efforts will be pursued actively, looking toward changes that can be achieved in the short run. More aggressive proposals also will be considered, but with the recognition that truly fundamental reform is likely only over the course of many years, only with strong showings of fundamental failures in administering civil justice or with powerfully persuasive new models.

One open-ended project will be to determine whether inspiration can be found in the "rocket docket" practices in the Eastern District of Virginia. The time from filing to disposition in the Eastern District is second shortest in the country. Deference to the local practices is reflected in Rule 26(f)(4), which authorizes a court to adopt a local rule accelerating the time for the Rule 26(f) conference of the parties and for reporting after the conference. Some or all of the local practices may be transferrable to other districts, perhaps by national rule provisions, perhaps by other means. The process of learning about these practices will begin with panel presentations by Eastern District judges and lawyers at the November Advisory Committee meeting.

A much more specific project is well underway. A group of lawyers who typically represent plaintiffs or defendants has been formed to develop a protocol of initial discovery requests that will be accepted without objection. Agreement has been reached as to many matters, and another meeting to be held this summer may be all that is needed to complete the work. It is expected that a good number of willing judges can be found to adopt the protocol in scheduling orders. The FJC is prepared to participate in a way that will ensure rigorous evaluation of the results. If this project succeeds, it may become a model that can be followed for other well-developed categories of litigation.

Working within the present framework, a long menu of possible rules amendments was generated by the Conference panels and papers. The Subcommittee has worked to establish priorities among these possibilities, without yet beginning drafting work on any of them. One goal common to some of the proposals is to better realize the capacities of the present rules. Among them are bolstering Rule 16, both for scheduling orders and pretrial conferences; adding a pre-motion conference requirement; reconsidering the rule that ordinarily discovery cannot begin until the parties have had a Rule 26(f) conference; and adding an explicit duty to cooperate. More detailed revisions also are being considered.

Rule 16(b) directs that a scheduling order issue in every case except in categories of actions exempted by local rule. The judge must consult with the parties "at a scheduling conference or by telephone, mail, or other means." Some of the information provided by the FJC study for the Conference suggests that scheduling orders may not always be issued — there was no discovery cutoff in nearly half the cases studied, even though Rule 16(b)(3)(A) requires that the order limit the time to complete discovery. Nor is it clear whether the parties consistently comply with the conference requirements imposed by Rule 26(f). Beyond education efforts to impress the directions of the present rule, some amendments might prove useful. It might be required that the parties and court confer directly, at least by telephone, in framing the order; the requirement might be excused if the parties agree on a joint scheduling order, although even then it may be helpful to confer with the judge to establish early familiarity and control.

Scheduling order practice raises another question — whether too much delay is permitted by the timing requirement, which supplements the hope that the order issue "as soon as practicable" by setting the outer limit as "the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared." Particularly in the era of electronic filing, it may prove possible to shorten the outer time limits as a step toward reducing delay.

In addition to focusing on scheduling-order practice, general pretrial-conference practice is being considered. It may be useful to require at least one conference in addition to a scheduling-order conference, although docket pressures in some districts may make this idea infeasible.

Pretrial-conference practices might be developed still further. One possibility would be to require a conference with the court before filing any motion. A survey of local rules and standing orders by the Administrative Office suggests that only a few judges impose a general pre-motion conference; there seems little reason to suggest a rule. On the other hand, pre-discovery-motion conferences are required by local rule or standing order of at least one judge in 37 districts. A

variation is found in the practices of many judges who announce that they are available to resolve discovery disputes at any time. For many years the Committees have heard that judges who do this find two benefits — many fewer discovery disputes come to the court at all, and most of those that do are resolved immediately by the phone call. Pre-motion conferences can work in much the same way. This may be an area in which much can be accomplished by ensuring that judges are aware of these approaches to keeping discovery under control. But revision of the national rules remains a possible alternative.

Rule 26(d) directs that a party may not seek discovery before the parties have conferred as required by Rule 26(f), with specified exceptions. The idea was that the conference will enable the parties to establish practical discovery plans proportional to the needs of the case, and ideally to achieve cooperative exchanges of information without the need for formal discovery requests and responses. There is a contrary view, however, suggesting that it would be useful to allow discovery requests to be served before the conference, deferring any obligation to respond. Knowing what at least the first wave of discovery will be may support better-informed discussion at the conference. This possibility remains open for further consideration.

The FJC is planning further research on the early phases of litigation. The results will inform the decision whether to work toward amending rule 16 and related provisions.

The need for cooperation among the parties is in large part served or defeated by the culture of the bar, as shaped by rules of professional responsibility. Nonetheless, it may be worthwhile to add an explicit rule provision. One possibility would be to add to Rule 1: "[These rules] should be construed and administered by the court, parties, and attorneys to secure the just, speedy, and expensive determination of every action and proceeding." Or: "should be construed and administered, with the cooperation of the parties and attorneys, to secure * * *."

Proportionality, a close cousin of cooperation in the elements of effective litigation, could be addressed in similarly general terms. Most of the concern about proportionality, however, focuses on discovery. What is now Rule 26(b)(2)(C) was added in 1983 "to guard against redundant or disproportionate discovery." The sponsors' high hopes have not been realized. The FJC study for the Conference did reconfirm the findings of several earlier empirical studies — in most actions in federal court there is little or even no discovery, and the overall cost seems reasonable for many actions. But it also reconfirmed the common lament that in some cases — enough cases to be truly worrisome — discovery can be very expensive, even as measured without accounting for the burdens shouldered by the parties themselves and the disruption of the parties' normal affairs. A cross-reference to Rule 26(b)(2) was later added to Rule 26(b)(1), and retained in the Style Project over objections of redundancy, in an effort to reinforce the command. But all too often courts address discovery disputes without seeming to mention proportionality. Still more emphatic rule language is possible, incorporating proportionality into the scope of discovery as defined by Rule 26(b)(1). Judge Grimm has undertaken to develop a set of materials that will provide guidance. This work, and the work of other groups, will support continuing education efforts. In the hope that efforts along these lines will prove effective, the possibility of recommending rules amendments has been deferred.

Other discovery topics have been considered. Daniel Girard advanced three specific proposals at the Conference to curtail evasive discovery responses. These proposals remain under active consideration. The initial disclosure requirements of Rule 26(a)(1), as diluted by amendments in 2000, provoked three sets of reactions at the conference: disclosure is not useful, it is useful sometimes, or it could become useful if restored to the more powerful version adopted in 1993. The division of views, and a sense that some good flows from at least some of the initial disclosure requirements, has led to deferring any further consideration in the near term. Specific presumptive numerical limits on the number of discovery requests might be added to Rule 34 document discovery and Rule 36 requests to admit, similar to the limits in Rules 30, 31, and 33. There is some broader concern with contention interrogatories and requests to admit. These topics remain on the agenda, but are not yet being developed.

Still other topics that veer toward radical reform have been suggested, but remain at the outer edge of possible active consideration. Rule 56 summary-judgment procedures were substantially revised by amendments that took effect on December 1, 2010. That project deliberately bypassed any attempt to reconsider the standards for summary judgment or the allocation of summary-judgment burdens. Dissatisfaction with Rule 56 remains, particularly among plaintiffs who believe that it contributes far more to cost and delay than it saves and may at times lead to improvident termination of valid claims. It seems too soon to revisit Rule 56, and the reasons that limited the scope of the recent project remain powerful. But this may be a good example of the issues that may provoke more sweeping projects over a period of several years.

E RULE 6(D): A STYLE GLITCH AND 3-ADDED DAYS

Eventually it will prove wise to amend Rule 6(d) as follows:

> **(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

This amendment corrects a misstep taken when Rule 6(d) was amended in 2005 to establish a uniform rule for calculating the 3 added days. Until 2005, it was clear that the 3 added days were available only when an act was required within a time measured after service "upon the party." "[B]eing served" conveys the same meaning. "[A]fter service," however, can be read to include situations in which a party is allowed to act within a specified time after that party has made service on another party. Times to act after making service are included in Rule 14(a)(1) for joining a third-party defendant, Rule 15(a)(1)(A) for amending a pleading once as a matter of course, and Rule 38(b)(1) for demanding jury trial. No one thought of these provisions when Rule 6(d) was amended. It makes no sense to allow a party to control the time it has to act by choosing the means of service — for example, to gain an added 3 days to amend a pleading by choosing to serve it by mail or e-mail. The fix is simple.

If the fix is simple, why not do it now? Two sets of concerns counsel deferring action. The more general concern arises from the prospect that other missteps may be found in translating former rule language into the conventions adopted by the Style Project, either as part of the Style Project or independently. The more specific concern arises from the prospect that it may be time to reconsider the choice among the modes of service that do, or do not, win the 3 added days. Reconsideration most likely should be approached by coordinating work among Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

Concern about style missteps has been expressed for many years. They seem almost inevitable, no matter how carefully the Style Projects have been implemented, and no matter how much care is taken with drafting outside the Projects. The Rule 6(d) contretemps was identified and explored at length by Professor James J. Duane in *The Federal Rule of Civil Procedure That Was Changed By Accident: A Lesson in the Perils of Stylistic Revision*, 62 S.C.L. Rev. 41 (2010). As the title suggests, the article expresses skepticism about the feasibility of implementing new style conventions without inadvertently changing meaning. Rule 6(d) is an example of restyling accomplished independently of the Style Project, but possible candidates from the Style Project have been suggested and others may appear.

The approach to correcting style missteps may be affected by the consequences of the misstep. Rule 6(d) is a good example of a misstep that is not likely to generate grave consequences. No cases have yet been found that allow a party to extend its own time to act by choosing the mode of service. If the issue does arise, there is a reasonable chance that a court will apply the caution expressed in the Committee Notes for each rule, even when the style changes were made outside the Style Project: style changes should not be read to change the rule's meaning. This prospect is enhanced by the lack of any reason to read the rule otherwise. But Rule 6(d) may be read as

Professor Duane argues. The consequences are not likely to be severe — a party wins 3 added days to act, usually in the early stages of an action. The most severe prospect is that a party will deliberately delay action to the end of the 3 added days, relying on that interpretation of Rule 6(d), only to confront a court that rejects the interpretation. Even then it seems unlikely that the court would deny leave to act if there were good reason to implead a third-party defendant, amend a pleading, or demand jury trial.

Absent the prospect of serious consequences, it may be wise to allow style missteps to accumulate for a while, to be addressed in a package. A continual parade of minor amendments should be avoided when possible. If only one or two appear, little is lost by delay. If a few appear, a package can be timed for publication in light of the apparent importance of one or more corrections, the possibility that publication with more important amendments might dilute the value of public comment, and the benefits of allowing a year or more to go by without any new rules.

Reconsideration of the 3-added days provision is most often suggested in the belief that service by electronic means does not merit the added time. Still, even e-mail from the court is not always delivered, and the concerns that prompted including electronic service in Rule 6(d) may survive in some measure. Service by mail, on the other hand, may well merit the 3 added days. The other modes of service specified in Rule 6(d) present intermediate questions — "leaving it with the court clerk if the person has no known address," or "delivering it by any other means that the person consented to in writing."

The 3-added-days questions affect other sets of rules intrinsically. What modes of service, if any, warrant increasing the time to act?

Even the style misstep may have some bearing on other rules. Appellate Rule 26(c) allows 3 added days only "after service." Apparently no Appellate Rule specifies a time to act after making service, so the style question does not arise. But the question of service by electronic means does arise. Criminal Rule 45(c) is nearly verbatim the same as Civil Rule 6(d), but apparently no Criminal Rule specifies a time to act after a party makes service. (The Criminal Rules Reporters suggest that Criminal Rule 12.1(b)(2) might be affected, but doubt that any possible problem is serious.) Bankruptcy Rule 9006(f) is similar to Rule 6(d); using language adopted long before Rule 6(d) was amended, it provides added time after a paper "is served by mail." The Bankruptcy Rules incorporate Civil Rules 14, 15, and 18 either for adversary proceedings or for all litigation. There to not appear to be any cases addressing the effect of the "served by mail" language in the context of Rules 14, 15, or 18.

If the 3-added-days question is to be revisited, most likely with some means of coordination among the Advisory Committees, the style issue can be dealt with in that context. Otherwise it will be moved ahead for action when there is no other reason to delay.

F CIVIL-APPELLATE RULES INTERSECTIONS

The Appellate Rules were liberated from the Civil Rules many years ago, but the Civil Rules continue to reflect the intertwining interests of trial courts and appellate courts. The Advisory Committees frequently work together to develop coordinated proposals that integrate related rules. A joint Civil-Appellate Rules Subcommittee has been formed to bring the perspectives of both Committees to bear on at least two current projects.

One project deals with problems that may arise from the effects of some post-judgment motions that suspend and then, on final disposition of the last such motion, "reset" or "restart" appeal time afresh. A pervasive problem in this area was corrected several years ago by parallel amendments of Civil Rule 58 on entering judgment and Appellate Rule 4. But, in the seemingly inevitable fashion of Rule 4, some possible problems linger on.

The second project deals with efforts to "manufacture" finality after adverse rulings that do not dispose of an entire action. Different circuits take different approaches to dismissal without prejudice, dismissal with prejudice, and dismissal with "conditional" prejudice that allows revival of the matters dismissed if the order giving rise to the appeal is reversed. These questions could be addressed, at least in part, through Civil Rule 41 on dismissal or Civil Rule 54(b) on partial final judgments. For that matter, it would be possible to craft an entirely new Civil Rule to complement Appellate Rules provisions.

The Appellate Rules Committee considered these matters at its April meeting, as discussed in their Report. The Civil Rules Committee will rely on the Subcommittee for initiating the next steps toward work on the Civil Rules.

III PENDING LEGISLATION

The Committee continues to monitor the progress of bills that affect the Civil Rules. The most prominent examples are the Sunshine in Litigation bills and the Lawsuit Abuse Reduction Act. Each set carries forward proposals that have been introduced regularly for many years — to curtail the use of discovery protective orders in actions that may affect public health or safety, and to restore Rule 11 to the version that was in effect from 1983 to 1993.

Andrea Kuperman's Legislative Report adds more detailed information.

TAB 5-F

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 4-5, 2011

The Civil Rules Advisory Committee met at the University of Texas Law School on April 4 and 5, 2011. The meeting was attended by Judge Mark R. Kravitz, Chair; Elizabeth Cabraser, Esq.; Judge David G. Campbell; Judge Steven M. Colloton; Judge Paul S. Diamond; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Judge John G. Koeltl; Judge Michael W. Mosman; Judge Gene E.K. Pratter; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Chilton D. Varner, Esq.; and Hon. Tony West. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, Judge Diane P. Wood, Judge Wallace Jefferson, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, James Ishida, Jeffrey Barr, Holly Sellers, and Andrea Kuperman, Chief Counsel to the Rules Committees, represented the Administrative Office. Judge Barbara Rothstein, Joe Cecil, and Emery Lee represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Observers included Alfred W. Cortese, Jr., Esq.; Joseph Garrison, Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA Litigation Section liaison); David Ackerman, Esq. (American College of Trial Lawyers); Kenneth Lazarus, Esq.; John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq.; Robert Levy, Esq.; Jerry Scanlon (EEOC liaison); Professor Lonny Hoffman; Andrew Bradt, Esq.; and Professor Robert Bone.

Judge Kravitz expressed thanks to the University of Texas Law School for hosting the event, They have been gracious hosts throughout the planning process. He came early to attend a clerkship extravaganza, a gathering of judges that included many current participants in the rulemaking process. Real thanks are due to Dean Sager.

Judge Kravitz introduced Judge Mosman as a new Committee member. Judge Mosman is a graduate of Brigham Young, and clerked for Judge Wilkie and then Justice Powell. He was an Assistant United States Attorney up to 2001, and then became the United States Attorney for the District of Oregon. He was confirmed as a District Judge in 2003 by a 93-0 vote of the Senate.

Judge Kravitz also welcomed Elizabeth Cabraser to the Committee. She has appeared before the Committee many times, and has helped its work by responding to other outreaches. The rest of the day could be filled by reciting the many accolades and awards she has received. She is a Super Lawyer, and has been named as one of the 50 most influential lawyers in the country. And she has written many articles, including a wonderful contribution to the Duke Conference last May. She already has taken hold in the work of the Discovery Subcommittee. She will be an outstanding member.

Judge Vaughn Walker was unable to attend this meeting because he is teaching, but sends his regards. It would have been nice to have him present to hear a renewed salute for his many contributions to the Committee.

During the introductions of all those present Judge Kravitz expressed particular appreciation to Tony West, noting that it is particularly important to have the Assistant Attorney General for the Civil Division with the Committee to reflect the experience and judgment of the Department of Justice.

Judge Kravitz lauded Chilton Varner's service as a member, and presented a certificate of the Judicial Conference's appreciation for her distinguished service and commitment to the federal judiciary.

Judge Kravitz then reported that Greg Joseph, Tom Allman, John Barkett, Dan Girard, Paul Grimm, and Emery Lee presented a panel discussion of preservation of electronically stored information to the Standing Committee in January. The panel elaborated on the importance of the problems and the difficulties of crafting a useful rule to address them. The Standing Committee also discussed pleading standards, and the work of the Duke Conference Subcommittee.

Bills affecting the Federal Rules of Civil Procedure continue to be introduced in Congress. Andrea Kuperman said that the Administrative Office is monitoring the Sunshine in Litigation bills that have been introduced in the House and Senate. The bills are similar to those that have been introduced in many past Congresses, but there are differences. They apply only when the pleadings in an action show facts relevant to the public health and safety. In such actions, a discovery protective order can enter only if supported by findings of fact that the order will not restrict disclosure of information affecting the public health or safety, or that the order is narrowly tailored to protect a specific and substantial interest in confidentiality. Similar findings are required to approve a settlement agreement that would restrict disclosure of such information. The Senate bill includes a provision that it does not constitute grounds for withholding information in discovery that is otherwise discoverable; it is not clear what this provision may mean. The central problems presented by earlier bills in this series remain: it is not feasible to make the required findings before knowing what information may be involved in discovery, and the process will add greatly to the contentiousness, cost, and delays of discovery.

Another bill would enact a Lawsuit Abuse Reduction Act. The bill would unwind the 1993 amendments of Rule 11, returning to the 1983 version. Sanctions for violations would be made mandatory, including attorney fees. The safe-harbor provision would be deleted. The House has held a hearing on the bill. Judge Kravitz, the American Bar Association, and the American College of Trial Lawyers sent letters in opposition. The motivation for this bill, and similar predecessors, is unclear; it may be viewed as a part of "tort reform." Research shows that the 1983 version of Rule 11 was counterproductive; it increased delay and costs. Whatever share of the federal civil docket is made up of frivolous cases, all the evidence is that the proportion did not increase in the wake of the 1993 amendments, and that the amendments greatly curtailed the satellite litigation of Rule 11 motions that was compounded by Rule 11 motions claiming that Rule 11 motions violated Rule 11. All the empirical work by the Federal Judicial Center is being ignored. Professor Hoffman testified against the bill; Victor Schwartz testified in support, along with a representative of small businesses.

November 2010 Minutes

The draft minutes of the November 2010 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Rule 45

Judge Kravitz prefaced the report of the Discovery Subcommittee by expressing thanks to Judge Campbell and Profesor Marcus for all their hard work on Rule 45. They and the Subcommittee were so devoted that they sacrificed President's Day to hold a meeting in Dallas. He noted that leaders of the American Bar Association Section of Litigation had provided comments on the current drafts, and that defense interests also had commented.

Judge Campbell introduced the Subcommittee report by stating the goal: To conclude work, and send to the Standing Committee a draft recommended for publication.

The drafts present four issues:

First, to move, emphasize, and improve the notice requirement. It has been widely disregarded. The basic proposal has been approved already, relocating the requirement to a more prominent position in Rule 45 and adding a requirement that a copy of the subpoena be served with the notice. Questions remain: some observers believe that the person serving the subpoena also should be required to notify other parties as things are produced in response. And some language changes have been suggested by the American Bar Association.

Second is the provision that would allow the court for the place of performance to transfer enforcement disputes to the court where the action is pending. Issues to be resolved include the standard for transfer, and — if transfer is made — which court should enforce the order issued by the court where the action is pending.

Third are the "Vioxx" issues: should there be a provision to compel a party or a party's officer to attend trial beyond the limits established by present Rule 45(b) provisions for serving a subpoena? The Subcommittee recommends that the Vioxx reading of Rule 45 be overruled, but also has prepared a draft that would restore some part of it. The alternative draft is not an alternative recommendation. Nonetheless it may be wise to publish it to ensure full comment, paving the way for adoption without republication if the testimony and comments persuade the Committee that it is better to establish some provision for compelling attendance at trial beyond the limits established for depositions.

Fourth is the proposal to simplify the "3-ring circus" aspect of Rule 45 created by the complex interplay of provisions that identify the court that issues the subpoena, provide for place of service, and, in a scattered fashion, address the place of performance. This proposal would provide nationwide service, and separately specify the place of performance.

The Subcommittee unanimously recommends the simplification of Rule 45, but has recognized that this departure from what has become familiar may encounter resistance. Alternative drafts have been prepared to show what Rule 45 would look like if it included only the provisions for notice, transfer, and overruling Vioxx. The agenda book thus contains four sets of Rule 45 materials: I is the Subcommittee's recommendation. II supplements I by showing a provision that would preserve some part of Vioxx. III parallels I, but without the simplification. IV supplements III by adapting the provisions that would preserve part of Vioxx in the rule as it would stand without simplification. One of the questions to be addressed is whether this four-part presentation generates too much confusion, whether it will be better to go forward to the Standing Committee with only Parts I and II.

Judge Kravitz said it is important that the Committee choose its preferred version and explain the choice. It may be useful to send Alternatives III and IV to the Standing Committee if this Committee concludes that it is better to go ahead to publication now without attempting any simplification of Rule 45 if the Standing Committee rejects whatever version of a simplified Rule 45 that may be approved at this meeting. The Standing Committee will be able to understand the role of the alternatives.

Judge Campbell stated that the Subcommittee clearly favors version I — rejecting the Vioxx decision, and simplifying Rule 45 by providing nationwide service of discovery subpoenas, separately regulating the place of performance. But it recommends publication in a subordinate

posture of the alternative that would preserve some authority to command testimony at trial of a party or a party's officer beyond the limits established for depositions. It does not recommend publication of versions III and IV; they are intended, at most, as illustrations of an alternative for the Standing Committee to consider if it rejects the Subcommittee's preferences.

Judge Rosenthal said that the Standing Committee would readily understand the role of versions III and IV if the Committee decides to present them. They are a clear road map.

A question was raised about the practice of publishing alternatives. How does it work? One practice, followed with some frequency, is to publish rule text with alternatives when the Committee itself is uncertain which is better. Another practice is to publish a preferred version, clearly identified as preferred, but also to focus comment on a competing version by presenting a clear text that responds to weighty countervailing positions. So with the Vioxx alternatives, the proposal is to publish the recommended version and to explain why it is recommended. The alternative would be published, perhaps as an appendix, with a clear statement that it is not recommended but with a request for comments both on the possible advantages of the alternative and on possible improvements on the alternative. Publication has great virtues. Time and again the Committees have been educated by comments and testimony that show how to improve initial proposals or show that a proposal does not deserve adoption.

Further discussion agreed that the mode of presenting versions I, II, III, and IV was clear. The value of publishing an alternative that carries forward some part of the Vioxx rule, albeit in a subordinate posture, was recognized. The risk that republication will be required is much reduced if there is an opportunity for public comment on a carefully developed draft. As for simplification, the question may be "yes" or "no"; in that case, it can be useful to carry forward versions III and IV at least as far as the Standing Committee. The question is a familiar severability question: the Standing Committee will readily understand the alternatives that present all the recommendations other than simplification. But it was asked whether it would be better to submit only versions I and II if the Committee decides that simplification is clearly desirable.

Publication of a Vioxx-preserving alternative was further supported on the ground that the district courts are divided. Several have adopted the Vioxx ruling. Some of the courts that reject it as inconsistent with the plain language of Rule 45 seem to regret that result. The Committee must be sensitive to a view that has attracted this much support.

The question whether to send forward a version that includes notice, overruling Vioxx, and transfer, but that does not include simplification, was postponed with the observation that the decision will depend on the course of deliberations on the merits. If simplification is clearly preferred, it may make sense to go forward with the simplified version alone. This course will be further supported if the Committee concludes that failure of the present simplification approach leaves the possibility of an intermediate simplification that would remain to be drafted and debated.

A preliminary question was noted: if a discovery motion is transferred by the court for the place of performance to the court where the action is pending, is there a problem with enforcing the order? It was noted that the absence of any present provision for transfer deprives us of the opportunity for any extensive experience. The Subcommittee has looked for published opinions, but the prospect of finding much help seems slender. Professor Marcus has been looking, without finding anything useful. A law clerk looked for contempt cases without success. And Administrative Office data are not likely to provide reliable information.

Professor Marcus began the detailed presentation of the Rule 45 proposals with Version I, Alternative A. Initially, he noted that a contemporary commentator reacted to the 1991 revisions

of Rule 45 when they were created by finding them highly complicated and difficult to follow. These sentiments have echoed through the following two decades.

Rule 45: Notice

The changes in the notice requirements are familiar from earlier Committee meetings. It is often lamented that many lawyers fail to heed the direction that before a subpoena to produce is served on the witness it must be served on each party. This problem is addressed by moving the direction from the last sentence of present Rule 45(b)(1) to become a new paragraph (a)(4). The notice requirement also is bolstered by requiring that the notice include a copy of the subpoena. Finally, the requirement is extended to include trial subpoenas by deleting the words that limit the notice requirement to subpoenas to produce "before trial." The Subcommittee concluded that prior notice may be even more important with respect to trial subpoenas than it is for discovery subpoenas.

The notice provision could be expanded. Several experienced lawyers urge that notice should be required when materials are produced in response to a subpoena. They complain that it is difficult to gain access to the materials. Leading figures in the ABA Litigation Section have recommended that after notice that the subpoena will be served, notice also should be given of any modification of the subpoena, and that things produced in response should be made available to all parties in a timely fashion. The Subcommittee has considered this question several times, and reconsidered it after it was raised at the Standing Committee last January. Each time it has concluded that these additional notices should not be required. There is a real concern that requiring subsequent notices could impose significant burdens, particularly when materials are produced in a rolling fashion — how many notices are required, and when? And there is concern that the requirement could become a source of "gotcha" disputes about compliance, particularly with respect to how many notices must be given, and how soon, when production spreads out over time. And the disputes may be deliberately deferred to motions made on the eve of trial, requesting exclusion of materials produced under the subpoena. Lawyers should bear the responsibility of following up on the notice that the subpoena will be served by making periodic inquiries about compliance, with requests for access to the materials produced. The draft Committee Note says, at pages 104-105 of the agenda materials, that parties desiring access should follow up to obtain access, and that the party serving the subpoena should respond by making reasonable provision for prompt access. This sort of advice does not seem appropriate for rule text.

Discussion began with observations that a lawyer who has notice that a subpoena is in play becomes responsible to follow up by inquiring about the response, and that it could be complicated to apply a notice requirement to rolling production — and phased discovery is often directed in the quest for proportionality. In addition, it was suggested that it is better to avoid anything that increases the length and complexity of Rule 45. This problem is a good example of the need to foster cooperation in litigation.

John Barkett, who participated in drafting the ABA letter, reported that it came out of exhaustive, robust discussions. The conclusion was unanimous. The participants included lawyers who engage in very complex litigation and others who engage in less complex litigation. Their experience is that no matter how often they call or ask, they do not get the documents produced under a subpoena. It is not enough to say it becomes the responsibility of other parties to pursue production by the party who served the subpoena. The suggestion that notice also should be required when the party who serves a subpoena negotiates modification of its terms with the person served may prove complicated in practice. But the problem is created by people who do not practice cooperatively. The prospect that a Committee Note can solve this behavior is not good.

It was suggested that there is no need for notice of modification if the breadth of the subpoena is cut back. Does it happen that modifications expand the reach, so other parties need notice that enables them to assert needs for protection?

An alternative was suggested: lawyers could agree in the Rule 26(f) plan to require the subsequent notices of modification and production, and the requirements could be included in the ensuing discovery order. Doubts were expressed in a different direction: "Rules are not always obeyed or enforced." Behavior will not be changed by adding new rule requirements. A similar doubt was expressed: "You cannot do all lawyering in the rules." Other parties should be responsible for calling the party who served the subpoena, or the nonparty who was served. If problems arise, the court can resolve them. "This is a 'gotcha' provision" that would cause lawyers to avoid doing what they should do to keep abreast of subpoena responses. A lawyer who encounters problems can issue an independent subpoena to the same nonparty.

The proposed notice provision, new Rule 45(a)(4), lines 62-65 on page 94 of the agenda materials, was approved without dissent.

Rule 45: Transfer

Earlier drafts had two transfer provisions that addressed motions to quash and motions to enforce, but not a motion to determine whether privilege or work-product protection apply to material covered by a notice given after initial production. It has seemed more efficient to redraft a single transfer provision, proposed Rule 45(f) at lines 257-263, pages 100-101 of the agenda materials. The transfer, at least at the first step, is from the court where compliance is required to the court where the action is pending. Three aspects of transfer should be discussed: the standard for transfer; enforcement issues that may arise if an order is entered by the court where the action is pending rather than by the court where performance is required; and potential choice-of-law issues. A minor drafting issue will be considered by the Subcommittee — whether the text should refer to a motion "in a court other than the issuing court," or instead to "in the court where compliance is required."

Earlier drafts began with the language of 28 U.S.C. § 1404(a) as a standard for transfer. But it seemed inappropriate to invoke the standard that governs transfer of an entire action, a more momentous event. A series of alternatives led to the current version: "considering the convenience of the person subject to the subpoena, the interests of the parties, and the interests of effective case management." The Committee Note attempts to make it clear that this standard is not easily met. Alternative approaches should be discussed. It may be that transfer should be readily made, or that it should be seldom made, or that some more-or-less neutral midpoint should be preferred. The Note comes close to the "really hard" end of the spectrum if the local nonparty addressed by the subpoena prefers local resolution without transfer. If that is the preferred approach, is the Note sufficient to overcome the fear that transfers will be ordered too often?

The ABA letter recommends that transfer should be ordered only on consent of the parties and the person subpoenaed, "or in exceptional circumstances." There may be little need to address the unanimous consent possibility in rule text — courts generally will honor such a request, and it may be better to recognize that in some circumstances the court may have good reason to refuse transfer in the face of unanimous consent. The "exceptional circumstances" term appears in other rules — 26(b)(4)(D)(ii) limiting discovery of consulting experts, and 37(e) on sanctions for failing to produce electronically stored information that has been lost. "[E]xceptional condition" appears in 53(a)(1)(B)(i) on appointing a special master. At the same time, the ABA provides examples of exceptional circumstances that do not seem all that exceptional — a risk of inconsistent rulings by different courts when performance is required in different places, the prospect that resolution of the

objections would materially affect the merits of the action, or the court for the place of performance cannot timely address the matter.

Judge Campbell noted that the proposed draft reflected a Subcommittee expectation that transfer will not happen very often, but that he has come to fear that the language may allow transfer too often. Busy judges in the place of performance may find justification in one phrase or another to justify transfer. It is not likely that a judge ruling on a discovery dispute will have time to consult a Committee Note. The ABA request for stricter language seems attractive.

The factor addressing the "interests of effective case management" was questioned. "A concept doesn't have interests. The draft permits too many arguments for transfer."

One possibility would be to provide that a person seeking transfer has the burden of justification. But it was thought sufficient to state a standard; the burden falls naturally on a party seeking transfer.

As usual, invoking a term found in other rules risks comparison to different problems that require different approaches. But a phrase like "exceptional circumstances" resonates more to general terms such as "good cause." There is little reason to fear that "good cause" provisions will be read to require the same threshold of justification in every rule where they appear. So a generic reference to "exceptional circumstances" will be read to set the tone for transfer in light of all the interests that bear on choosing the court to rule on the motion.

It was urged that "exceptional circumstances is demanding." The ABA list of examples "does not capture the situation where enforcement is integrally related to management of the case by the court where the action is pending." The draft reference to effective case management does capture this situation, although it might also be read to enable the court where discovery is pending to manage its cases by transferring a problem away. The standard should be drafted in a way that invokes the burdens on the nonparty subject to a subpoena, the interests of the parties, and the relation of the discovery dispute to the underlying litigation.

Another member suggested that transfer is not necessarily a bad thing. Concern for local interests and the nonparty subject to the subpoena may be relatively rare in comparison to concern about the impact of the issues on the whole case. "Making transfer easier is not a bad thing."

The Subcommittee, however, has been worried that a nonparty should have access to a local judge. It has believed that most issues relate to the nonparty, that relation to the central issues in the case is less common.

Another suggestion was that it could be useful to put the ABA examples in the Committee Note, and perhaps to refer to the local interests as well as the convenience of the local nonparty. An example was given. Enterprises such as Google and Facebook are frequently served with nonparty subpoenas. It often takes a few days for the subpoena to come to the attention of the appropriate people. The time to respond is, as a practical matter, very short. It can be very helpful to locate the dispute in the court local to the place where compliance is required.

A preference was expressed for "exceptional circumstances" as a way to avoid making it too easy to transfer. "The focus should be on the nonparty, who has no interest in the case."

John Barkett noted that the ABA wants transfer really to be the exception, not the rule. If there are words better than "exceptional circumstances" to achieve this end, that's fine. Another

observer said that Lawyers for Civil Justice also favors the "exceptional circumstances" wording. The Committee Note could provide examples in addition to those suggested by the ABA.

Still further support was offered for "exceptional circumstances." As drafted, Rule 45(f) reads as if the court can act on its own, without a motion. Do we want that? (No answer was given.)

The question was framed again: suppose, under the nationwide subpoena proposal, a subpoena issues from the Western District of Washington, addressed to a nonparty in Connecticut. Should we generally prefer that the parties deal with objections — particularly those made by the nonparty — in Connecticut? The provision for nationwide service intersects the provision for transfer, although transfer can be provided for in a rule that carries forward the present practice of issuing the subpoena from the court where performance is required.

In response to a question about actual experience with nonparty discovery disputes relating to a distant action, a judge described that he had encountered these problems twice. Once involved discovery in his court incident to an action elsewhere, while the other involved discovery elsewhere incident to an action in his court. These problems arise only in exceptional circumstances, and are likely to involve large, high-stakes commercial litigation. The nonparty is more likely to be a corporation than an individual. It is not a bad thing to have the dispute resolved in the court where the action is pending. But it would be better to provide that the party seeking transfer has the burden of showing justification.

After support was expressed for the "exceptional circumstances" test, a proposal to adopt it was approved unanimously. The Committee Note will be modified accordingly. Either in rule text or Note, account will be taken of the situation in which the parties and the person subject to the subpoena join in requesting transfer.

Rule 45(f) also includes a sentence authorizing an attorney for the party subject to a subpoena to appear in the court where the action is pending if a motion is transferred. An invitation to discuss the provision drew no response.

Rule 45: Enforcement After Transfer

Three draft provisions bear on the enforcement questions that may arise after a Rule 45 motion is transferred to the court where the action is pending. Two alternatives are proposed for Rule 45(f). The first: "If [appropriate]{necessary} to enforce its order on the motion, the issuing court may retransfer [the motion]{its order} after entering its order." The alternative: "If the issuing court orders discovery from a nonparty [not subject to its jurisdiction], it may retransfer [the motion]{its order}for enforcement after entering its order." The first alternative looks toward transfer back after problems arise; the second looks toward transfer back as a precautionary measure.

Proposed Rule 45(g), with an addition over the version that appears in the agenda materials, would provide: "The court for the district where compliance is required — or, after transfer of the motion, the issuing court — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order relating to the subpoena."

Rule 37(b)(1), as presented, would allow "either court" to treat as contempt a deponent's failure to obey an order to be sworn or to answer a question if the court where the discovery is taken transfers the motion to the court where the action is pending. The draft could be read to allow the court where the action is pending to impose contempt sanctions even without transfer from the court where the motion is made. That will be corrected by further drafting.

There is a faint analogy for holding a nonparty witness in contempt of a court at a distance from the witness in Criminal Rule 17, which authorizes nationwide service of trial-witness subpoenas. There is not a lot of law on the enforcement aspects of these subpoenas.

Turning first to Rule 45(f), the basic question is whether the court where the action is pending should want to remit enforcement to the court where the discovery is to occur before there are any concrete reasons to anticipate failures to comply with the order.

A judge asked whether the standard for contempt is the same nationwide? And whether the practice also is uniform. He holds a person in contempt only after an in-person appearance. Would it be right to allow the Western District of Washington to hold a person in the Southern District of Florida in contempt without a personal appearance in Washington? Would it be reasonable to drag a nonparty charged with contempt across the country for this purpose? This is in part a subset of the choice-of-law problem, as well as the decision to provide nationwide service of all nonparty subpoenas from the court where the action is pending. "How far should we upset local-court expectations in civil actions"? It also invokes the distinction between civil and criminal contempt — and criminal contempt raises rights to jury trial and proof beyond a reasonable doubt.

The purpose of providing for transfer back to the court where compliance is required is to ensure personal appearance in a convenient tribunal. Transfer seems less complicated than the alternative of proceeding by motion in the court where compliance is required to enforce the order of the court where the action is pending.

It also was noted that pro se parties will be a problem, assuming they manage to pursue proceedings to the point of participating in a motion, transfer, and subsequent enforcement proceedings. "It is the party trying to enforce the subpoena who will have to figure it out."

A further distinction may be drawn between enforcement of orders that restrict requested discovery and enforcement of orders that compel discovery. Problems are more likely to arise from orders that compel discovery.

The relationship between proposed 45(f) and proposed 45(g) was addressed by asking whether 45(g) authorizes the court where compliance is required to enforce an order of the court where the action is pending without transfer back. With the proposed revision, it would allow the compliance court to enforce an order relating to the subpoena made by the court where the action is pending. There may be real advantages in enforcement by the court where compliance is required. Disputes about compliance may focus on whether what in fact has been done does in fact comply with the order, raising essentially local issues.

A separate problem was noted. Civil contempt may be courted by a party that wants a basis to appeal a discovery order. Selection of the court that enters the contempt order will determine the circuit in which appeal is available, and that may affect the law that governs the dispute. Rule 45(g), indeed, identifies only contempt as the enforcement sanction, although a minority of courts have recognized the use of other sanctions.

The question was reframed: is there a clear answer to the place-of-enforcement question? The reasons for preferring enforcement where the nonparty is required to comply might lead to a rule that automatically calls for enforcement by that court. The court where the action is pending could achieve most of the case-management advantages, and could satisfy any need for uniform rulings on issues arising in different places of compliance, by issuing the order. Confiding enforcement to the court for the place of compliance would seize the advantages of localy resolving local issues as to compliance or no. There might be some awkwardness about interpreting the order,

or about motions to modify it, but they need not be great. And this approach would provide a clean, simple rule.

This suggestion was resisted. One difficulty would arise if the court where the action is pending is directed to rely for enforcement on several courts in several different places where compliance is required. Those courts might interpret and enforce the same order differently. And enforcement often will be ordered because it is a party that is causing the problem — one example was a case in which a defendant directed a nonparty witness to refuse to produce the documents. Compare Rule 26(c), which directs a nonparty from whom discovery is sought to move for a protective order in the court where the action is pending, and provides an alternative only for matters relating to a deposition by allowing a motion in the court where the deposition will be taken. Flexibility seems better than a simple requirement that enforcement always be in the court where compliance is required.

A preference was expressed for Alternative 1, providing for transfer back when a problem arises. That might make it wise to adopt "necessary" as the standard for transferring back, and to transfer back the order, not the motion. Style changes were also suggested. The sentence might be shortened like this: "To enforce its order on the motion, the issuing court may transfer the order." But it was asked whether drafting in this fashion would suggest that the court where the action is pending (the issuing court) lacks authority to enforce its order. That led to the question whether the court for the place of compliance can enforce an order of the court where the action is pending without transfer back; Rule 45(g), as proposed, may not clearly answer that question. It was observed that "We do not want two courts to be able to enforce the same order simultaneously — different parties may go to different courts." A rule that says "either" does not mean that both can do it. Another suggested edit would have the rule allow the court where the action is pending to "retransfer the matter," understanding "matter" to include both the motion and the order. Or: "To enforce its order, the issuing court may transfer the order to the court where [the motion was filed]{compliance is required}."

This discussion concluded with unanimous approval of "alternative 1," to provide — in language to be worked out — for retransfer to the court where the motion was filed.

The Committee unanimously approved the suggested addition to Rule 45(g), described above, adding at line 272, page 102, these words: "may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena <u>or an order relating to the subpoena</u>."

Turning to Rule 37(b)(1), the drafting problem described above came on for discussion. The Subcommittee does not want to establish power for the court where the action is pending to enforce an order entered by the court where compliance is required if there has not been a transfer. A relatively lengthy drafting fix is readily accomplished. Perhaps a shorter version can be managed. It is useful to amend Rule 37 because it is the only place that covers nonparty deposition testimony, as compared to the production subpoenas covered at length in Rule 45.

Rule 45: Choice of Law With Transfer

Choice-of-law problems can arise in the present structure of Rule 45, even absent a transfer provision. An illustration is provided by Jimenez v. City of Chicago, 733 F.Supp.2d 1268 (W.D.Wash.2010). A nonparty witness was subpoenaed in the Western District of Washington to give testimony for an action pending in the Northern District of Illinois. The question was whether to rely on Ninth Circuit journalist privilege law, or to invoke the Seventh Circuit's rejection of the privilege. The court chose Ninth Circuit law, as the precedent binding it as the court that issued the subpoena. This example is particularly useful because it serves as a reminder that not only may the

rules of evidence and discovery vary among the circuits, but state law also may become relevant, as when Evidence Rule 501 invokes state privilege law. In a transfer regime, the question would be sharpened if the subpoena issued from the court in Illinois and the court in Washington decided to transfer the issue to Illinois.

The agenda materials include only one entry on this question, a possible Committee Note sentence: "If the transfer might alter the legal standards governing the motion, this factor might affect the desirability of transfer." Would adding this to the Note help? Create confusion or even suggest undesirable practices? It was concluded that these questions should not be addressed, either in rule text or in the Committee Note.

Rule 45: Party as Trial Witness

The Vioxx decision, discussed at length in earlier meetings, interpreted Rule 45 to authorize a subpoena commanding a party or a party's officer to appear as a trial witness without regard to the place-of-service limits in Rule 45(b). It has been followed by other courts. It also has been rejected by other courts.

The Subcommittee proposes to reject the Vioxx ruling. It misreads the present rule. More importantly, it reaches a wrong result. Proposed Rule 45(c)(1)(A) expressly overrules the Vioxx result by providing that a subpoena may require a party or a party's officer to appear at a trial only within the state where the party or its officer resides, is employed, or regularly transacts business in person, or within 100 miles of where the party or its officer does such things. This proposal has been discussed and approved in earlier meetings. The Committee confirmed it again as a recommendation to the Standing Committee for publication.

At the same time, the Subcommittee recognizes the support that Vioxx has commanded. It may be that public comments supporting Vioxx will prove persuasive. To encourage and focus comments, the Subcommittee has prepared an alternative that would go part way to preserving the Vioxx result. But only part way. The alternative does not authorize a party to issue a subpoena to another party. It requires a court order, and requires good cause to issue the order. The order can be directed only to the party; if it seeks testimony of the party's officer, it is the party that is directed to produce the officer to appear and testify at trial. Before issuing the order the court must consider the alternative of audiovisual deposition, or securing testimony by contemporaneous transmission under Rule 43(a). The court may order reasonable compensation for expenses incurred to attend the trial. The Committee Note emphasizes the good-cause requirement. Vioxx does not include any of these limits.

The Subcommittee recommends that the alternative preserving some part of Vioxx be published along with the Rule 45 proposal, but in a subordinate posture that clearly marks it as something the Committees do not recommend.

The Committee approved the language of the alternative, as it appears on page 111 of the agenda materials.

Discussion turned to the question whether the alternative should be published. It was noted that Vioxx does not stand alone, but has gathered support. And some of the cases that reject Vioxx rely only on the language of present Rule 45, at times seeming to indicate a preference for the Vioxx rule if it could be squared with the rule language. And plaintiff's lawyers at the Dallas meeting in February thought it is good to be able to command trial testimony when it can be shown that a party's officer has important knowledge about the events in suit.

The efficacy of publishing an alternative for comment was also noted. There is a risk that when an alternative is published as something the Committees do not favor, subsequent adoption of the alternative will lead to protests that people who supported the Committees' primary recommendation did not bother to express their support because they assumed the Committees would not be moved from their initial preference. But a clear invitation to comment now on both alternatives will reduce the force of any such protests. Various forms of alternative publication have been used in the past. What is important is to be careful to actively solicit comment, without presenting the disfavored alternative as if it were co-equal with the preferred version. The solicitation for comment will be worked out carefully, for the purpose of enhancing the prospect that if the Committees eventually decide to go part way toward embracing Vioxx there will be no need to republish.

Rule 45: Simplification

Alternative I simplifies Rule 45 by providing that subpoenas issue from the court where the action is pending and may be served anywhere in the United States. The place of compliance is separated from the place of service. These changes are reflected in Rules 45(a)(2), (b)(2), and (c).

The subdivision (c) provisions for place of compliance are drawn from present Rule 45, but are not entirely the same. Exact similarity would complicate the rule. The changes remove any reliance on state law. They also end the possibility of compelling appearance for a deposition or trial by serving a witness as a transient. On the other hand, nationwide service means there is no need to serve the witness where the discovery is to occur; that issue is addressed directly by the provisions designating the place of compliance. It seems likely that these changes will not matter in most cases.

As a separate matter, the provision that would restore some part of the Vioxx rule will be relocated from the position shown in the agenda materials to become part of subdivision (c). That will put all of the provisions on place of compliance in the same subdivision.

The draft identifies many possible questions in footnotes. None of them were raised for further discussion.

The Committee unanimously approved the recommendation to advance the simplified Rule 45 for publication.

The Committee then returned to the question whether to send on to the Standing Committee the versions that omit simplification but incorporate the provisions for notice, transfer, and overruling Vioxx. One concern is that there are many alternative means of simplifying Rule 45 in some measure. If the Standing Committee concludes that full simplification goes too far, it may be better to ask for a remand to consider alternative approaches. An invitation to publish Rule 45 now, without any attempt to simplify, may be unduly defeatist. Deferring publication of Rule 45 proposals for another year is not a matter for great concern; we have been living with its present form since 1991. And it would be unwise to publish one set of Rule 45 proposals now and then publish a second set in another year or two.

The question whether to send Versions III and IV to the Standing Committee as a fallback for publication if the simplification proposals are rejected was deferred for consideration on the second day of the meeting. The Subcommittee then recommended that only the simplified version, including the Vioxx alternative, be sent to the Standing Committee. If full simplification is rejected, the Subcommittee will want to develop alternative versions in light of the discussion in the Standing Committee. The no-simplification alternative presents questions different from going forward to

publish the alternative that partially restores Vioxx. Publishing the Vioxx alternative will enhance the prospect that a final rule can be adopted without republication if public comments show that Vioxx should be restored in part or in full. The comments will be more useful if they focus on a specific model; criticisms of the model can suggest variations, or complete restoration of Vioxx. Publication also will show respect for the courts that have adopted the Vioxx rule.

Concern was expressed that publishing an alternative that expands the reach of orders for trial testimony by a party or a party's officer may appear as a recommendation to codify Vioxx. But the publication will not be framed as one asking "which do you like." The alternative likely will be framed as an appendix. The letter transmitting Rule 45 for publication will clearly recommend that Vioxx be overruled. This approach will ensure active comments. At the Dallas meeting in February plaintiffs lawyers who work in multidistrict cases thought the MDL panel should adopt the Vioxx rule for MDL cases. A like approach has been taken in the past, asking for comment on alternatives that are designated as disfavored. The resulting comments may cause the Committees to rethink the question, and support adoption of a revised rule without the need to republish. The concern about sending confused signals remains important, however, as a reminder of the need to be very careful about how the proposal is published.

The concluding comments observed that "When we publish we are not necessarily trying to persuade. We are seeking input." Putting the alternative out for comment will stimulate a more complete spectrum of views. It seems particularly important to enhance the comment process by these means when the courts have divided on a question addressed by a proposal.

The Committee agreed unanimously that the nonsimplified versions, III and IV, should not be sent to the Standing Committee.

Discovery: Preservation and Sanctions

Prompted by the strong recommendations made at the Duke Conference by the panel chaired by Greg Joseph, the Discovery Subcommittee began work last fall on possible rules governing preservation of discoverable information and sanctions for failing to preserve. The task is challenging. The case law is clear that a duty to preserve can arise before an action is filed. But when? What must be preserved? How long must it be preserved? Wrong guesses can lead to sanctions for spoliation. The uncertainties are reported to cause great anguish.

The anguish over exposure to sanctions could be alleviated by highly specific preservation rules. But the more specific the rule, the greater the prospect there will be important omissions. A more general rule designed flexibly to cover all important preservation duties, on the other hand, may be of little use for want of concrete guidance.

After wrestling with illustrative drafts similar to those in the agenda materials, the Subcommittee concluded that it needs more information. It hopes to hold a miniconference in September, to hear from people versed in the technology of storing, searching, and retrieving electronically stored information; from plaintiffs' counsel, defense counsel, and in-house counsel. The miniconference will be focused by providing drafts similar to those presented in the agenda materials for initial discussion. Suggestions about people who should be invited to the conference are eagerly requested.

An immediate suggestion for a conference participant was made, pointing out that many lawyers are poorly informed about the realities of preservation. In many circumstances it does not cost much to preserve electronically stored information, whatever the cost may be to preserve other forms of information. And the dreaded costs of searching huge accumulations of electronically

stored information may be reduced dramatically by electronic searching and screening. Beyond word-search terms, concept searching is being developed. Comparisons to human searches show that computer searching can produce far better results at dramatically lower costs.

The Committee agreed that the miniconference should be held.

The agenda materials illustrate three approaches. The first states a duty to preserve and attempts to provide detailed provisions; the second states a duty to preserve but elaborates the duty only in general terms; the third avoids any direct statement of a duty to preserve, but instead describes appropriate responses and sanctions for failure to preserve. The thought behind the sanctions-only rule is that it will give retrospective guidance on what should be preserved.

These models are presented for reactions at a conceptual level. The details are useful only to illustrate the characteristics of each approach. And the Subcommittee is open to suggestions for still different approaches that depart from any of these three models.

Models I and II present alternative forms of a new Rule 26.1 creating a duty to preserve. The first model, full of specifics, provides the best model for discussion because the specifics identify the problems encountered with preservation. The details have been borrowed from various sources, beginning with the elements agreed upon by the Joseph panel at Duke. Additional sources continue to emerge, including a lengthy comment by the Lawyers for Civil Justice received three days ago.

The very first part of the first subdivision, Rule 26.1(a), seeks to disclaim any intent to supersede preservation duties "provided by other law." Katherine David, interim Rules Law Clerk, provided a memorandum sketching the wide variety of other laws that establish duties to preserve. A discovery preservation rule should not attempt to displace any of them; they exist for independent purposes.

The draft imposes a duty to preserve on "every person who reasonably expects [is reasonably certain] to be a party to an action cognizable in a United States Court." These few words address several issues. The duty is established at a time before any action is filed. It reaches anyone who reasonably expects to be a party — but should the standard be raised to "reasonably certain," higher than the case law seems to be? Should the duty extend to a person who does not reasonably expect to be a party, but who should reasonably understand that it has information that may be important to litigation among others? The duty extends only to an expectation of litigation in a federal court — it would not do to attempt to write a rule for state courts — but how is a prospective party (or nonparty) to know whether anticipated litigation may be cognizable in a federal court? And bracketed language identifies the question whether a preservation rule should be limited to electronically stored information, the source of most current anxieties, or should extend to all discoverable information. It may be useful to recall that many of the cases identified by Emery Lee's FJC study involve tangible items — things, not simply paper documents.

The first question was whether the Enabling Act authorizes a rule that would establish a duty before any federal-court action has been filed. The Committee still has not decided that question. Instead, it seems useful to determine what sort of rule, if any, seems best. If the preferred rule recognizes a duty to preserve before an action is filed, and if the Committees conclude that Enabling Act authority for the rule is uncertain, Congress can be asked for authority to develop the rule. It was pointed out that federal courts now enforce a duty to preserve that arises before a federal action is filed: what is the authority to do that? If the duty can be, indeed has been established by decisions, should there not be authority to clarify and regulate the duty through the Enabling Act? One of the chief concerns is that the decisions are not uniform in some aspects, particularly on the

relationship between degree of culpability in failing to preserve, the degree of prejudice to others, and selection of an appropriate sanction. That seems the stuff of proper rulemaking.

It was suggested that it is troubling to think of developing a rule aimed only at electronically stored information. Other forms of information remain important, and often critical. And leaving other forms of information outside the rule, to be governed by decisional law, would perpetuate disuniformity and create complications in the many cases that involve preservation of information in various forms. And there might be problems of categorization: is a printout of an e-mail message electronically stored information?

It was pointed out that the "reasonably expects" phrase in 26.1(a) contrasts with "would lead a reasonable person to expect to be a party" in 26.1(b). "Reasonable person" suggests an objective standard, and the comparison may imply that "reasonably expects" is a subjective standard. What is intended? The Subcommittee intends an objective standard — perhaps 26.1(a) should be revised to say something like "who reasonably should expect."

The relationship to other sources of preservation duties was explored by an observer. There are thousands of sources of obligations to preserve information. They are established independently of whatever duties relate to litigation. The rules should not attempt to interfere with them. Professor Marcus replied that the intent clearly is to leave all other duties as they are. Perhaps it would be better to write the rule like this: "~~In addition~~ Without regard to any duty to preserve information provided by other law * * *."

The relationship to other duties to preserve also is addressed by the "trigger" provisions of 26.1(b)(6), invoking a duty to preserve on "the occurrence of an event that results in a duty to preserve information under a statute, regulation * * *." Does this mean that a litigant is the beneficiary, for example, of a duty to preserve mandated by the SEC? An observer suggested that major problems could be created by invoking external duties established without any thought to use in litigation. A wondrous variety of duties to preserve are created by federal and state statutes, administrative regulations, and ordinances. The focus should be on an objectively reasonable anticipation of litigation, not failure to comply with standards that do not bear on litigation and that often will be obscure or unknown.

It was pointed out that duties to preserve information overlap with state attorney-discipline rules. In England, these problems are dealt with in disciplining the attorney who allowed spoliation.

The issue of preservation costs was addressed by another observer, who pointed out that costs are imposed by preserving information for litigation that never gets filed. A group of in-house counsel are trying to develop more specific information on these costs.

The identity of the beneficiary of a duty to preserve was raised as another source of difficulty. Draft 26.1(b)(2) triggers a duty to preserve on receipt of a notice of claim or other communication indicating an intention to assert a claim. Suppose one person indicates an intent to sue, and suit is then brought by someone else? Does the duty to preserve extend to the benefit of the actual plaintiff? Does it make a difference whether there was a reason to anticipate a possible action by the actual plaintiff — if the original communication is made by the driver of an automobile involved in a collision, for example, should it depend on whether the defendant was on notice that there was a passenger in the automobile who ultimately proved to be the plaintiff? If there was no information about the passenger, and the information was destroyed three years after the communication, could there be a violation of the duty to preserve? For that matter, it was suggested that outside the states that recognize a tort claim for spoliation, the duty to preserve is identified as a duty to the court, not to opposing parties. That is important in determining sanctions.

The scope of the duty to preserve described in 26.1(b) raises still other problems. In the first model the list initially appears as a finite and total list, but then (b)(7) seeks to avoid the risk of omissions by adding a catch-all: "Any other [extraordinary] circumstance that would make a reasonable person aware of the need to preserve information." The catch-all "may catch too much." But a rule limited to defined categories will invite litigation disputing whether a bit of information falls into any of the categories. Return to the example of a communication of intent to sue over an automobile collision. Does the scope of the duty to preserve depend on whether the putative defendant knows there was a passenger? On whether the model of automobile was identified to a manufacturer defendant? So of the other categories. A potential party might retain an expert consultant, (b)(4), for the purpose of correcting perceived problems in a product, without any thought of being sued. A notice to preserve information, (b)(5) may be detailed — does that give license to discard information not identified? And so on through the list. And the Lawyers for Civil Justice submission identifies still other specific events that might trigger a duty to preserve.

One possibility is that ambiguity in the events that trigger a duty to preserve may be taken into account in sanctions decisions. That directs attention to the third model, which relies on provisions that directly govern sanctions as an indirect means of identifying the nature of the duty to preserve.

Discussion of these questions began by asking whether "cloud computing" practices that farm out data storage to unknown systems in unknown places is moving us toward a requirement that everyone preserve everything? We need to be educated as to what cloud computing is — perhaps as to the many different and potentially different things that it is or may become. Who controls the cloud — the owner of the information, or the system operator? What happens if the owner stops paying the cloud? How much of this will change in the next three years?

A specific example was offered. "Most people would say that filing an EEOC complaint would trigger a duty to preserve," but only a small fraction of these complaints eventually lead to litigation. Should the filing trigger a duty to preserve? The EEOC liaison responded by observing that an EEOC regulation requires preservation of everything relevant to the EEOC complaint. But he did not know how often private litigation follows after an employee files a complaint with the EEOC. Another observation was that only a small fraction of people who receive right-to-sue letters actually bring an action, but that there are a lot of private Title VII suits independent of the EEOC complaint process. This example may illuminate the choice between defining the duty as one to preserve by a person who is reasonably certain to become a party or one imposed on a person who should reasonably expect to become a party. Perhaps "reasonably anticipates" would work better?

A member asked whether the "laundry list" of triggers might better be included in a Committee Note, not rule text. The second version of 26.1(b) provides the same list, but in the form of "such as" examples of a generally described duty to preserve. That approach also could be shifted to a Note. An observer who had been a member of the Joseph panel noted that some panel members thought the list of triggers should be exhaustive, while others thought it should include a catch-all. A different observer who had been a member of the panel noted that he had preferred relegating the list to a Committee note.

An observer asked why a list of triggers will cause any appreciable harm if preservation is inexpensive? It was suggested that "we hear different things about the cost of preservation." And so long as preservation is not costless in any dimension, there is a risk that expansive preservation duties will impose unwarranted costs, or lead to unwarranted sanctions when they are overlooked. An enterprise that frequently confronts the possibility of litigation may encounter substantial costs if there is an expansive duty to preserve associated with each of them. And the cost of preserving

information is not limited to direct preservation costs — once you have preserved it, you face the prospect of search costs if litigation is actually commenced.

After the trigger provisions of 26.1(b) come the "scope" provisions of 26.1(c). These may create greater difficulty than the trigger provisions. An anecdote from long ago illustrates the problems. In United States v. IBM the preservation order required IBM to retain "all documents related to computing." IBM responded by not throwing away anything. The waste baskets were emptied into storage. When the order was vacated, IBM had to file an environmental impact statement because there was so much paper. "Scope matters."

The starting point of 26.1(c) requires "actions that are reasonable under the circumstances to preserve discoverable information." Bracketed alternatives then invoke the proportionality criteria of Rule 26(b)(2)(C) by cross-reference or by paraphrase. But when and how can a prospective party identify what is proportional to litigation that has not even been filed?

The preface is followed by 26.1(c)(1), presented as four alternative provisions to define the subject matter of what must be preserved. One of them is very narrow — it demands only preservation of information relevant to a subject on which a potential claimant has demanded preservation, seemingly obviating the duty to preserve anything in response to any of the other triggering events listed in 26.1(b). The first alternative broadly requires preservation of anything relevant to any claim or defense that might be asserted in the action: is that too broad? The fourth alternative looks to what a reasonable person would appreciate should be preserved under the circumstances: does that give sufficient guidance?

The next provision, 26.1(c)(2), addresses the sources of information to be preserved. One alternative is limited to information "that is reasonably accessible to the person." This test looks to the Rule 26(b)(2)(B)(2) protection against discovery of electronically stored information, but it presents questions. Why not require preservation, particularly if the cost is low, against the prospect that cause may be found for discovery? And how does this affect other forms of information? The second alternative is specific, invoking all sorts of technological concepts that many will not understand and that may become obsolete in short order. How many lawyers, for example, will fully understand what it means to establish a presumptive exclusion that excuses preservation of "deleted, slack, fragmented or unallocated data on hard drives"?

Draft 26.1(c)(3) extends the duty to preserve to documents and tangible things as well as electronically stored information. But what of real property?

At this point Judge Campbell suggested that the central point had been made. Difficult and controversial issues will arise at many points, perhaps at every point, in attempting to define a specific duty to preserve. It may make better use of remaining meeting time to offer general observations, leaving specific suggestions for later messages.

One suggestion was that it would be good to include in the September conference representatives of medium-sized businesses that are based outside the United States but do business here. It seems likely that they would view either version of Rule 26.1 as frightening, much more frightening than the Rule 37 approach to preservation obligations by defining the occasions for sanctions.

This observation led to another. The European Union, moved by privacy concerns different from those that prevail in the United States, is aggressive in imposing obligations to discard data after a relatively brief time. Stringent requirements in the United States could whipsaw enterprises

that operate in both places. Perhaps the United States Trade Representative's Office might be able to send someone to the conference to explore these issues.

The suggestion that the conference should be structured to include representatives of the plaintiff perspective was renewed. It will important to learn what they think is sensible, what they need to be able to discover.

It will be more difficult to know how to gain information about imposing duties to preserve on individual litigants. A prospective plaintiff or defendant may give little thought to these matters. In employment cases, for example, employers seek discovery of Facebook pages for information that may undercut the plaintiff's litigating positions. Similar quests may be made in class actions for information bearing on adequacy of representation and commonality of class-member interests. Other plaintiffs may be different — governments often appear as plaintiffs, and may be expected to preserve in a sophisticated way. Here too, the plaintiffs' bar should be searched for information.

Discussion closed with a statement that the Subcommittee hopes to be able to recommend a general approach at the November meeting, and to have a concrete proposal for consideration at the Spring 2012 meeting.

Pleading: FJC Report

Judge Kravitz noted that the Supreme Court has already delivered two opinions on pleading standards in 2011. The Skinner opinion invokes the Swierkiewicz decision and applies it outside employment law, finding the complaint sufficient. Matrixx Initiatives also seems to reflect a relatively relaxed approach. It has been suggested that before the Twombly and Iqbal decisions the Court seemed to swing back and forth between pronouncements that heightened pleading is not required and somewhat indirect approaches to raising pleading thresholds. It may be that a similar fluctuation is going on now.

The Committee asked the Federal Judicial Center to study the impact of the Twombly and Iqbal decisions on the district courts. The study will be presented by Joe Cecil. In addition, Judge Rothstein and Joe Cecil have agreed to do a follow-up study to determine what happens when dismissal is coupled with leave to amend: is a new motion filed to challenge the amended complaint? What happens on the renewed motion?

Joe Cecil presented the report, beginning with an expression of thanks to Professor Gensler, who recruited University of Oklahoma Law School students to do the coding for the study. "That's how we got it done."

The purpose of the study was to assess changes in Rule 12(b)(6) practice over time in broad categories of civil cases. Footnote 4 in the study summarizes other studies that have been done. The other studies find increases in motions to dismiss, particularly in civil rights cases. But they have relied on cases published in the Westlaw database, which is likely to overrepresent orders granting motions, and have examined orders decided soon after Iqbal and before interpretation of the decisions by the courts of appeals.

The study was based on 23 districts, generally the largest two districts in each regional Circuit. Together, these districts account for 51% of the actions filed in federal court.

The central conclusions of the study are that there has been an increase in the rate of filing Rule 12(b)(6) motions to dismiss, although this may not prove out in civil rights cases where the rate

of motions was high before the Twombly and Iqbal decisions. But the rate of granting motions and the rate of termination after a grant both held constant. And as noted below, the picture is more complicated than that.

Joe Cecil found this study the most complicated study that he has done in 30 years at the Federal Judicial Center because of the need to make statistical adjustments to account for other events that were occurring in the federal courts apart from the Twombly and Iqbal decisions. Looking to the period immediately before the Twombly decision, for example, is subject to the prospect that courts may defer rulings in anticipation of new guidance from the Supreme Court. But decisions in 2006 are not likely to be affected by anticipation of Twombly.

The study is based on actual CM/ECF records. This approach yields more cases than reliance on published decisions. It also shows more decisions denying motions, which are less likely to be published than decisions that grant motions.

Prisoner and pro se cases were excluded from the study.

Motions in response to counterclaims and affirmative defenses also were not considered. The study also excluded cases in which a motion to dismiss was converted to a motion for summary judgment because materials outside the pleading were considered.

"A lot changed between 2006 and 2010 that was unrelated to Twombly and Iqbal." The types of cases changed. There were fewer tort cases in 2010, and motions to dismiss are not made as frequently in tort cases as in other types of cases. There were many more financial instrument cases in 2010 than in 2006. The financial instrument cases often were filed in state court, removed, dismissed as to the federal claims as a matter of law, and remanded. And there were more amended complaints in 2010; they are more likely to be dismissed.

Different districts seem to take different approaches to motions to dismiss. Some tend to deny. Others grant with leave to amend. The Southern District of New York seems to have a low rate of filing motions to dismiss, but to tend to grant them without leave to amend. An effort was made to control for these differences.

The study looked only to the rate of filing motions to dismiss in the first 90 days of an action. It found an increased filing rate in all types of cases, including § 1983 civil rights cases, but not in other types of civil rights cases where the rate was already high in 2006. Financial-instrument cases "are a bubble in the data we have to account for."

Without statistical adjustments to account for factors unrelated to the Supreme Court decisions, the grant rate increased from 66% to 75%. But it is an increase in grants with leave to amend — the cases were not terminated. There were great variations across districts. And there were more amended complaints in 2010 than in 2006.

The raw numbers seem to show an increase in claims dismissed, but after statistical adjustment that held only for financial-instrument cases. As for types of cases where particular concerns have been expressed, there was no increase in the rate of dismissal in employment discrimination and civil rights cases.

The study did not examine possible changes in substantive law. Nor did it consider the effect of any changes in pleading practices that may have resulted from the Twombly and Iqbal decisions. Remember that it was based only on motions filed in the first 90 days of an action. And it did not determine the outcomes after leave to amend was granted.

Critics of the study do not accept the statistical adjustments, but they have not heard of the need to make the adjustments. They also question the exclusion of pro se and prisoner cases. But the prisoner cases have a different procedure.

The study is not able to identify cases that were not filed in federal court because of pleading standards, whether the choice was to file in state court or not to file at all. Removal rates were considered; no change was found even after separating fact-pleading states from notice-pleading states. (It was recognized that classifying state pleading practices can be difficult. California formally seems to be a code pleading state. But at various times, and in different types of actions, actual pleading standards may be more sympathetic to plaintiffs than federal notice pleading is. "It goes in cycles.")

Nor was the study able to identify cases where the pleadings suffered from factual deficiencies that could be cured only by discovery. The further study will attempt to determine whether discovery continues after dismissal with leave to amend, but it may be difficult to find this. A related comment observed that the problem of access to information available only to defendants can be resolved by informal means in some situations. Antitrust plaintiffs, for example, may be able to offer one potential defendant an exchange — give us all the information you have about the conspiracy, and we won't name you as a defendant.

In response to a question, it was agreed that Table 4 shows a 7% increase in the rate of filing motions to dismiss in civil rights cases, but the increase does not meet the ordinary 0.05 standard of significance. It would be significant if a 0.10 standard of significance were employed. And the number of cases increased from 2006 to 2010.

Another question pointed out that page 21 of the report finds no increase in the rate of granting motions with or without leave to amend. But this reflects the difference between the raw figures in Table 4 and the statistical adjustments. Table 5 shows that after statistical adjustments, only financial instruments showed an increase. The adjustments are described in Appendix B. They provide a way of accounting for changes that would have happened even if Twombly and Iqbal had never been decided.

A judge observed that many district judges have said that Twombly and Iqbal have not made much of a difference, apart from an increase in the rate of filing motions. Joe Cecil responded that the study confirms these observations. And the study of what happens after leave to amend will be important.

Another judge asked the direct question: if the rate of filing motions has increased, and if the rate of granting motions holds constant, doesn't that mean that there are more dismissals? Joe Cecil agreed that might be the case. With more cases being filed, and motions more likely to be filed in those cases, the same rate of granting dismissal will result in more dismissals. "But we have two very different data sets, so we can't just combine the estimates and be confident of the answer." It is important to remember that leave to amend is more often granted than before.

Pro se cases were addressed by asking whether it is possible to go back to examine fee-paid pro se cases. They may prove interesting because Twombly and Iqbal may make it easier to dismiss "fanciful" claims than it was earlier. They are only conceivable, not plausible.

It was suggested that Committee members should think about anything that would be particularly useful for the study about leave to amend. Do cases settle after leave to amend is granted? Is there a renewed motion to dismiss?

And what about staying discovery while a motion to dismiss is pending? Joe Cecil was uncertain whether the codes will show whether there is a formal stay of discovery. But it would be useful to know whether discovery proceeds, with or in the absence of a formal stay. The difficulty is that discovery requests and responses are not filed. And the parties may suspend discovery without an order, perhaps after consulting with a judge who recommends the suspension. It was suggested that many pro se cases are brought against "the government," which responds with a motion for summary judgment that the plaintiff does not think to address by requesting an opportunity for discovery. Joe Cecil said he would think about the challenges of making reliable findings about discovery stays.

Joe Cecil also said that the greatest difficulty with the study arises in attempting to distinguish pleadings that fail for want of factual sufficiency alone and those that fail in whole or in part for advancing an untenable legal theory. The difficulty is most acute with cases decided before the Twombly decision. It was noted that the recent Skinner decision says that a complaint need not pin the claim on a precise legal theory. A plausible short and plain statement of the claim is all that is required. "This is likely to be quoted a lot."

Responding to a question about the time taken to decide motions to dismiss, Joe Cecil said that the motions may be filed a couple of days earlier after Twombly and Iqbal. The person who put the question then said that "there are cycles of relative desirability of state courts and federal courts." In California, the state courts believe the facts stated in the complaint; the baseline assumption is that discovery continues while the court deliberates a motion to dismiss. And the state court is required to decide the motion quickly. In the federal courts, at least in complex cases, discovery is stayed pending decision on the motion to dismiss. "State-court desirability is at an all-time high." Joe Cecil agreed to study the time taken to dispose of motions to dismiss.

An observer asked what it means to dismiss with leave to amend. Is it possible to find the changes that were made to enable the amended complaint to survive where the initial complaint failed? Joe Cecil said it would be possible to retrieve the pleadings, but the FJC is not in a position to suggest specific lessons about the comparison or the quality of the changes made by the amended complaint. A judge supported this approach, noting that — to take only one example — securities cases often have "huge complaints." Joe Cecil said it also would be interesting to look at the cases that were terminated by a motion to dismiss.

Judge Kravitz praised the report as enormously helpful to the Committee and to scholars. The FJC has the Committee's thanks. The further work, following up on what happens after leave to amend is granted, also will be very useful. The Al Kidd case pending in the Supreme Court may say something more about pleading.

Pleading: Rule Revisions?

Judge Kravitz introduced the question whether the time has come to consider rules revisions to respond to the Twombly and Iqbal decisions. The Supreme Court continues to describe pleading standards in variable terms. It may continue to provide guidance that helps lower courts to converge on a common understanding. Given this continuing evolution, it may not be useful to attempt to consider amending the pleading rules. Perhaps the right thing is to focus on discovery practices in relation to motions to dismiss. And the Court has not said anything about the standards for pleading affirmative defenses. Plaintiffs complain that defendants often plead affirmative defenses by label alone. It is more useful to require added detail — a fraud defense, for example, should be pleaded with some detail.

Doubts about amending the pleading rules were repeated. The Supreme Court seems to continue active consideration of these problems. It is a moving target.

The agenda-book sketches of possible revisions of the rules for pleading a complaint were described. The first step is to identify the reason for revision. What is it that needs to be changed in pleading practice has it has developed in the years since the Twombly and Iqbal decisions?

One sketch would "restore what never was." This approach would seek to reduce the pleading threshold to the discarded dictum that dismissal is proper only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." A pleading need only give notice of the claim. Courts routinely required more than that in countless decisions rendered before the Twombly opinion. It is fair to ask whether new reasons have appeared to justify going in this direction now.

Another approach would attempt to find rule language that would reestablish the pleading standards that prevailed before the Twombly and Iqbal decisions. This approach assumes that those decisions have caused the pleading threshold to be raised to some level identifiably higher than the standard prevailing on May 20, 2007. It may be too early to rely on that assumption. An attempt to roll back to pre-Twombly practice, moreover, must account for the fact that there was no easily stated or uniform practice. Actual pleading standards varied among different types of claims, and among different courts. Nor was practice entirely stable. Rule revisions could do no more than invite courts to disregard the Twombly and Iqbal opinions and to carry on the process of adapting practices vaguely characterized as "notice pleading" as they had been doing. And even that invitation would encounter the challenge of persuading lower courts that Supreme Court implementation of the new rule would not be affected by the concerns that led to the Twombly and Iqbal decisions.

A third approach might be to seek some sort of middle ground between the practices perceived to have existed before the Twombly decision and the standards perceived to have resulted from it. It could prove difficult to find words capturing this purpose.

Another approach would seek to confirm in rule language an understanding of what the Twombly and Iqbal decisions have come to mean. The opinions were not written as rule text, nor should they have been. Clear expression will require a clear understanding of what was intended, or — perhaps more usefully — what has emerged as lower courts have worked to implement the Court's intent in the best ways possible.

Defense interests have suggested another step up the scale. They suggest that, at least as lower courts have developed it, the practice emerging from Twombly and Iqbal has not raised pleading standards as high as they should be. Without attempting to judge whether this position is right, it must be recognized that rules proposed to adopt it would encounter fierce opposition.

Still other approaches to pleading a claim are possible, including an explicit revival of "fact pleading." Or the rules could expand the categories of claims singled out for pleading with particularity. Or, conversely, the rules might establish categories of claims that can be pleaded more generally than most claims.

A member asked whether there is any reason to suppose the Supreme Court would adopt a rule that reduces pleading standards below the level set by the Twombly and Iqbal decisions. It was suggested that the Court would be receptive if the Committee could show a major problem, that large classes of cases are being kept out of federal court. But that may not be likely. Observers

often complain, for example, about the fate of employment discrimination cases. But "I never get a motion to dismiss in employment cases." They are pleaded carefully and effectively.

Indirect responses also might be well received. Many courts have experimented over the years with a requirement that a plaintiff provide a reply when a defendant pleads official immunity. The Iqbal decision shows special concern for official-immunity cases, concern that might well support a rule requiring a reply.

The Committee concluded that it is not yet time to discuss these various possibilities. Nor did it find need to discuss a variety of models that would respond to the arguments that it is unfair to require plaintiffs to plead details of a claim that are known only to defendants. These models would provide for discovery in aid of stating a claim, perhaps before an action is filed, or at the time of filing, or in response to a motion to dismiss.

Pleading will remain on the agenda. It may be that further FJC work will show that the rise in orders granting dismissal but also granting leave to amend does not have the benign effect of simply provoking better pleadings that help frame the case and reduce the burdens of discovery. The prospect of further information, a sense that practice has not fully crystallized in the lower courts, and the possibility that the Supreme Court will have more to say, however, undercut arguments that the time has come to begin preparing rules revisions for publication and eventual adoption.

Pleading: Forms

The intense focus on pleading brought on by the Twombly and Iqbal decisions has put the illustrative "Rule 84" Forms back on the agenda. There are powerful arguments for taking the adoption and revision of forms outside the Enabling Act process. Action has been deferred, however, for fear that abrogation of the pleading forms — which are particular targets of criticism and doubt — might appear to be taking a position in the debates engendered by Twombly and Iqbal. But the debates have matured to a point that may make it feasible to launch a forms project.

The first observation was that the Forms were important in 1938 when the new pleading philosophy was just that — entirely new. The Forms provided concrete illustrations of "the simplicity and brevity" intended by the new rules. Now the rules are mature. "It is not Charles Clark's world." The pleading forms were time-bound, are no longer important.

Carrying the Forms forward as creatures of the Enabling Act process presents several problems. One big problem is that they need to be tended to, and tending to them would absorb great amounts of time. The Committee has not been able to devote serious attention to the Forms for many years. Even in the Style Project, they were revised by a process far less intense than the process for the rules themselves. The consequences may be troubling. The Form 18 form complaint for patent infringement, for example, has been excoriated. A related problem is that it would be useful to be able to revise forms with some speed to respond to changing circumstances. "Some speed" is not a characteristic of the Enabling Act process.

These problems may be exacerbated by the idiosyncratic selection of topics covered by the Civil Forms. It is not at all clear how possible topics were selected, honoring some problems with forms and ignoring others.

Consideration of the Forms questions should be undertaken in conjunction with the Appellate, Bankruptcy, and Criminal Rules Committees. The roles played by forms, and the means of developing them, are different among the different sets of rules. The criminal procedure forms are developed outside the Enabling Act framework, although the Criminal Rules Committee reviews

some of the forms and offers advice. A similar process could be followed for civil procedure forms, leaving most of the work to the Administrative Office. Work is under way now on revising the procedures for the conduct of business by the rules committees. A focus on the procedures for generating forms is an appropriate adjunct of this work, although in the end it may be that work on the procedures should finish on other topics, leaving the way for additional provisions after the several committees and the Standing Committee work through the forms process.

It was pointed out that most of the forms are not illustrative complaints. Revising the whole framework need not be seen as implicit commentary on the Twombly and Iqbal decisions, but instead can be recognized for what it is — a program to shift the initiating responsibility for forms away from the full Enabling Act process.

The Committee concluded that work should begin on Rule 84. The rate of progress will depend on the interest of other advisory committees in beginning a joint project. At least a progress report should be submitted at the November meeting.

Duke Subcommittee

Judge Koeltl presented the report of the Duke Subcommittee. Its deliberations on possible rules revisions have been guided by the menu of possible subjects set out in the agenda materials at page 286. The menu itself is not all-inclusive; it filtered out suggestions that seemed not ripe for present action. The menu has been whittled down through e-mail messages, meetings by conference call, and in-person meetings. The agenda materials include a significantly narrowed set of rules to be considered further. Which of them will lead to specific proposals continues to be discussed.

Some common themes will be recalled. Conference participants repeatedly emphasized the need for proportionality and cooperation in litigation, and for active judicial management to help achieve these goals. Radical revision of the rules has failed to command majority, or near-majority support. There is a strong stream of views that most problems can be resolved within the current framework of rules given sensible behavior by lawyers as encouraged by case management. But there is support for relatively modest "tweaks" of various rules to further these goals.

One source of inspiration will be a study of the "rocket docket" practices in the Eastern District of Virginia. The study will aim to identify practices that might be generalized and carried to other courts. The Subcommittee will form panels of judges and lawyers to make presentations about rocket-docket practices at the November Committee meeting.

Employment lawyers representing plaintiffs and defendants, led by Joseph Garrison and Chris Kitchell, have come together to develop a set of initial disclosures and discovery requests, documents to be provided and questions to be answered. The hope is to have these standard obligations incorporated in scheduling orders. They made enormous progress at a meeting at the Institute for the Advancement of the American Legal System two weeks ago. They plan to meet again this summer and expect to reach agreement then. They also expect that some judges will be eager to adopt these queries as scheduling orders. The FJC is prepared to frame a study that will determine in a rigorous way whether these practices reduce cost and delay. Many nuances remain to be resolved, but the process of bringing all the lawyers together for direct consultation has proved very good.

Joseph Garrison said that it would be desirable to use the employment discrimination protocol as the prototype for developing protocols for other types of litigation. Judge Koeltl was a great facilitator at the IAALS meeting. The drafting group hopes that twenty or thirty judges will

adopt the protocol as scheduling orders. And the drafting group is working on a model protective order.

Judge Kravitz suggested that there will be no problem in finding a suitable number of judges willing to adopt the protocol. But it will be necessary to coordinate with the FJC in order to establish the framework for effectively measuring the results.

Judge Koeltl noted that the protocol will function as a first wave of discovery, and may lead to early settlement. The possible facilitation of settlement will be another facet of the study of cost and delay. At the least, adoption of the protocol in a scheduling order should reduce disputes about what is discoverable.

Judge Koeltl continued the Subcommittee report by noting that the Administrative Office did a study of pre-motion conference practices as revealed by district web sites. It asked about the use of conferences before discovery motions, and also before other motions such as Rule 12(b)(6) motions to dismiss and Rule 56 summary-judgment motions. The question was raised because some of the participants in the Duke Conference said that some judges are drowning in discovery motions, while others do not seem to have such severe problems.

The Administrative Office found 37 districts in which some or all judges require a pre-motion conference before a discovery motion can be filed. Judges that require, a conference before other motions were found in only four districts.

The dearth of pre-motion requirements for motions other than discovery motions effectively forecloses exploration of a rule that would impose this requirement. There is no real support for it.

The question whether to require a conference before filing a discovery motion remains on the table. The same effect might be achieved by calling for oral discovery motions, avoiding the risk that a judge might fail to do anything after the pre-motion conference, effectively barring any motion. (That risk also could be addressed by providing that a motion could be filed if no action were taken within a prescribed number of days after the conference.)

Judge Rothstein has agreed to have the FJC do research on the beginning phases of litigation. Rule 16(b) directs that a scheduling order must enter as soon as practicable, and no later than 120 days after any defendant has been served or, if earlier, 90 days after any defendant has appeared. Among other things, the scheduling order must limit the time to complete discovery and file motions. And lawyers are required by Rule 26(f) to confer at least 21 days before a scheduling conference is to be held or a scheduling order is due.

Several obscurities surround Rule 16(b). One arises from Rule 16(b)(1)(B), which directs that the order enter after receiving a Rule 26(f) report or after consulting with the parties at a conference "or by telephone, mail, or other means." What are the other means? Perhaps e-mail exchanges would be.

The Duke Conference suggested there are problems. Data revealed that no discovery cutoff is set in nearly half of all cases. Why? Is it because the cases settle? Are dismissed before they progress to the scheduling-order phase? Do lawyers really hold Rule 26(f) conferences? Are Rule 26(f) conferences helpful? Do the Rule 16(b)(1)(B) timing provisions make any sense, or are they too drawn out? The experience of Subcommittee members suggests that districts differ in these dimensions. In some districts lawyers do meet, provide a Rule 26(f) report, and the judges enter a scheduling order without actually meeting with the parties. It is a loss when the judge does not meet

and confer with the lawyers to provide judicial management. In other districts, lawyers often do not meet together but instead go straight to a meeting with the judge.

Changes are possible. The time to enter a scheduling order seems too long. Perhaps there should be a presumptive requirement to meet with the judge. The Rule 26(d) bar on discovery before the Rule 26(f) conference may deserve reconsideration — it might be better to allow discovery requests to be served before the conference, so that the parties and later the judge have a better idea of what the discovery issues may be. The FJC research will help to explore these issues.

The Subcommittee is open to suggestions of other topics that should be considered, or excluded. It has tended to keep issues on the table to encourage discussion. The lack of suggestions has been disappointing.

Initial disclosure under Rule 26(a)(1) has been put in the background. Some lawyers think it does no good. Others think it is worthwhile in some cases. Courts do impose sanctions for failures to disclose.

The scope of discovery relates to the questions of proportionality and cooperation. Proportionality has been required by Rule 26(b)(2) since 1983, but it seems to be buried. It is seldom raised. When appellate courts describe the scope of discovery they focus on the broad terms of Rule 26(b)(1) without going on to note the express incorporation of 26(b)(2)(C) at the end of (a)(1). Should something be done about this? Would even a separate rule on proportionality capture judges' attention? Is it better to rely on judicial education to ensure that proportionality is addressed in all discovery conferences?

Judge Grimm has volunteered to generate a list of references and a set of concrete examples to help walk through the need for proportionality. Cases can be found that note proportionality in passing, but there are not many cases on how to do it. Professor Gensler has written on it. The Sedona Conference has generated guides for cooperation. A set of guidelines and examples may prove helpful. Judge Kravitz thanked Judge Grimm for undertaking this work, and suggested that efforts to educate judges seem a desirable first step before considering rules changes. Judge Koeltl noted that Judge Rothstein has agreed to include discovery proportionality in judicial education materials.

The Subcommittee also has considered the possibility of adding cooperation to the rules. Cooperation appears now only in the heading of Rule 37, but nowhere in the rule text; it was added in 1980, when the rules were amended to include a Rule 26(f) conference provision quite different from the present provision, which dates to 1993, and when what is now Rule 37(f) was added to reflect the duty to participate in a discovery conference in good faith. One possibility would be to add a duty of cooperation to Rule 1, imposing on attorneys as well as the courts the duty to achieve the just, speedy, and inexpensive disposition of every action and proceeding.

Three specific proposals to curtail evasive discovery responses advanced by Daniel Girard at the Duke Conference continue to attract strong support in the Subcommittee. The first would amend Rule 26(g)(1)(B)(i) to add a certification that a discovery request, response, or objection is "not evasive." The second would add an explicit requirement to produce in response to a Rule 34 request. The third would amend Rule 34 to provide that each objection to a request must specify whether any responsive documents are being withheld on the basis of the objection.

Other discovery proposals remaining on the agenda would reconsider the role of contention interrogatories and requests to admit, and consider presumptive numerical limits on the number of

Rule 34 requests to produce and Rule 36 requests to admit. Some judges now adopt pretrial orders that limit the number of requests to produce, perhaps to 25. The limit encourages parties to focus on what they need, but may have the counterproductive effect of encouraging more general requests.

Discussion began with the observation that the tenor of the Duke Conference was to ask whether there is a better way to conduct litigation that too often is too long, too cumbersome, and too expensive. The Subcommittee has done a great job, but the present agenda does not seem calculated to accomplish broad improvement. Is there a way to force the Committee to think about more efficient procedures? Can something be done to help address pro se litigation — the civil docket in the District of Arizona is now up to 45% pro se cases. The rise of pro se litigation is both a problem and a symptom of the expense of litigating with a lawyer in federal court. Studying docket practices in the Eastern District of Virginia may yield clues as to how to experiment with moving cases along, but there is a concern that a solo practitioner may be forced to devote all available time to a single case under rocket-docket procedures.

The Committee was reminded of the value in looking to what others do, including state courts. Oregon uses fact pleading. Arizona has vastly expanded unilateral disclosure requirements. There even may be lessons to learn from other countries. But we should remember the results of the FJC study for the Duke Conference. Many cases finish in ten months to a year, with some discovery but not a great deal, and with a cost of around $15,000. There are, to be sure, monster cases. Controlling them requires special techniques, but it is important to remember the frequent advice that the rules are adequate to the task, that the need is for better implementation of present rules more than for new rules.

It was suggested that it would be helpful to study ways to deal with pro se cases apart from rules changes. "Help desks," and internet forms, might be a start.

Judge Koeltl observed that even within the federal system there is an enormously diverse array of courts, case loads, and conditions. Courts are experimenting with ways to deal with pro se cases, and with other procedural devices. The Southern District of New York has adopted forms for excessive-force cases, and hopes to mount a pilot project for complex cases. The IAALS is looking for other pilot programs. The Seventh Circuit is well into its pilot project on e-discovery. Continuing experimentation will help. It also will help to pursue vigorous programs to educate judges and lawyers about the opportunities available in the present rules.

Fact pleading has been one idea, but "we may not go there."

Many states track cases. State courts have many more cases than the federal courts do, and they have many cases with little discovery. State courts also entertain complex litigation, however, and several states are creating complex-litigation courts that often attract cases that might have been filed in federal court. The Delaware Chancery court is a familiar example of a state court that has dealt with highly sophisticated and complex litigation for many years. And state courts entertain class actions of broad, even nationwide, scope.

An observer suggested that "Rule 56 is a big driver of all the cost and expense." The Committee will have to deal with it in ways more fundamental than the recent amendments if cost and expense are to be reduced. A summary-judgment motion often forces discovery that otherwise would not be undertaken. Many arbitrators achieve efficiency by going straight to hearings, without summary judgment. Such, at least, is the experience in employment cases.

A sympathetic comment observed that "Rule 56 makes no sense in excessive-force cases." Different judges have different ways of dealing with this.

Another observer said that when acting as a mediator, he uses the costs of litigation as a tool to encourage settlement. But in arbitration, he finds criticisms that arbitration can be too slow and too expensive, with calls for summary judgment. What is most important, as said repeatedly at the Duke Conference, is engagement by and with the judge, cooperation, and proportionality. Engagement by the judge is the most important factor. The rules we have can work; a really fine judge can use them to deal with the problems. Long-range improvement must begin with changes in the law schools, teaching lawyers how to contribute to the administration of justice.

Judge Kravitz noted that it is terrific that the FJC is considering ways to provide judicial education programs outside D.C. One shortcoming of education programs is measured by the judges who do not attend, and taking the programs to them may accomplish much good.

Attention should be devoted to finding ways to get feedback from the bar outside major conferences, occasional miniconferences, and the publication of formal proposals for amendments. It will be useful to let the bar know what the Committees are doing, and to encourage a flow of information from lawyers and judges to the Committees.

An optimistic note was suggested. It may not sound like much to achieve a 1% reduction in the cost of litigating all cases — it would not much reduce the burdens on litigants. But the cumulative saving for the system would be substantial. Seemingly modest improvements can do real good.

It was asked when the Committee could devote a day to thinking about these issues. Some help might be available from the National Center for State Courts. David Steelman at the Center has studied what works for efficient court systems. Other people can be found who know of innovative ways of doing things.

These questions will have to be worked out in developing the agenda for the November meeting. Time should be set aside for the first hearing on the Rule 45 proposals. The rocket-docket panel will take some time. The Discovery Subcommittee plans to present recommendations on the approach to be taken to preservation and sanctions issues, whether a highly detailed description of a duty to preserve, a more open-ended reasonable but express duty to preserve, or an indirect approach that defines the circumstances and limits of sanctions for failing to preserve. The Duke Conference Subcommittee can consider what is desirable and make recommendations for making use of the time available.

And it will be important to let the Standing Committee know that the Advisory Committee is considering the possibility of aggressive changes, but also is tending to changes in the rules that can be achieved and do good in the short term.

Appellate-Civil Subcommittee

Judge Colloton delivered the report of the Appellate-Civil Subcommittee. There is no recommendation for present action.

The one topic currently active on the agenda is "manufactured finality." The question arises when a plaintiff encounters an adverse ruling that cannot be appealed under normal rules. One tactic has been to achieve finality by dismissing whatever remains of the action. A common illustration arises when the principal claim is dismissed by the court, and the plaintiff believes that the remaining minor claims are not worth litigating alone or that it costs too much to litigate the remaining claims to final judgment with the hope that an appeal will revive the principal claim for a second trial. Most courts recognize that the plaintiff can achieve finality by dismissing all

remaining parts of the action with prejudice, but the price is that those parts cannot be revived if dismissal of the principal claim is reversed. A few courts address that problem by allowing dismissal of the remaining claims without prejudice, but most courts reject that practice because it seriously corrodes the final judgment rule. An intermediate approach has occasionally been recognized, most clearly in the Second Circuit. Under this approach, the plaintiff secures dismissal of the remaining parts of the action with prejudice, but subject to revival if the adverse court rulings are reversed on appeal. This practice has been dubbed "conditional prejudice" in Subcommittee discussions. The Subcommittee has not been able to find out much about the operation of the conditional prejudice practice in the Second Circuit; it may be that it is little used.

The Subcommittee believes that two approaches are most promising. One would be to craft a rule that allows finality to be manufactured only by dismissing all remaining parts of the action with prejudice. The rule would defeat attempts to manufacture finality by dismissing the remaining parts without prejudice, or with conditional prejudice. The other approach would be to do nothing, leaving it to the courts to continue present practices as they may evolve in the light of experience. The Subcommittee is pretty much in equipoise between these approaches. The Appellate Rules Committee will meet soon. Once its views are known, the Subcommittee will work toward a final recommendation.

It was noted that Rule 54(b) does not address all of the concerns that lead litigants to seek manufactured finality. The district judge may refuse to enter a partial final judgment. The court of appeals may conclude that entry of judgment was an abuse of discretion. Or — and more sympathetically — the case may not fall within Rule 54(b) possibilities. A common illustration would be a ruling that excludes vital evidence, or rejects the major components of requested damages, but leaves all claims alive.

Rule 6(d): Three Added Days

The "three added days" provision in Rule 6(d) presents two problems. The more fundamental problem is whether all of the modes of service that now entitle a party to three added days deserve the added time. The simpler problem arises from a misstep in the 2005 amendment that revised Rule 6(d) to establish a single and uniform method of calculating the three added days.

The misstep in drafting the 2005 amendment was identified in an article by Professor James J. Duane, *The Federal Rule of Civil Procedure that was Changed by Accident: A Lesson in the Perils of Stylistic Revision*," 62 S.C.L. Rev. 41 (2010). Although the change was made two years before the Style Project revisions, the misstep was a result of applying Style Project drafting conventions.

The drafting problem is most easily identified by the simple fix: "When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C). (D),(E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a)."

Before the 2005 revision, Rule 6(d) provided added time after service "upon the party" if a paper or notice "is served upon the party" by designated means. "[A]fter service" seemed a reasonable way of saving words. But it overlooked three rules that permit a party to act within a specified time after the party has made service. See Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). Using Rule 15(a)(1)(A) as an illustration, the unintended but possible effect of the 2005 revision is to allow a party to expand the time available to amend its own pleading by choosing to serve the pleading by mail, e-mail, or the other means that support the 3 added days.

No cases have been identified that make anything of the changed wording. It is possible that a court confronted with an argument from the apparent meaning of the present rule will reject the

argument, ruling that it makes no sense to allow a party to expand its own time to act by unilaterally choosing the means of serving a paper, and that the rule should be read to carry forward the meaning clearly established by the prior language. Nonetheless, it seems appropriate to amend Rule 6(d) to restore the clear meaning that no one thought to change.

The recommendation to amend Rule 6(d) does not determine how soon the amendment should be made. There is no apparent reason for urgent action. In most circumstances, the worst result may be that a party has three added days to implead a third-party defendant without seeking leave, to amend a pleading once as a matter of course, or to demand jury trial. It is possible that a wily party will make a deliberate decision to defer one of those acts in reliance on the apparent meaning of the rule, only to confront a court that chooses to carry forward the original clear meaning. It seems unlikely that the court would then deny leave to act if there were any persuasive reason for the desired action.

Two reasons appear for delaying action. One is general. It seems likely that various missteps in the Style Project itself will be identified. Rather than act item-by-item, confronting the bar with an irregular series of amendments to digest, it may be better to allow non-urgent revisions to accumulate for a while, to be presented as a package.

A second reason to delay is the growing sense that the 3-added days provision should be reconsidered. There is particular interest in the question whether 3 added days are appropriate when service is made by e-mail, particularly when service is made through the court's system. The 3-added days may seem a relatively minor cause of delay, but they also complicate time calculations. And when the time allowed is 7, 14, or 21 days, they defeat the purpose of same-day time computations.

Committee discussion concluded that it is, or soon will be, time to reconsider which modes of service deserve the 3 added days. This question arises in other sets of rules, and likely should be addressed as a common project. Indeed it may be appropriate to make the question part of a much larger project for all the Advisory Committees to bring the rules of procedure into the e-filing and e-service world.

The Committee agreed that case-law developments should be monitored for signs that the style misstep is causing trouble. Absent any indication of trouble, the question will be carried forward for action as part of a larger project.

Next Meeting

The dates for the next meeting have been set for November 7 and 8. The meeting likely will be in Washington, D.C.

Valedictory

Judge Kravitz noted that he had followed six years as a member of the Standing Committee with four years as chair of the Civil Rules Committee. The Advisory Committee members welcomed him warmly and supportively when he arrived, and have provided continued support and inspiration, and have worked enormously hard, ever since. The Committee has done a superb job,

with first-rate results. The Reporters have provided fine support. Judge Rosenthal has provided wise and patient guidance. Now term limits provide the occasion for great thanks to all. The Committee responded with a long and loud standing ovation.

Respectfully submitted,

Edward H. Cooper
Reporter

TAB 6-A

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

MEMORANDUM

DATE: May 2, 2011

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

FROM: Honorable Jeffrey S. Sutton, Chair, Advisory Committee on Federal Rules of Appellate Procedure

RE: Report of the Appellate Rules Advisory Committee

I. Introduction

The Advisory Committee on Appellate Rules met on April 6 and 7, 2011, in San Francisco, California. The Committee approved for publication proposed amendments to Rules 28 and 28.1 and to Form 4, removed four items from its study agenda, and discussed a number of other items. On the second day of the meeting, the Committee met jointly with the Advisory Committee on Bankruptcy Rules.

Part II of this report discusses the proposals for which the Committee seeks publication for comment: proposed amendments to Rules 28 and 28.1 and Form 4. Part III covers other matters.

The Committee has scheduled its next meeting for October 13 and 14, 2011, in Atlanta, Georgia.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting[1] and in the Committee's study agenda, both of which are attached to this report.

II. Action Items

The Committee is seeking approval to publish for comment proposed amendments to Rules 28 and 28.1 and Form 4. The proposed amendments to Rule 28(a) revise and combine existing Rules 28(a)(6) and 28(a)(7) into a single requirement that briefs contain a statement of the case and the facts (roughly emulating the approach taken in Supreme Court Rule 24.1(g)). Conforming amendments are proposed to Rules 28(b) and 28.1. The proposed amendments to Form 4 (concerning applications to proceed in forma pauperis ("IFP")) make some technical changes and remove the current Form's requirement of detailed information concerning the IFP applicant's expenditures for legal and other services in connection with the case.

A. Rule 28

The Committee recommends that the Standing Committee approve for publication the proposed amendments to Rule 28 as set out in the enclosure to this report. The proposed amendment would revise Rule 28(a) to remove the requirement of separate statements of the case and of the facts.

Current Rule 28(a)(6) requires "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Current Rule 28(a)(7) requires that the brief include "a statement of facts." Rule 28(a) requires these items to appear "in the order indicated." These dual requirements have confused practitioners. It seems intuitively more sensible to permit the appellant to weave those two statements together and present the relevant events in chronological order. As a point of comparison, Supreme Court Rule 24 does not separate the two requirements; rather, Supreme Court Rule 24.1(g) requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, e.g., App. 12, or to the record, e.g., Record 12."

The proposed amendment to Rule 28(a) would consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." The proposed new Rule 28(a)(6) would allow the lawyer to present the factual and procedural history chronologically, but would also provide flexibility to depart from chronological ordering. Conforming changes would be made by

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

renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10), and by revising Rule 28(b)'s discussion of the appellee's brief.

B. Rule 28.1

The Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 28.1 as set out in the enclosure to this report. The proposed amendment complements the amendment to Rule 28 by making conforming changes to Rule 28.1 (concerning cross-appeals).

C. Form 4

The Committee recommends that the Standing Committee approve for publication the proposed amendments to Form 4 as set out in the enclosure to this report. Appellate Rule 24 requires a party seeking to proceed IFP in the court of appeals to provide an affidavit that, inter alia, "shows in the detail prescribed by Form 4 ... the party's inability to pay or to give security for fees and costs." (Likewise, a party seeking to proceed IFP in the Supreme Court must use Form 4. *See* Supreme Court Rule 39.1.) The proposed amendments would substitute one revised question for two of the questions on the current Form 4: Question 10 – which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments – and Question 11 – which inquires about payments for non-attorney services in connection with the case.

Questions 10 and 11 have been criticized by commentators and those questions seek information that seems unnecessary to the IFP determination. Some commentators have suggested that Questions 10 and 11 might in some circumstances seek disclosure of information protected by attorney-client privilege and/or work product immunity. Research by the Committee's reporter suggested that though the information solicited by Questions 10 and 11 is relatively unlikely to be subject to attorney-client privilege, it may sometimes constitute protected work product. The Committee also discussed the possibility that even if the information solicited by Questions 10 and 11 is not privileged or protected, its disclosure could as a practical matter disadvantage some IFP litigants. In any event, the function of Form 4 is to provide the information necessary to determine whether the applicant is unable "to pay or to give security for fees and costs," Fed. R. App. 24(a)(1)(A). Neither the Committee's own deliberations and research nor informal discussions with the Supreme Court Clerk's Office have disclosed any reason to think that it is necessary to obtain all of the information currently sought by Questions 10 and 11. Accordingly, the proposed amendment would replace Questions 10 and 11 with a new Question 10 that would read: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?"

The proposed amendments would also make certain technical amendments to Form 4, to bring the official Form into conformity with changes that were approved by the Judicial Conference

in fall 1997 but were not subsequently transmitted to Congress. The proposed technical amendments would add columns in Question 1 to permit the applicant to list the applicant's spouse's income; would limit the requests for employment history in Questions 2 and 3 to the past two years; and would specify that the requirement for inmate account statements applies to civil appeals.

III. Information Items

The Committee's joint meeting with the Bankruptcy Rules Committee provided a beneficial opportunity for the two Committees to discuss the proposed revisions to Part VIII of the Bankruptcy Rules (dealing with bankruptcy appeals) and related revisions to Appellate Rule 6. The Committees plan to continue their collaboration on these matters.

The Committee has continued to work jointly with the Civil Rules Committee, through the Civil / Appellate Subcommittee. At its spring meeting, the Appellate Rules Committee discussed the Subcommittee's work on a proposal to amend Appellate Rule 4(a)(4) to adjust its treatment of the time to appeal after the disposition of a tolling motion, and also discussed the Subcommittee's work on a proposal to address the doctrine of "manufactured finality."

The Rule 4(a)(4) proposal arises from the observation that under Rule 4(a)(4)(B) the time to appeal from an amended judgment runs from the entry of the order disposing of the last remaining tolling motion. In some scenarios, a time lag between entry of the order and entry of the judgment can raise questions concerning the restarted appeal time. At its fall 2010 meeting, the Appellate Rules Committee discussed a possible solution that would peg the re-starting of appeal time to the "later of" the entry of the order disposing of the last remaining tolling motion or the entry of any resulting judgment. Difficulties with that proposal led the Committee to seek other options. The Committee now has before it a proposal to address the problem from another angle, by suggesting to the Civil Rules Committee that Civil Rule 58(a)'s separate document requirement be extended to encompass orders disposing of tolling motions. Further discussion in the Civil / Appellate Subcommittee and with the Civil Rules Committee will be needed in order to fully assess the costs and benefits of such a course. The main potential downside would appear to be the already troublesome degree of noncompliance with the existing separate document requirement.

The manufactured finality project concerns the doctrines that govern a litigant's attempt to "manufacture" a final judgment in order to take an appeal when the district court has disposed of fewer than all claims in an action. At the Appellate Rules Committee's spring meeting, members of the Civil / Appellate Subcommittee updated the Committee on the Subcommittee's discussions of this topic. There is consensus on the Subcommittee that a dismissal of the remaining claims with prejudice should produce finality for appeal purposes. As to dismissals of the remaining claims without prejudice, there is a circuit split, but the Subcommittee members believe that such dismissals should not produce finality. The question on which the Subcommittee has not yet reached consensus is how to treat conditional-prejudice dismissals – i.e., situations in which the would-be appellant dismisses the remaining claims subject to a right to reassert them if, and only if, the court's dismissal of the other claims is reversed or vacated on appeal. The Appellate Rules Committee decided to ask

the Subcommittee to try to formulate a concrete proposal on the topic of manufactured finality for consideration in the fall.

The Committee considered the Federal Judicial Center's report on the amount of appellate costs awarded under Appellate Rule 39. The Committee had asked the FJC to investigate this topic in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). The FJC study found that circuits differ in their approach to printing costs, and that this variation produces significant differences in the size of possible cost awards. The Committee plans to share the FJC report with the Chief Judges and Clerks of each Circuit. The Committee also discussed its ongoing review of the caselaw interpreting Appellate Rule 4(a)(2), which addresses premature notices of appeal in civil cases. Recent caselaw developments have suggested that some existing circuit splits may be lessening. The Committee decided to continue work on a proposal to amend Rule 4(a)(2), while also monitoring the caselaw for further developments. The Committee took up a new agenda item relating to redactions in appellate briefs. An attorney with the Public Citizen Litigation Group has raised a concern that such redactions are often insufficiently justified and that they impede meaningful briefing by amici. The Committee plans to confer with the Civil Rules Committee concerning principles that should govern the treatment of sealed documents on appeal.

The Committee removed four items from its study agenda. One item related to concerns raised by Public.Resource.Org about the presence of alien registration numbers in federal appellate opinions. The Standing Committee's Privacy Subcommittee considered these concerns at length and concluded that alien registration numbers should not be added to the list of items for which the national Rules require redaction. In the light of this conclusion, the Appellate Rules Committee decided to remove this item from its agenda. Another item arose from *Vanderwerf v. Smithkline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010), which held that the withdrawal of a Civil Rule 59(e) motion deprived that motion of tolling effect and rendered the movant's appeal untimely. Members were chiefly concerned about the possible effects of this ruling on situations in which a non-movant has relied on the tolling effect of a post-judgment motion that is subsequently withdrawn. Because no decision has applied *Vanderwerf* to an appeal by a non-movant, the Committee concluded that the decision did not warrant further consideration at this time. A third item concerned a suggestion that the Appellate Rules be amended to address intervention on appeal. No consensus emerged in favor of amending the Rules to address this issue. The fourth item removed from the Committee's agenda arose from a suggestion that Appellate Rule 32(a)(7)(B)(iii) be amended to exempt from the type-volume limitation for briefs the statement of interest required of amici by Appellate Rule 29(c)(4).

At its fall 2011 meeting, the Committee expects to continue its consideration of a number of other projects, including a proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Another project concerns possible rulemaking responses to the Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a district court's attorney-client privilege ruling did not qualify for an immediate appeal under the collateral order doctrine.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE**

RULE 28. BRIEFS

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

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

(3) a table of authorities – cases (alphabetically arranged), statutes, and other authorities – with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory

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

provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a concise statement of the case ~~briefly indicating the nature of the case, the course of proceedings, and the disposition below;~~

~~(7) a statement of~~ setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review with appropriate references to the record (see Rule 28(e));

~~(8)~~ (7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

~~(9)~~ (8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

~~(10)~~ (9) a short conclusion stating the precise relief sought; and

~~(11)~~ (10) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-~~(9)~~ (8) and ~~(11)~~ (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

~~(4) the statement of the facts;~~ and

~~(5)~~ (4) the statement of the standard of review.

* * *

Committee Note

Subdivision (a). Rule 28(a) is amended to remove the requirement of separate statements of the case and of the facts. Currently Rule 28(a)(6) provides that the statement of the case must "indicat[e] the nature of the case, the course of proceedings, and the disposition below," and it precedes Rule 28(a)(7)'s requirement that the brief include "a statement of facts." Experience has shown that these requirements have generated confusion and redundancy. Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." This permits but does not require the lawyer to present the factual and procedural history chronologically. Conforming changes are made by renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10).

Subdivision (b). Rule 28(b) is amended to accord with the amendment to Rule 28(a). Current Rules 28(b)(3) and (4) are consolidated into new Rule 28(b)(3), which refers to "the statement of the case." Rule 28(b)(5) becomes Rule 28(b)(4). And Rule 28(b)'s reference to certain subdivisions of Rule 28(a) is updated to reflect the renumbering of those subdivisions.

RULE 28.1. CROSS-APPEALS

* * *

(c) Briefs. In a case involving a cross-appeal:

(1) Appellant's Principal Brief. The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) Appellee's Principal and Response Brief. The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply

with Rule 28(a), except that the brief need not include a statement of the case ~~or a statement of the facts~~ unless the appellee is dissatisfied with the appellant's statement.

(3) Appellant's Response and Reply Brief. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-~~(9)~~ (8) and ~~(11)~~ (10), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

~~(D) the statement of the facts;~~ and

~~(E)~~ (D) the statement of the standard of review.

(4) Appellee's Reply Brief. The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and ~~(11)~~ (10)

and must be limited to the issues presented by the cross-appeal.

Committee Note

Subdivision (c). Subdivision (c) is amended to accord with the amendments to Rule 28(a). Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review...." Rule 28.1(c) is amended to refer to that consolidated "statement of the case," and references to subdivisions of Rule 28(a) are revised to reflect the re-numbering of those subdivisions.

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

* * * * *

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify): _____	$_____	$_____	$_____	$_____

Total monthly income: $_____ $_____ $_____ $_____

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. *How much cash do you and your spouse have? $_____*

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have

multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

* * * * *

~~*10. HAve you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form?* ☐ Yes ☐ No~~

~~If yes, how much? $_____~~

~~If yes, state the attorney's name, address, and telephone number:~~

~~_____~~

~~_____~~

~~_____~~

~~*11. HAve you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*~~

~~☐ Yes ☐ No~~

~~If yes, how much? $_____~~

~~If yes, state the person's name, address, and telephone number:~~

~~_____~~

~~_____~~

~~_____~~

10. *Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit?*

☐ Yes ☐ No

If yes, how much? $_____

~~12.~~ 11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

~~13.~~ 12. *State the city and state of your legal residence.*

_____

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

Last four digits of your social-security number: _____

TAB 6-B

DRAFT

Minutes of Spring 2011 Meeting of
Advisory Committee on Appellate Rules
April 6 and 7, 2011
San Francisco, California

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, April 6, 2011, at 8:35 a.m. at the Fairmont Hotel in San Francisco, California. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Robert Michael Dow, Jr., Justice Allison Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Mr. James F. Bennett, Ms. Maureen E. Mahoney, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Lee H. Rosenthal, Chair of the Standing Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Leonard Green, liaison from the appellate clerks; Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); Ms. Holly Sellers, a Supreme Court Fellow assigned to the AO; and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Peder K. Batalden, Esq., attended the meeting on April 6. Prof. Catherine T. Struve, the Reporter, took the minutes. (On the second day of the meeting, the Appellate Rules Committee met jointly with the Bankruptcy Rules Committee. The attendees of the joint meeting are noted in Part VIII below.)

Judge Sutton welcomed the meeting participants and introduced the Committee's newest member, Professor Amy Coney Barrett. He noted that Professor Barrett attended Rhodes College and Notre Dame Law School, clerked for Judge Silberman and then for Justice Scalia, and now teaches Civil Procedure (among other subjects) at Notre Dame. Judge Bye introduced Mr. Batalden, who clerked for Judge Bye and who now, as an appellate practitioner, has submitted thoughtful suggestions and comments to the Appellate Rules Committee. Judge Sutton welcomed Mr. Batalden.

During the meeting, Judge Sutton thanked Mr. McCabe, Ms. Kuperman, Mr. Ishida, Mr. Barr, and the AO staff for their expert work in preparing for the meeting.

II. Approval of Minutes of October 2010 Meeting

A motion was made and seconded to approve the minutes of the Committee's October 2010 meeting. The motion passed by voice vote without dissent.

III. Report on January 2011 Meeting of Standing Committee

Judge Sutton summarized relevant events at the Standing Committee's January 2011 meeting. The Standing Committee approved for publication proposed amendments to Rules 13, 14, and 24; these amendments would address permissive interlocutory appeals from the United States Tax Court and also would revise Rule 24(b)'s reference to the Tax Court to remove a possible source of confusion concerning the Tax Court's legal status.

Judge Sutton noted that he also discussed with the Standing Committee the pending proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Members of the Standing Committee expressed varying views concerning this proposal, with a couple of members expressing support and two or three others taking a contrary view. Judge Rosenthal observed that members from western states tend to be more familiar with the issue. Judge Sutton noted that the Appellate Rules Committee has consulted the Chief Judges of the Eighth, Ninth, and Tenth Circuits (where relatively many tribal amicus filings occur) for their views; so far, the Committee has received formal responses from the Eighth and Ninth Circuits and informal feedback from the Tenth Circuit. With that input, the Committee will be in a position to revisit this item in the fall.

IV. Other Information Items

Judge Sutton reported that the Supreme Court has approved the proposed amendments to Appellate Rules 4 and 40 that will clarify the treatment of the time to appeal or to seek rehearing in civil cases to which a United States officer or employee is a party. Because the time to appeal in a civil case is set not only by Appellate Rule 4 but also by 28 U.S.C. § 2107, the Judicial Conference is seeking legislation to make the same clarifying change to Section 2107. Senate Judiciary staff have conveyed an inquiry by the Office of Senate Legal Counsel (SLC), who have questioned whether the "safe harbors" in the proposed rule and statute amendments[1] apply in cases in which a House or Senate Member, officer, or employee is sued in an individual capacity and is represented by SLC or by the House Office of General Counsel rather than by the DOJ. Judge Sutton noted that the language of the proposals, as drafted, covers such cases, but he observed that the Senate Judiciary staff have expressed an inclination to add language underscoring that point in the legislative history of the proposed amendment to Section 2107. It has also been suggested that similar language should be added to the Committee Notes to Rules 4 and 40; but changing the Notes at this stage would be unusual and complicated, given that the Supreme Court has already approved the proposed amendments. Mr. Letter noted that he has spoken with House staffers to underscore the DOJ's support for the proposed amendments.

[1] The "safe harbors" provide the longer appeal or rehearing periods when the United States represents the officer or employee at the time the relevant judgment is entered or when the United States files the appeal or petition for the officer or employee.

Judge Sutton recalled that the Committee, at its fall 2010 meeting, had discussed Chief Judge Rader's proposal, on behalf of the judges of the Federal Circuit, that 28 U.S.C. § 46(c) be amended to include in an en banc court any senior circuit judge "who participated on the original panel, regardless of whether an opinion of the panel has formally issued."[2] It turns out that the Judicial Conference Committee on Court Administration and Case Management (CACM) simultaneously considered this proposal and decided to recommend it favorably to the Judicial Conference. The CACM proposal was on the agenda for the Judicial Conference's March 2011 meeting, but was taken off the agenda in order to permit time for coordinated consideration of the proposal by CACM and the Appellate Rules Committee. The two committees will form a joint subcommittee to consider this question over the summer.

V. Action Items

A. For publication

1. Item No. 08-AP-G (substantive and style changes to Form 4)

Judge Sutton invited the Reporter to introduce this item, which concerns proposed revisions to Form 4 (the form that is used in connection with applications to proceed in forma pauperis ("IFP") on appeal). Effective December 1, 2010, Form 4 was revised to accord with the recently-adopted privacy rules. During the discussions that led to the 2010 amendments, the Committee also discussed possible substantive changes to the Form. In particular, it was suggested that Questions 10 and 11 request unnecessary information. Question 10 requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments; Question 11 inquires about payments for non-attorney services in connection with the case. In the past, the National Association of Criminal Defense Lawyers ("NACDL") has suggested that questions like Question 10 intrude upon the attorney-client privilege. More recently, comments received from attorneys in the Pro Se Staff Attorneys Office for the District of Massachusetts have suggested that requiring IFP applicants to disclose information concerning legal representation could impose a strategic disadvantage on those applicants.

The Reporter stated that, at least in most instances, the information requested by Questions 10 and 11 would not seem to be covered by attorney-client privilege. However, to the extent that Question 11 is read to encompass payments to investigators or to experts (especially non-testifying experts), it might elicit information that reveals litigation theories and strategy and that therefore qualifies as opinion work product. In addition, as the comments mentioned above suggest, the disclosures required by Questions 10 and 11 would enable an IFP applicant's opponent to learn the details of a represented applicant's fee arrangement with the applicant's lawyer, and could reveal the fact that an IFP applicant who is proceeding pro se has obtained legal advice from a lawyer who has not appeared in the case.

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[2] The statute currently provides that a senior judge may participate in an en banc court that is "reviewing a decision of a panel of which such judge was a member."

During the Committee's previous discussions of Form 4, members did not identify any reason to think that the details currently sought by Questions 10 and 11 are necessary to the disposition of IFP applications. Because Form 4 is also used in connection with applications to proceed IFP in the Supreme Court, members suggested seeking the Court's views on the question. Judge Sutton spoke informally to the Supreme Court Clerk's Office, which could not think of any reason why the information was necessary. In light of these discussions, the Reporter suggested, it would make sense to amend Form 4 by combining Questions 10 and 11 into a single, simpler question: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?"

The Reporter also suggested that the Committee make certain technical amendments to Form 4, to bring the official Form into conformity with changes that were approved by the Judicial Conference in fall 1997 but were not subsequently transmitted to Congress. The proposed technical amendments would add columns in Question 1 to permit the applicant to list the applicant's spouse's income; would limit the requests for employment history in Questions 2 and 3 to the past two years; and would specify that the requirement for inmate account statements applies to civil appeals.

A district judge member stated if the purpose of Form 4 is to enable the court to determine whether the applicant's finances qualify him or her to proceed IFP, then the simpler the form is, the better. He noted that information showing that a litigant has obtained legal advice might affect a judge's determination of how to construe the litigant's pleadings, but that the question of the amount of latitude to give a pro se litigant is separate from the question of whether a litigant should be permitted to proceed IFP. Professor Coquillette observed that the proposed amendment would address the complaints that NACDL has raised in the past.

Apart from the merits of the proposed amendments, Professor Coquillette suggested, the Committee should give attention to the process by which they are to be adopted. He reported that the Civil Rules Committee has begun to reconsider the procedures for adopting and amending forms. Participants have queried whether the forms should go through the standard rulemaking process. Judge Rosenthal observed that, at present, Civil Rule 84 addresses the forms that accompany the Civil Rules. The time may be opportune to reconsider the relationship of the forms and the rulemaking process. In 1938, the forms had a key function: to instruct the bench and bar concerning the new approach taken by the Civil Rules. But in 2011, the forms are no longer necessary for that purpose. Rather, in the case of the Civil Rules, it may be preferable for the Forms to focus on ministerial topics. Moreover, it is no longer practicable for the Rules Committees to monitor and maintain the forms on an ongoing basis in the way that they monitor and maintain the Rules themselves. It seems worthwhile for the rules committees jointly to consider how to handle the revision and maintenance of the forms. Mr. McCabe stated that the Bankruptcy Forms raise special issues. Under Bankruptcy Rule 9009, the Official Bankruptcy Forms go to the Judicial Conference for approval, but the Director of the AO is authorized to issue additional forms as well. Depending how quickly this inter-committee project proceeds, the fruits of this project may yield a new process that can be used to implement the proposed Form 4 amendments. However, it was noted that the project was likely to take at least three years.

An attorney member asked how a litigant responding to the proposed new Question 10 should answer the question if the litigant has a contingent fee arrangement with a lawyer. The Reporter responded that this excellent question also arises with respect to current Question 10. She suggested that such a litigant should check the "Yes" box in response to the amended Question 10, but that it would be unclear how to respond to the question's inquiry concerning "how much" money would be spent. The attorney member, though, predicted that an applicant who has a contingent fee arrangement might well check the "No" box in response to proposed Question 10 as drafted. He suggested revising proposed Question 10 to ask whether the litigant has agreed to share part of any recovery. Another attorney member, though, questioned whether that additional query is worthwhile; most of those applying to proceed IFP on appeal, she noted, will have lost in the court below.

Professor Coquillette mentioned the significant changes that are occurring concerning litigation financing. Mr. Letter noted that if a litigant's answers on Form 4 left the Clerk's Office unsatisfied, the office could inquire further of the litigant; given this possibility, he suggested, there is no need to further complicate the form. Mr. Green agreed that if the information provided on Form 4 proved inadequate, his office would request more information from the litigant; he reported that such situations are very rare.

A judge member suggested that even if the proposed amended Question 10 might not elicit full information in all cases, it strikes a reasonable balance. He noted that one might, in fact, argue for striking Questions 10 and 11 altogether, as unnecessary to the assessment of the litigant's finances. But he has seen some cases in which a litigant who was represented during part of a lawsuit later applies for IFP status. Gathering some information about the money spent on the litigation could be useful in assessing such requests.

A district judge member suggested that proposed Question 10 might be revised to read, in part, "or might you be spending" (rather than "or will you be spending") in order to more clearly encompass contingent fees arrangements. An attorney member responded that the key question is whether the Committee feels that it is necessary for Form 4 to elicit information that will reveal whether the applicant has a contingent-fee arrangement with a lawyer who may be advancing some of the litigation costs. If that is not a pressing concern, then it would be less important to draft Form 4 with a view to eliciting detailed information on this question. The Reporter observed that IFP status also relieves the litigant from any otherwise-applicable obligation to post security for costs.

Professor Coquillette expressed strong support for revising Questions 10 and 11. These questions, he suggested, should not be posed without a good reason. If the only goal of Form 4 is to elicit information concerning a litigant's poverty, Questions 10 and 11 are not germane. An appellate judge member asked whether it would be useful to seek the views of some practitioners' organizations such as the Litigation Section of the American Bar Association; another appellate judge predicted that such groups would be happy with the proposed revisions to Questions 10 and 11. An attorney member expressed support for adopting the proposed revisions to Form 4 as shown in the agenda book. The main issue that usually rides on IFP status, this member stated, is whether a litigant will be required to pay the $450 docket fee.

A motion was made and seconded to approve for publication all of the proposed revisions to Form 4 as shown in the agenda book. The motion passed by voice vote without dissent.

2. Item No. 10-AP-B (statement of the case)

Judge Sutton presented this item, which concerns Rule 28(a)(6)'s requirement that the brief contain "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." The statement required by Rule 28(a)(6) must precede the "statement of facts" required by Rule 28(a)(7); and these requirements have confused practitioners and produced redundancy in briefs. Judge Sutton observed that the Committee has obtained input on this item from two groups – the ABA Council of Appellate Lawyers and the American Academy of Appellate Lawyers. Nearly everyone whom the Committee has heard from agrees that there is a problem with the current Rule. To focus the discussion, the agenda materials presented three possible options for revising Rule 28(a). The first option would revise Rule 28(a) to emulate the Supreme Court's approach of combining the statement of the case and of the facts. The second option would retain the separate subdivisions of Rule 28(a) requiring statements of the case and the facts, but would reverse their order and revise the reference to the "course of proceedings." The third option would relocate the "course of proceedings" requirement from Rule 28(a)(6) to Rule 28(a)(7) so as to permit the description of the course of proceedings in chronological order (after the facts). Mr. Batalden, in a recent letter, suggested another possible variation. Ms. Sellers, meanwhile, provided the Committee with illuminating research on similar requirements in state-court briefing rules. Judge Sutton invited Ms. Sellers to present the results of her research.

Ms. Sellers noted that characterizing the various state approaches had presented a challenge. It is possible to sort states into two rough categories – those with rules similar to Rule 28 and those with rules that diverge from Rule 28. Some states appear to model their rules on a former version of the U.S. Supreme Court rules. Three states have rules that provide explicitly for an introduction. Depending on what approach the Committee decides to take, the state-court rules may provide models. Judge Sutton thanked Ms. Sellers for her thorough and informative research, and noted that it was useful to know that the states have reached no consensus on the best means of approaching the question. He observed that the question of providing for an introduction in briefs warrants consideration as a distinct agenda item.

Judge Sutton next invited Mr. Batalden to comment. Mr. Batalden stated that the most important question, for attorneys, is the ordering of the statements: Was it necessary, he asked, that the statement of the course of proceedings precede the statement of the facts? Mr. Letter noted that he is part of a group of lawyers whom Chief Judge Kozinski has appointed to advise the Ninth Circuit on various matters; Mr. Letter reported that the group has discussed this question, and that judges who were present observed that when lawyers comply with the current Rule's ordering the result is unhelpful.[3] Judges, Mr. Letter emphasized, are the audience for briefs, so the question is

[3] Later in the discussion, Mr. Letter noted that the Ninth Circuit is currently considering moving the table of authorities to the back of the brief.

what judges find most useful. Judge Sutton reported that he spoke with one appellate judge who does not read the statement of the case in view of the redundancy caused by it. Mr. Letter agreed that judges' perspectives on this question are likely to vary; but most judges, he suggested, would favor a change in the order of the requirements.

An attorney member stated that she has always struggled with Rule 28(a)'s requirements, and she stressed that there is a need for more flexibility in the Rule. This member stated that she liked the first option set forth in the agenda materials, but suggested a change to that option. The first option, as shown in the agenda materials, proposed that the later references in Rules 28 and 28.1 to the "statement of the case" and "statement of the facts" be replaced by references to "the statement of the case and the facts." The member proposed deleting "and the facts," so as to refer simply to the "statement of the case." (Later in the discussion the Committee determined by consensus that conforming revisions should be made to the proposed amendments to Rules 28(b) and 28.1 – so that those Rules, as amended, would refer simply to "the statement of the case" rather than to "the statement of the case and the facts.") Also, the member proposed deleting from the Committee Note to the proposed amendment to Rule 28(a) a statement that the amendment "permits the lawyer to present the factual and procedural history in one place chronologically." The member stated that she did not favor the second of the options shown in the agenda materials because that option did not provide attorneys with flexibility in drafting their briefs. Nor did she favor the third option; that option, she suggested, could confuse attorneys who might wonder what the revised Rule 28(a)(6) meant by referring (without more) to "a statement of the case briefly indicating the nature of the case." Responding to the suggestion that flexibility is better than an approach that simply reverses the order of the statement-of-the-case and statement-of-the-facts requirements, Mr. Letter observed that in some instances a lawyer may wish to provide context for the brief and an introductory statement can be useful in that regard.

An attorney member stated that he also favored the first option set forth in the agenda materials, but he suggested inserting a reference to the "rulings presented for review" into the proposed new Rule 28(a)(6) so that the amended Rule would require "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review with appropriate references to the record (see Rule 28(e))." Mr. Batalden agreed that the inclusion of that language would be helpful, but wondered whether it could instead be added to Rule 28(a)(5), which currently directs the inclusion of "a statement of the issues presented for review. The attorney member responded that inserting the "rulings presented for review" requirement into subdivision (a)(5) might make the statement of the issues unduly long. An appellate judge noted that briefs filed in the Eleventh Circuit have a separate page for the issues and a separate page for the standard of review; this system, he observed, is very helpful. The attorney member suggested that it would also be useful to revise the Committee Note to Rule 28(a) to state that the amended Rule 28(a)(6) "permits but does not require the lawyer to present the factual and procedural history chronologically."

A motion was made and seconded to approve for publication the proposed amendments to Rules 28 and 28.1, with the changes noted above. The motion passed by voice vote without dissent.

Prior to the vote, an attorney member had stated that she read the proposed amended Rule 28(a)(6) to permit brief writers to include an introduction at the beginning of the "statement of the case" section of the brief. This member suggested that it might be useful to mention that fact in the Committee Note – perhaps by saying something like "Briefs may, but are not required to, include an introduction in the statement of the case." Judge Sutton responded, however, that it would be better to keep the issue of introductions to briefs separate from the proposed amendment to the statement of the case. Accordingly, after the Committee completed its consideration of Item No. 10-AP-B, Judge Sutton invited further discussion of the topic of introductions to briefs.

Mr. Letter reported that the United States Attorneys' Offices in the Southern District of New York and in districts within the Ninth Circuit customarily include introductions in their briefs. The U.S. Attorney's Office in the Southern District of New York usually keeps the introduction to a single page. But Mr. Letter reported occasions when a very complex case had occasioned a four-page introduction in a brief. He noted that there are no local rules provisions in the Second or Ninth Circuits that explicitly provide for introductions in briefs but that courts do not reject briefs that include such introductions. Mr. Letter noted the possibility that the Ninth Circuit might consider revising the Ninth Circuit's local rules to permit (though not require) an introduction. Judges, he reported, consider introductions very useful. Mr. Letter also observed that he has read briefs by public interest groups such as Public Citizen and the ACLU that make very effective use of introductions. Mr. Letter noted that one question that might arise is whether the inclusion of an introduction diminishes the need for a summary of the argument.

An appellate judge noted that introductions can be provided for by local rule; given that fact, he wondered, was it necessary for the national rules to address introductions? Mr. Letter responded that the key is what judges prefer; if judges would prefer to have an introduction, then the rules should require it. Mr. Batalden observed that lawyers include introductions in their briefs despite the fact that Rule 28 does not mention them. Thus, any rule amendment would be a matter of accommodating existing practice. He pointed out that if Rule 28(a) is amended to refer explicitly to introductions, then such an amendment could alter existing practice by mandating a particular placement for the introduction (because Rule 28(a) states that the listed items must be included "in the order indicated").

An attorney member reiterated her view that the new statement of the case provision that the Committee had approved for publication would permit the inclusion of an introduction in the statement of the case, and she advocated revising the Committee Note to mention that. The introduction, she suggested, could be placed either at the start of the statement of the case or directly before it. Somewhat later in the discussion, another attorney member returned to this suggestion. He wondered whether it might be useful to consider moving the statement of issues (currently required by Rule 28(a)(5)) so that it comes after rather than before the statement of the case. The jurisdictional statement required by Rule 28(a)(4) is short, but the statement of issues can be longer. If the statement of issues followed rather than preceded the statement of the case, then an introduction contained in the statement of the case would be the first item of substance in the brief. An appellate judge member noted that under the Supreme Court's rules, the questions presented are the first item in petitions for certiorari and in merits briefs. The attorney member suggested,

however, that the questions presented section in a Supreme Court brief differs from the statement of issues section in a court of appeals brief. Mr. Letter noted that Supreme Court briefs tend to include, in the questions presented section, a couple of sentences that serve, in effect, as an introduction.

An attorney member noted that if the Rule were revised to mandate (rather than merely permit) an introduction, then the Committee would have to determine what the introduction should contain. An appellate judge responded to this observation by asking what an introduction would contain that is not already set forth somewhere in the existing parts of the brief. Mr. Letter noted that while introductions can be designed to provide information concerning the posture of the case and the relevant issues, introductions can also serve a persuasive function. He observed that the proposal currently being considered by the Ninth Circuit contemplates that if the brief is to have an introduction, the introduction should be the first substantive item in the brief.

A member asked whether a provision concerning introductions would be better placed in the national rules or in local rules. Addressing the topic through local rules, she suggested, might provide more flexibility. A district judge member stated that he saw appeal in the idea of including the introduction in the statement of the case; that option, he suggested, would provide flexibility. He noted that the lawyers know more about the case than the judges do. On the other hand, he observed, the inclusion of an introduction in the statement of the case might occasion tension to the extent that the introduction is argumentative. This member noted that in the Seventh Circuit, lawyers must anchor in the record any citations to the facts. An appellate judge member asked Mr. Letter whether the proposed Ninth Circuit rule concerning introductions would provide for citations to the record in the introduction. Mr. Letter responded that the rule would not provide for record citations in the introduction, but that factual assertions elsewhere in the brief would be accompanied by citations to the record. The judge member noted that the quality of briefs filed in the Eleventh Circuit is very high. Mr. Letter suggested that judges in the Ninth Circuit may be less satisfied with the briefs filed in their circuit.

Judge Sutton summed up the range of issues that might arise with respect to introductions in briefs: Should introductions be permitted? Should they be mandatory? What should an introduction contain? Where should it be placed? He stated that it would make sense to solicit input on these questions. He suggested, however, that it would be difficult to take up these questions simultaneously with the proposed amendment to Rule 28(a)(6). Instead, he proposed, the Committee should make the introduction question a separate agenda item and discuss it in the fall. This new agenda item would include both the topic of introductions and also the possibility, noted above, of moving the statement of issues so that it follows rather than precedes the statement of the case.

VI. Discussion Items

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

Judge Sutton invited the Reporter to update the Committee on this item, which concerns issues related to the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007). The

Reporter noted that in *Dolan v. United States*, 130 S. Ct. 2533 (2010), the Court had provided a typology of deadlines. The *Dolan* Court noted (citing *Bowles*) that some deadlines are jurisdictional; some other deadlines are claim-processing rules; and still other deadlines "seek[] speed by creating a time-related directive that is legally enforceable but do[] not deprive a judge ... of the power to take the action to which the deadline applies if the deadline is missed."

More recently still, in *Henderson ex rel. Henderson v. Shinseki*, 2011 WL 691592 (U.S. March 1, 2011), the Court held that the 120-day deadline set by 38 U.S.C. § 7266(a) for seeking review in the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals is not jurisdictional. The Court of Appeals for Veterans Claims had dismissed Mr. Henderson's appeal because he had filed it 15 days late. A divided en banc Federal Circuit affirmed, holding (in reliance on *Bowles*) that the deadline is jurisdictional. The dissenters pointed out that the very veterans who most deserve service-related benefits may be the litigants least likely to be able to comply with the filing deadline. The sympathetic facts of the case spurred legislative action, and four bills were introduced in Congress in response to the Federal Circuit's decision. This spring, the Supreme Court (with all eight participating Justices voting unanimously) reversed. The Court held that *Bowles* was inapplicable because *Bowles* involved a deadline for taking an appeal from one court to another; by contrast, Section 7266(a) sets a deadline for taking an appeal from an agency to an Article I court in connection with a "unique administrative scheme." Instead of applying *Bowles*, the Court applied the clear statement rule from *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). The Court found no clear indication that Congress intended Section 7266(a)'s deadline to be jurisdictional. This holding, the Reporter observed, does not directly affect any deadlines that affect practice in the courts of appeals. But the *Henderson* Court's method of distinguishing *Bowles* – as a case that concerned court/court review – might leave the door open in future cases for the argument that *Bowles* does not govern the nature of deadlines for seeking court of appeals review of an administrative agency decision. Such an argument, though, would have to confront the precedent set by *Stone v. INS*, 514 U.S. 386 (1995), in which the Court held that the then-applicable statutory provision delineating the procedure for petitioning for court of appeals review of a final deportation order by the Board of Immigration Appeals was jurisdictional. The Reporter suggested that it will be interesting to see how this branch of the doctrine continues to develop. She also suggested that the Court's decision in *Henderson* appears likely to remove the impetus for the legislative proposals that grew out of the Federal Circuit's decision.

The Reporter also briefly noted a certiorari petition pending before the Court in *United States ex rel. O'Connell v. Chapman University* (No. 10-810), in which the petitioner seeks to narrow *Bowles* through the application of 28 U.S.C. § 2106. With respect to the development of *Bowles*-related caselaw in the courts of appeals, the Reporter observed that the most interesting questions continue to arise with respect to hybrid deadlines – namely, appeal deadlines set partly by statute and partly by rule.

B. Item No. 08-AP-D (FRAP 4(a)(4))

Judge Sutton invited Ms. Mahoney to introduce this item. Ms. Mahoney observed that this item arose from Mr. Batalden's observation that under Appellate Rule 4(a)(4)(B) the time to appeal

from an amended judgment runs from the entry of the order disposing of the last remaining tolling motion. In some scenarios, Mr. Batalden had suggested, the judgment might not be issued and entered until well after the entry of the order. Ms. Mahoney noted that the Committee has been considering how to clarify the Rule. The Committee has discussed a possible solution that would peg the re-starting of appeal time to the "later of" the entry of the order disposing of the last remaining tolling motion or the entry of any resulting judgment.

Ms. Mahoney reported that Mr. Taranto had recently suggested another possible approach – one that would require the entry of a new judgment on a separate document after the disposition of all tolling motions. If the court were to deny all of the tolling motions, it would re-enter the same judgment that it had originally entered. Such an approach, Ms. Mahoney suggested, could be by far the most sensible solution. Judge Sutton observed that Mr. Taranto has presented the Committee with a new way of thinking about the issue, and he suggested that it would be worthwhile to consider this new proposal over the summer.

Mr. Taranto noted that the proposal will require joint discussion with the Civil Rules Committee. He explained that his proposal uses the term "resetting motion," rather than "tolling motion," to indicate that the relevant motions, when timely filed, reset the appeal-time clock to 0. He stated that the extension of the separate-document requirement to this context is justified because the formality provided by that requirement is appropriate even when the end of the case follows from the disposition of a resetting motion. Extending the separate-document requirement, Mr. Taranto noted, might eliminate the need to define the term "disposing of" (a question that had occupied the Committee at the fall 2010 meeting). The extension of the separate-document requirement could also, he argued, provide an opportunity to simplify Civil Rule 58 and Appellate Rule 4(a), because there would be no need to address separately the situations in which no separate document is currently required. Mr. Taranto explained that the proposal would make use of the statutory authorization, in 28 U.S.C. § 2072(c), to define when a district court's ruling is final for purposes of appeal under 28 U.S.C. § 1291. Under the proposal, the judgment in a case where timely resetting motions have been made would not be final for appeal purposes until the entry of the required separate document after the disposition of all resetting motions. But an appellant could waive the separate-document requirement and appeal an otherwise-final judgment after disposition of all resetting motions but prior to the provision of the separate document.

Judge Sutton expressed the Committee's gratitude for Mr. Taranto's work on this item, and he suggested that Mr. Taranto's proposal be forwarded to the Civil / Appellate Subcommittee for its consideration. Judge Sutton noted he had previously heard some misgivings about the separate document requirement. Judge Rosenthal observed that it would be optimistic to assume that the separate document requirement is widely known or understood. Judge Sutton asked Mr. Green how the circuit clerks would react to an expansion of the separate document requirement. Mr. Green responded that the change should be straightforward from the clerks' perspective. A district judge member observed that district judges within the Seventh Circuit do not question the separate document requirement. If a separate document were always (rather than sometimes) required, this member suggested, that could make compliance simpler for the district judges. Mr. Batalden

expressed support for Mr. Taranto's proposal; he suggested that an additional benefit of requiring a new judgment on a separate document would be that enforcement of the judgment would be easier.

Judge Sutton thanked Mr. Taranto, Ms. Mahoney, Mr. Letter, and Mr. Batalden for their efforts with respect to this item.

C. Item No. 08-AP-H (manufactured finality)

Judge Sutton invited Mr. Letter to introduce this item, which concerns the doctrines that govern a litigant's attempt to "manufacture" a final judgment in order to take an appeal. Mr. Letter offered the following example: Suppose that a plaintiff includes five claims in a complaint and the court dismisses two of the five. Without obtaining a certification under Civil Rule 54(b), the plaintiff cannot appeal the dismissal of the two claims until the other three claims have been finally disposed of. Some lawyers have suggested that the option of seeking a Civil Rule 54(b) certification does not satisfactorily address this scenario because Rule 54(b) certification lies within the district judge's discretion. It is generally accepted that if the plaintiff dismisses the remaining three claims with prejudice, that dismissal results in a final judgment so that the plaintiff can appeal the dismissal of the two claims. If the plaintiff dismisses the three remaining claims without prejudice, some would argue this produces finality for appeal purposes but most take the contrary view. More difficult questions arise if the plaintiff dismisses the remaining three claims with conditional prejudice (that is to say, stating that the dismissal is without prejudice to the reinstatement of the remaining three claims if the two previously-dismissed claims are reinstated on appeal).

Mr. Letter reported that the Civil / Appellate Subcommittee, which has been considering this item, has recently discussed suggestions by Ms. Mahoney and by Mr. Keisler. Judge Rosenthal observed that the Civil Rules Committee – at its spring meeting – discussed this item and concluded that it would welcome guidance from the Appellate Rules Committee.

Mr. Letter noted that lawyers in his office regularly ask him questions relating to the manufactured-finality doctrine. During the Subcommittee's prior discussions, questions were raised concerning the experience within the Second Circuit (which is the only Circuit so far to issue a decision approving the use of a conditional-prejudice dismissal to create an appealable judgment). Mr. Letter informally canvassed Assistant United States Attorneys in the Second Circuit – and especially in the Southern District of New York – to ask their experience; they told him that the issue of conditional-prejudice dismissals does not come up frequently.

Ms. Mahoney noted that there is consensus on the Subcommittee that a dismissal of the remaining claims with prejudice should produce finality. As to dismissals without prejudice, there is a circuit split, but the Subcommittee members believe that such dismissals should not produce finality. The question on which the Subcommittee has not reached consensus is how to treat conditional-prejudice dismissals. An attorney member of the Subcommittee from the Civil Rules Committee has expressed support for permitting conditional-prejudice dismissals to produce finality, and has expressed opposition to amending the rules to bar such dismissals from producing finality. Ms. Mahoney argued that the rules should be amended to provide for a nationally uniform approach

to the question of manufactured finality. She noted that she finds the conditional-prejudice idea appealing but that it is proving complicated to devise a rule that would implement the idea in multi-party cases. In such cases, she observed, there is a possibility that unrestrained use of the conditional-prejudice dismissal mechanism could result in unfairness to parties other than the would-be appellant. Ms. Mahoney suggested that one possible approach would be to amend Civil Rule 54(b) to provide that the district court shall certify a separate Rule 54(b) judgment when the would-be appellant has dismissed all other claims with conditional prejudice, unless another party shows that such a certification would be unfair.

Mr. Taranto observed that the question of manufactured finality also arises in the context of criminal cases, and he asked Mr. Letter whether the DOJ has a view concerning potential amendments that would address this topic. Mr. Letter responded that the DOJ would definitely wish to express its views on the matter. Judge Rosenthal observed that many districts will not allow a criminal defendant to plead guilty unless the defendant waives appeal (including with respect to constitutional issues). Thus, in the criminal context, these issues could implicate the dynamic of plea bargaining. She noted that it would be wise to seek the views of the Criminal Rules Committee in order to gain a sense of how such changes would be viewed on the criminal side.

An appellate judge member observed that it is useful to ask whether a question of this nature is better resolved by rule or by caselaw; in this instance, he noted, the fact that the question concerns appellate jurisdiction might weigh against leaving the issue to development in the caselaw. Concerning Ms. Mahoney's suggestion that it would be useful for a rules amendment to address the circuit split concerning the effect of dismissals without prejudice, the member noted that such an amendment would seek to achieve uniformity by adopting the more stringent side of the circuit split. Ms. Mahoney acknowledged this point but argued that the circumstances under which an appeal is available should be uniform from one circuit to another. She suggested that it would be useful to know whether the Appellate Rules Committee feels that the circuit split should be addressed.

An appellate judge member of the Civil / Appellate Subcommittee expressed a preference for not amending the rules to address the manufactured-finality issue. Amending the rules, he suggested, might interfere with the flexibility that is currently available to district judges. Another appellate judge member of the Committee expressed agreement with this view. An attorney member argued, in response, that in the circuits where the manufactured-finality doctrine currently permits the appellant an alternative way to appeal without obtaining a Civil Rule 54(b) certification, the existing doctrine can be seen as removing control from the district judges. The appellate judge member responded that such a result would only occur in a circuit in which the court of appeals has chosen to move the doctrine in that direction. This judge member stated that if the Rules Committees were to do anything with respect to this item, he would lean toward putting control in the hands of the district judge.

An appellate judge member wondered whether it would be beneficial for the Committee to ask the Subcommittee whether the Subcommittee's members could reach consensus on a concrete proposal. Mr. Letter suggested that it would be a mistake not to take action to address the question of manufactured finality. The appellate judge member responded that it would be helpful for the

Subcommittee to craft a concrete proposal, at least concerning the treatment of dismissals without prejudice. An attorney member of the Subcommittee suggested that it would be useful to encourage the Subcommittee to address both dismissals without prejudice and conditional-prejudice dismissals. An appellate judge member of the Subcommittee reiterated his view that the rulemakers should not proceed at this time to propose an amendment; rather, he suggested, the Committee could re-consider the question later if someone in the future formulates a proposal on the subject.

It was decided that the Committee would request that the Subcommittee attempt to reach consensus on a specific proposal. Consultation with the Criminal Rules Committee will become necessary in the event that the Civil and Appellate Rules Committees decide to move forward with a proposal.

D. Item No. 08-AP-K (alien registration numbers)

Judge Sutton invited the Reporter to introduce this item, which arose from concerns voiced in 2008 by Public.Resource.Org about the presence of social security numbers and alien registration numbers in federal appellate opinions. The Appellate Rules Committee discussed the issue in fall 2008 and referred it to the Standing Committee's Privacy Subcommittee, which was considering various privacy-related questions relating to the national Rules. The Privacy Subcommittee reviewed the materials submitted by Public.Resource.Org; it commissioned the FJC to conduct a survey of court filings; it reviewed local rules concerning redaction; with the assistance of the FJC, it surveyed judges, clerks and attorneys about privacy-related issues; and it held a day-long conference at Fordham Law School in April 2010. One of the panels at the Fordham Conference focused specifically on immigration cases.

In its recent report to the Standing Committee, the Privacy Subcommittee concluded that alien registration numbers should not be added to the list of items for which the national Rules require redaction. The Subcommittee found that disclosure of alien registration numbers does not pose a substantial risk of identity theft. In addition, the Subcommittee noted that both the DOJ and circuit clerks had emphasized that alien numbers provide an essential means of distinguishing among litigants and preventing confusion.

The Reporter suggested that in the light of the Privacy Subcommittee's determination, the Committee might wish to consider removing Item No. 08-AP-K from the Committee's study agenda. A motion to remove that item from the study agenda was made and seconded and passed by voice vote without opposition.

E. Item No. 10-AP-A (premature notices of appeal)

Judge Sutton introduced this item, which concerns the possibility of amending Appellate Rule 4(a)(2) to address the question of the relation forward of a premature notice of appeal. Judge Sutton noted that the Committee's previous review of the caselaw applying the relation-forward doctrine to a range of fact patterns had found a number of lopsided circuit splits concerning the availability of relation forward in particular sorts of circumstances. He observed that, since the time

that the Committee commenced its consideration of this issue, developments in the caselaw appear to have lessened or removed some of the circuit splits. He suggested that the Committee should consider whether it would prefer to consider amending Rule 4(a)(2); or hold the item on the agenda while monitoring the developing caselaw; or remove the item altogether.

Judge Sutton pointed out that if the Committee decides to consider amending Rule 4(a), the agenda materials included four sketches designed to illustrate different possible approaches. Judge Sutton stated that among those four sketches, he slightly favored the fourth, which would amend Rule 4(a)(2) to provide a (non-exhaustive) list of scenarios in which relation forward occurs. He asked participants for their views on whether pursuit of a Rules amendment would be worthwhile.

A district judge member asked whether the relation-forward ruling in in *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993), *overruled on other grounds by Otis v. City of Chicago*, 29 F.3d 1159 (7th Cir. 1994), was still good law. He suggested that the Seventh Circuit's caselaw may be moving away from the *Strasburg* approach for cases where a decision is announced contingent on a future event and the notice of appeal is filed between the announcement and the occurrence of the contingency. He wondered whether there is any problem that needs to be addressed through a Rules amendment.

Judge Sutton responded that Rule 4(a)(2) does not set out the approaches that courts have developed through the caselaw, and he wondered whether the Rule could usefully codify existing practice. The question, he suggested, is whether the existence of inter-circuit consensus on a given approach provides a reason to codify that approach in the Rule. Judge Rosenthal observed that one could view the recent adoption of Civil Rule 62.1 and Appellate Rule 12.1 as an example of such codification. There was general consensus (subject to variation on some details) among the circuits concerning the practice of indicative rulings, but many practitioners were unfamiliar with the indicative-ruling mechanism. There is a role, she suggested, for Rule amendments that codify and/or clarify existing practice. Such rules can be especially helpful in providing guidance to pro se litigants.

An attorney member expressed support for retaining this item on the agenda and continuing to work on it while also monitoring the caselaw developments. This member pointed out that the Eighth Circuit has rejected the majority approach to scenarios that involve a judgment as to fewer than all claims or parties, with later disposition of all remaining claims with respect to all parties. There is no reason to think, the member suggested, that the Eighth Circuit will reverse itself on this point. Turning to the four possibilities sketched in the agenda materials, this member expressed skepticism concerning the second and third sketches because those approaches would not resolve all of the existing circuit splits. The member stated that the first sketch[4] provides an approach that

[4] In that sketch, Rule 4(a)(2) would be amended to read: "A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry, if and only if the decision or order, as announced, would otherwise be appealable."

seems harsh but would be clear. As to the fourth sketch, the member suggested that the list of scenarios in which relation forward can occur should be introduced by the phrase "including but not limited to" in order to avoid creating the impression that the listed scenarios are the only ones in which relation forward can occur. There are, the member observed, many possible permutations.

By consensus, the Committee resolved to continue its work on this item.

F. Item No. 10-AP-D (taxing costs under FRAP 39)

Judge Sutton thanked Ms. Leary for her excellent research concerning the award of costs under Appellate Rule 39, and he invited her to present that research to the Committee. Ms. Leary observed that the Committee had asked the FJC to provide data in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*. Ms. Leary explained that the FJC had researched each circuit's local rules and procedures for determining cost awards, and that the FJC had used the courts of appeals' CM/ECF databases to identify cases in which cost awards had been made.

Ms. Leary reported that there is no simple answer to the question what constitutes a typical award of appellate costs under Rule 39. Multiple variables determine the amount of a Rule 39 cost award, and each circuit has adopted its own combination of those variables. The variables include the range of documents and fees that are recoverable, the amount recoverable for copying each page of a document, and the number of copies for which costs are recoverable.

Turning to the results of the FJC's database search, Ms. Leary cautioned that the search was limited by the fact that the FJC had not obtained data from the Federal Circuit because that Circuit was not yet live on CM/ECF. In addition, the data from the Second and Eleventh Circuits were limited because those Circuits only recently went live on CM/ECF. Some limitations also applied to the data from the Fifth, Seventh, and Ninth Circuits. The data show that most cost awards go to appellees upon affirmance of the judgment below. But when appellants received cost awards upon reversal, partial reversal, modification, or vacatur of the judgment below, their average cost award was higher than the average cost award to appellees. Using the range in size of a majority of the awards in a given circuit as a benchmark, the FJC assessed whether any awards in that circuit could be seen as "outliers" in relation to that circuit's normal range. Such outliers were found in nine circuits; the award in *Snyder* was one such outlier. The very large award in *Snyder* resulted from the length of the appendix and the fact that the Fourth Circuit permits recovery of printing costs up to $4.00 per page (which in *Snyder* meant recovery of 50 cents per page for each of eight copies of the appendix).

Judge Sutton noted that in the *Snyder* case, the existing rules gave the court of appeals the discretion not to impose costs on the appellant. Professor Coquillette agreed that Rule 39 gives the court of appeals discretion. Mr. Letter noted that it would not be a good idea for Rule 39 to be amended to distinguish among particular types of cases with respect to the permissibility of cost awards.

Judge Sutton asked how costs would be computed in a case where the briefs are filed electronically. Mr. Green responded that if the briefs were filed only in electronic form, then no printing costs would be awarded. However, he noted that – with the exception of the Sixth Circuit – the circuits that have transitioned to electronic filing nonetheless require paper copies as well.

Judge Sutton stated that he would send a copy of Ms. Leary's report to the Chief Judge and Circuit Clerk for each Circuit. By consensus, the Committee retained this item on its study agenda.

G. Item No. 10-AP-E (effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case)

Judge Sutton invited the Reporter to introduce this item, which arose from Howard Bashman's suggestion that the Committee consider issues raised by *Vanderwerf v. SmithKline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010). The Reporter reminded the Committee that in *Vanderwerf*, the majority held that the withdrawal of a Civil Rule 59(e) motion deprived that motion of tolling effect and rendered the movant's appeal untimely. No consensus emerged, at the fall 2010 meeting, in favor of a rulemaking response to *Vanderwerf*. Members did express interest in considering further the situation faced by a non-movant who has relied on the tolling effect of a post-judgment motion that is subsequently withdrawn. One might question whether the *Vanderwerf* holding extends to cases in which the movant and the appellant are different parties. It would not seem to make sense to extend the *Vanderwerf* holding to situations in which the tolling motion is made (and then withdrawn) by a litigant other than the would-be appellant. Admittedly, no textual basis is readily apparent in Appellate Rule 4(a)(4) for distinguishing between appeals by the litigant that made the withdrawn motion and appeals by other litigants. However, there has as yet been no decision that applies *Vanderwerf* to an appeal by a non-movant. The Reporter suggested that the Committee consider whether, in the absence of such a decision, it is worthwhile to maintain this item on the study agenda.

A motion was made and seconded to remove Item No. 10-AP-E from the study agenda. The motion passed by voice vote without dissent.

H. Item No. 10-AP-G (intervention on appeal)

Judge Sutton invited discussion of this item, which arose from Mr. Letter's observation that Civil Rule 24 sets standards for intervention in the district courts, but that no comparable provision covers the general question of intervention in the courts of appeals. Mr. Letter noted that the United States has been successful in moving to intervene in a number of appeals. He observed that unless a statute provides a right to intervene, the decision whether to allow intervention rests in the court's discretion. An attorney member expressed concern with the idea of formalizing a procedure for seeking to intervene in the court of appeals (instead of in the district court); such a measure, this member suggested, might have unintended consequences.

A motion was made and seconded to remove Item No. 10-AP-G from the study agenda. The motion passed by voice vote without dissent.

VII. Additional Old Business and New Business

A. Item No. 10-AP-I (consider issues raised by redactions in appellate briefs)

Judge Sutton invited the Reporter to present this item, which arises from concerns expressed by Paul Alan Levy, an attorney at Public Citizen Litigation Group, concerning redactions in appellate briefs. Mr. Levy explains that in some cases, broadly worded district court orders permitting the parties to designate discovery materials as confidential may be followed by the filing, on appeal, of briefs that are heavily redacted to obscure references to those materials. Mr. Levy reports that the filers of such redacted briefs often provide no justification for the redactions. In some cases, no one files a motion to unseal the unredacted copies of the briefs; and even if such a motion is filed, by the time that the unredacted copies of the briefs are filed it is too late for would-be amici to have a meaningful chance to draft their briefs in the light of the unredacted record.

The Reporter noted that she had shared Mr. Levy's suggestion with the Chairs and Reporters of the Privacy and Sealing Subcommittees, and that Judge Hartz had provided thoughtful comments. Judge Hartz observed that the questions raised by Mr. Levy fall outside the scope of the Sealing Subcommittee's inquiries, because that Subcommittee considered only the sealing of entire cases. But some of the Subcommittee's suggestions – such as requiring judicial oversight of sealing decisions and sealing as little as necessary – could be relevant to Mr. Levy's concerns. Judge Hartz noted that the appellate context poses challenges because judges are not usually assigned to a case until after the answering brief is filed, and even then judges may feel uncomfortable resolving a sealing question before having had a chance to fully consider the merits of the appeal. The challenge, he suggested, is to provide for judicial involvement without creating too great a burden. One possibility might be an approach that provides that matters are unsealed when submitted to the court of appeals absent a showing of good cause.

The Reporter noted that all circuits have one or more local provisions dealing with sealed materials. Not all circuits specify whether materials sealed below presumptively remain sealed on appeal. Seven circuits have provisions that state or imply (with varying degrees of explicitness) that materials sealed below presumptively remain sealed on appeal. But two of those seven circuits – the First and the Sixth – also provide that a party wishing to file a sealed brief must move for leave to do so. Two circuits take a different approach: When records have been sealed below, these circuits maintain the seal only for a limited period to afford an opportunity for a party to move in the court of appeals to seal the materials. The Seventh Circuit applies this approach to all cases, except where a statute or procedural rule provides otherwise. The Third Circuit follows this approach in appeals in civil cases, and also provides that a litigant must move for leave to file a sealed brief.

Mr. Taranto drew the Committee's attention to the Federal Circuit's recent decision in *In re Violation of Rule 28(d)*, 2011 WL 1137296 (Fed. Cir. Mar. 29, 2011), in which the court of appeals sanctioned counsel for improperly marking portions of briefs confidential in violation of Federal Circuit Rule 28(d). Judge Rosenthal noted the Civil Rules Committee's extensive consideration of protective orders issued under Civil Rule 26. She observed that the law is quite clear that good

cause is required in order for the court to seal discovery items. And a more stringent showing is required in order to seal materials filed with the court in support of a request for judicial action. Despite the clarity of the law, however, practitioners persist in asserting that materials subject to a protective order are for that reason subject to sealing even when submitted as part of a court filing. There is a divide between law and practice. A district judge member agreed, and noted that in the Seventh Circuit matters are presumptively unsealed if the litigant fails to show within 14 days why they should remain sealed. Judge Sutton asked whether the concerns about sealing in the court of appeals would dissipate if questions of sealing were properly addressed at the district court level. A district judge participant said that they would.

A district judge member suggested that practices would improve if the Appellate Rules embodied the approach taken by the Seventh Circuit; the presence of such a provision in the Appellate Rules would help to focus district judges on the need to require a stringent showing to seal materials filed in support of a request for judicial action. An attorney member stated that the standards for sealing in the district court and the court of appeals should be the same. Another attorney member agreed, but noted that the application of those standards in the court of appeals might differ from that in the district court if the reason for protecting the materials at issue has dissipated by the time of the appeal. Mr. Letter pointed out that D.C. Circuit Rule 47.1(b) requires the parties to an appeal to review the record to make sure that continued sealing is appropriate.

Judge Sutton suggested that the Committee coordinate its consideration of these questions with the Civil Rules Committee. Mr. Letter observed that this topic also has implications for criminal matters. He suggested that one approach to the issue might be to impose a requirement that the district court review any sealing orders before closing a case. An alternative approach would be to adopt the D.C. Circuit's requirement of continuing review. Judge Rosenthal observed that the question of Rule 26 and protective orders has been on the agenda of the Civil Rules Committee for a very long time. The Civil Rules Committee has not, to date, found it necessary to update Rule 26 as it relates to protective orders and confidentiality, because the caselaw dealing with this issue is on the right track. However, a conclusion by the Civil Rules Committee that there is no need to amend Civil Rule 26 does not necessarily answer the question raised by Mr. Levy. The Appellate Rules Committee could consider requiring re-justification of any sealing decisions in the context of an appeal; it might be the case that a separate set of arguments becomes relevant in the appeal context. Professor Coquillette expressed agreement.

A district judge member observed that in the Seventh Circuit, lawyers know that the court of appeals will unseal matters that should not have been sealed, and this provides accountability. An attorney member asked whether the Appellate Rules Committee should consider adopting in the national rules an approach like the Seventh Circuit's. An appellate judge member asked whether the Supreme Court has a rule governing sealed documents. Mr. Letter stated that he did not think that the Supreme Court has a rule. Sealed filings are rare in the Supreme Court, he observed, but the DOJ has made such filings on occasion.

By consensus, the Committee retained this item on its study agenda. Judge Dow agreed to work with the Reporter to develop a proposal for presentation to the Committee in the fall.

B. Item No. 11-AP-A (exempt amicus statement of interest from length limit)

Judge Sutton invited the Reporter to introduce this item, which concerns a proposal by R. Shawn Gunnarson and Alexander Dushku that Appellate Rule 32(a)(7)(B)(iii) be amended to "provide that the statement of interest by an amicus curiae, required by Rule 29(c)(4), is not included in the word count for purposes of the type-volume limitation of Rule 32(a)(7)(B)." The proponents argue that amici's statements of interest are more similar to items already excluded from Rule 32(a)(7)(B)'s limits than to other items that must be counted under those limits. They report that counting the statement of interest for purposes of Rule 32(a)(7)(B)'s limits is burdensome when a brief is filed by a large consortium of amici. And they state that the interpretations of the current Rule by clerk's offices vary from circuit to circuit.

The Reporter stated that Messrs. Gunnarson and Dushku make good arguments for exempting the statement of interest from the length limit. On the other hand, it is worth considering the possible downside of such an exemption: It might tempt amici to skirt the length limits by smuggling argument into the statement of interest. To get a sense of length of statements of interest, the Reporter had performed a small and rough search on Westlaw. The search – described in the agenda materials – found a wide variation in length, both in absolute terms and when measured in number of words per amicus. Many statements in the sample were concise, but not all were. And the three briefs, within the sample, that had the greatest number of words per amicus contained argumentation.

The Reporter noted that most circuits do not appear to address by local rule whether the statement of interest is included in the length limit; the Third Circuit, though, does have a local rule that appears intended to exclude the statement. A member asked whether the three longest statements in the sample came from briefs filed in a circuit that excluded the statement of interest from the length limit. The Reporter stated that she would check.[5] An attorney member observed that the Rules should attempt to encourage multiple amici to file a single brief when possible. This member wondered whether a rule could be drafted that would exclude the statement of interest from the word count, but only up to a specific number of words per amicus. Another attorney member responded that any rule that depended on the number of amici could be manipulated – for example, by listing as amici not only an association but also its members. This member suggested, as an alternative, a rule that would exclude the statement of interest up to a uniform ceiling (such as 250 words). A third attorney member stated that he did not think it was worthwhile to address this matter in the national Rules.

An attorney member noted that in Supreme Court briefs, it has become customary to place in a separate addendum or appendix a paragraph describing each amicus; that addendum or appendix does not count toward the length limit. A district judge member observed that some court of appeals judges prefer not to encourage amicus filings, and he suggested that such judges would fail to see

[5] Subsequent to the meeting, the Reporter determined that one of the three briefs in question was filed in the Third Circuit.

a reason to address this question in the national Rules; he noted that an amicus can make a motion for permission to serve an over-length brief. Judge Sutton asked the meeting participants whether any of them had found the current Rule to be problematic. An attorney member responded that she could envision cases in which it could be a problem, but that in such instances the amicus could file a motion.

The Reporter had noted earlier that an argument might be made for excluding new Rule 29(c)(5)'s authorship-and-funding disclosure requirement from the length limits. Judge Sutton recommended that the Committee defer considering that possibility until such time as it is considering other amendments to the relevant Rule.

A motion was made and seconded to remove Item No. 11-AP-A from the study agenda. The motion based by voice vote without dissent.

VIII. Joint Discussion with Advisory Committee on Bankruptcy Rules concerning Item No. 09-AP-C (Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules), and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

At 8:35 a.m. on April 7, Judge Sutton and Judge Eugene R. Wedoff called to order the joint meeting of the Bankruptcy Rules Committee and the Appellate Rules Committee. Present from the Bankruptcy Rules Committee were Judge Wedoff (the Chair of the Committee); Judge Karen K. Caldwell; Judge Arthur I. Harris; Judge Sandra Segal Ikuta; Judge Robert James Jonker; Judge Adalberto Jordan; Judge William H. Pauley III; Judge Elizabeth L. Perris; Chief Judge Judith H. Wizmur; J. Michael Lamberth, Esq.; David A. Lander, Esq.; and John Rao, Esq. J. Christopher Kohn, Esq., Director of the Commercial Litigation Branch of the Civil Division of the DOJ, was present as an ex officio member of the Bankruptcy Rules Committee. Judge Laura Taylor Swain attended as the past Chair of the Bankruptcy Rules Committee. Judge James A. Teilborg attended as liaison from the Standing Committee and Judge Joan Humphrey Lefkow attended as liaison from the Committee on the Administration of the Bankruptcy System. Present as Advisors or Consultants to the Bankruptcy Rules Committee were Patricia S. Ketchum, Esq.; Mark A. Redmiles (Deputy Director, Executive Office for U.S. Trustees); and James J. Waldron (Clerk of the United States Bankruptcy Court for the District of New Jersey). Also present were Judge Dennis Montali, Molly T. Johnson from the FJC, and James H. Wannamaker III and Scott Myers from the AO. Professor S. Elizabeth Gibson and Professor Troy A. McKenzie were present as the Reporter and Assistant Reporter for the Bankruptcy Rules Committee. Also in attendance were Philip S. Corwin, Esq. of Butera & Andrews; David Melcer, Esq. of Bass & Associates P.C.; and Lisa A. Tracy of the Executive Office for U.S. Trustees.

Judge Sutton commenced by observing that the joint meeting would be interesting and helpful. He noted that the Appellate Rules Committee members were eager to benefit from discussions with the Bankruptcy Rules Committee, including with respect to the experience with electronic filing in bankruptcy. Judge Wedoff thanked the Appellate Rules Committee for agreeing to meet jointly with the Bankruptcy Rules Committee. He noted that one of the goals of the

Bankruptcy Rules Committee's Part VIII revision project is to achieve consistency with the Appellate Rules. Judge Wedoff introduced three new members of the Bankruptcy Rules Committee. Judge Robert James Jonker is a district judge in the Western District of Michigan who has had a longstanding interest in bankruptcy law. Judge Adalberto Jordan, who clerked for Justice O'Connor, will be joining the subcommittee on appeals and will bring a great deal of appellate experience to that subcommittee. Professor Troy A. McKenzie joins the Committee as its Assistant Reporter; Professor McKenzie, who teaches at N.Y.U. Law School, has a rare combination of expertise in both bankruptcy and civil procedure.

Judge Pauley observed that the Part VIII revision project arose from the efforts of Eric Brunstad, who produced an initial draft of the proposed revision. The Bankruptcy Rules Committee's Subcommittee on Privacy, Public Access, and Appeals has held two mini-conferences on the subject. The process has been iterative and thoughtful.

Professor Gibson proposed that the joint meeting focus on issues of common interest to the two Committees. Those include issues relating to electronic filing and transmission, as well as issues concerning the intersection of the Bankruptcy and Appellate Rules (especially with respect to appeals directly from the bankruptcy court to the court of appeals). Professor Gibson noted that bankruptcy appeals are relatively rare, and that it is thus a challenge to find practitioners who specialize in appellate bankruptcy practice. She reported that there have been two perspectives voiced during the deliberations thus far – that of practitioners who handle bankruptcy appeals only occasionally and who view the Part VIII Rules as difficult, and that of appellate specialists who would like the Part VIII Rules to more closely resemble the Appellate Rules.

Professor Gibson observed that the Bankruptcy Rules elsewhere incorporate by reference a number of Civil Rules. Thus, a question that arose early on was whether the Part VIII Rules should simply incorporate the Appellate Rules by reference. At the Standing Committee's January 2011 meeting, it became clear that the Standing Committee does not favor such an approach for the Part VIII Rules.

Professor Gibson suggested that it might be useful for the joint meeting to commence by discussing the possibility of incorporating into the national Rules a presumption of electronic filing and transmission. For example, how would such a change affect the rules concerning the submission of briefs, the form of briefs, and how the record is assembled? Professor Gibson noted that it would be particularly useful to learn about the experience in the Sixth Circuit; she observed that other courts, such as the Ninth Circuit Bankruptcy Appellate Panel ("BAP"), have also moved toward electronic filing. She pointed out that a key question is how to manage the transition to electronic filing while also retaining paper filing where necessary. Judge Sutton responded that in the courts of appeals, there is a presumption that there will continue to be paper filings; the courts must accommodate filings by inmates, who will ordinarily file in paper form rather than electronically. Professor Gibson noted that in bankruptcy a similar accommodation must be made for paper filings by pro se debtors. A member of the Bankruptcy Rules Committee noted that the rates of paper filings vary by district but can be as high as 25 or 30 percent; this member noted that the court will scan paper filings into PDF format. Judge Wedoff noted that the requirement that attorneys file

electronically has worked well. Mr. Green observed that while circuits other than the Sixth Circuit will accept electronic filings, those circuits also require paper copies. In courts within the Sixth Circuit, he reported, some 40 to 45 percent of the filings are paper filings by inmates; the court converts those filings to PDF format. The Sixth Circuit generally will not accept paper filings from attorneys and does not accept the appendix or record excerpts in paper form. Instead, the judges access the electronic record themselves. But the Sixth Circuit, he noted, is an outlier in this respect. Judge Wedoff asked whether the Sixth Circuit's system has worked well. Judge Sutton responded that it is the right approach, but that it took years for judges' chambers to adjust; the Sixth Circuit's system transfers the burden of printing to chambers. During the first year of electronic filing, Judge Sutton printed paper copies of briefs; now, he reads them on an iPad. Professor Gibson asked how the record is handled in the Sixth Circuit. Mr. Green responded that the electronic case filing architecture differs in the court of appeals, so the Clerk's Office must reach out and bring the electronic record from the court below into the court of appeals' system. The Clerk's Office is able to use that method to provide the court of appeals judges with electronic links to the record. Counsel identify for the court of appeals what the relevant portions of the record are. Judge Sutton noted that the Sixth Circuit used to include in the case schedule time to assemble the appendix; things move faster now because there is no need to allow time for putting the appendix together.

A participant asked whether bankruptcy judges like the system of electronic filing. Judge Wedoff responded that the system works well because the Clerk's Office provides whatever support the judges need. A key benefit is that a judge can work on the latest filings from anywhere, whether at home or during travel. And litigants, similarly, can file wherever and whenever they prefer. A bankruptcy judge from the Ninth Circuit agreed. In his district, each judge posts his or her policy concerning chambers copies. Another advantage of electronic filing is that emergency matters can be filed and accessed at any time. Electronic filing is particularly useful for the BAP because the Ninth Circuit spans such a large area. Judge Sutton asked what provisions the bankruptcy courts have made for situations in which the computer system crashes. Judge Wedoff responded that the courts have backup centers at other locations; backing up court files, he observed, is easier when those files are in electronic format.

Professor Gibson turned the Committees' attention to proposed Bankruptcy Rule 8006, which concerns the certification of a direct appeal to the court of appeals. Professor Gibson explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") put in place for bankruptcy appeals a framework – in 28 U.S.C. § 158(d)(2) – for direct appeals by permission that is in some ways similar to, but in other ways quite distinct from, the interlocutory-appeal framework set by 28 U.S.C. § 1292(b). Under Section 158(d)(2), a direct appeal from the bankruptcy court to the court of appeals requires a certification from a lower court and also requires permission from the court of appeals. Section 158(d)(2)'s criteria for the certification differ from those set by Section 1292(b) for interlocutory appeals from the district court to the court of appeals. Moreover, Section 158(d)(2) sets out a variety of means for certification. The certification may be made by the court on its own motion; by the court on a party's motion; by the court on request by a majority of the appellants and a majority of the appellees; or jointly by all the appellants and appellees. Three different courts can make the required certification in appropriate circumstances – the bankruptcy court, the BAP, or the district court. Proposed Rule

8006(d) provides that the certification is to be made by the court in which the matter is pending, and proposed Rule 8006(b) sets for the rule for determining in which court the matter is pending at a given time. Proposed Rule 8006(g) then sets a 30-day time limit for filing in the court of appeals a request for permission to take a direct appeal to the court of appeals.

Professor Gibson invited Professor Struve to discuss proposed new Appellate Rule 6(c), which would address the procedure for permissive direct appeals under Section 158(d)(2) subsequent to the filing in the court of appeals of the petition for leave to appeal. Proposed Rule 6(c)(1) provides that the Appellate Rules, with specified exceptions, govern such an appeal. Proposed Rule 6(c)(2) provides that Bankruptcy Rule 8009 and 8010 govern the designation and transmission of the record on appeal.

Professor Struve noted that it would be useful to obtain participants' views on whether proposed Appellate Rule 6(c), as drafted, appropriately addresses the procedure for direct appeals under Section 158(d)(2). As an example, she noted the question of stays pending appeal. The proposal as drafted would provide that Appellate Rule 8 would apply to direct appeals. That Rule's treatment of stays is basically similar to proposed Bankruptcy Rule 8007 (which addresses stays in the context of appeals from the bankruptcy court to the district court or BAP), but there is a question about Rule 8's provision for proceeding directly against a surety. Rule 8 provides that a surety's liability can be enforced on motion in the district court without the need for an independent action. If Rule 8 applies to bankruptcy direct appeals, then it would contemplate such a direct proceeding in the bankruptcy court. One question is whether such a proceeding would fall naturally within the existing jurisdiction of the bankruptcy court. Professor Gibson noted that Bankruptcy Rule 9025 currently provides that sureties submit to the jurisdiction of the bankruptcy court. Rule 9025, though, provides for the determination of the surety's liability in an adversary proceeding. This raises a question as to whether any provision for proceedings against the surety in the bankruptcy court should contemplate an adversary proceeding; perhaps proposed Appellate Rule 6(c) could be revised to incorporate by reference the terms of Bankruptcy Rule 9025. Professor Gibson asked whether any of the bankruptcy judges on the Committee wished to comment on their experiences with proceedings against sureties, but no members volunteered a response.

Professor Gibson asked whether participants in the meeting had experience with direct appeals under Section 158(d)(2). Mr. Green reported that there have been few such direct appeals in the Sixth Circuit, and that there have been no problems with their processing. A bankruptcy judge observed that *Blausey v. United States Trustee*, 552 F.3d 1124 (9th Cir. 2009), illustrates the confusion that can arise concerning the appropriate procedure in connection with direct appeals under Section 158(d)(2). This judge observed that it would be salutary for the Rules to settle the question of the proper procedures on such appeals.

An attorney member of the Appellate Rules Committee observed that proposed Bankruptcy Rule 8006's certification provisions seem odd. Professor Gibson explained that those provisions are drawn from Section 158(d)(2). A participant questioned why Section 158(d)(2) provides for the four different means of certification noted previously. A bankruptcy judge member of the Bankruptcy Rules Committee observed that a Section 158(d)(2) certification can read in various ways; the

bankruptcy judge can draft the certification with varying degrees of forcefulness. For example, if the judge is issuing the certification only because he or she is required to do so in response to a request by a majority of the appellants and a majority of the appellees, the judge may draft a certification that sounds equivocal.

Professor Struve noted that the joint Part VIII project also provides an occasion to address possible revisions to Appellate Rule 6(b), which concerns appeals from a district court or BAP exercising appellate jurisdiction in a bankruptcy case. One proposed amendment to Rule 6(b) would update a cross-reference to Appellate Rule 12. Another proposed amendment would revise Rule 6(b)(2)(A) to eliminate an ambiguity; a similar ambiguity in Appellate Rule 4(a)(4) was eliminated by a 2009 amendment.

Professor Struve observed that the Appellate Rules Committee is currently considering other possible changes to Appellate Rule 4(a)(4), stemming from the fact that the time to appeal after disposition of a tolling motion runs from entry of the order disposing of the last remaining tolling motion rather than from entry of any resulting altered or amended judgment. In some instances, there can be a time lag between the two events – as when the court grants a motion for remittitur and the plaintiff has a period of time within which to decide whether to accept the remitted amount. At the Appellate Rules Committee's meeting the previous day, the Committee's consensus was that the possibilities it had previously considered for addressing this issue were not worth proceeding with. Instead, the Committee has decided to consider a new suggestion by Mr. Taranto that takes a different approach. Mr. Taranto's proposal addresses the timing question by extending Civil Rule 58's separate document requirement to the disposition of tolling motions. Such an extension would provide clarity concerning the point at which the appeal time resets under Appellate Rule 4(a)(4). The Committee has not yet had an opportunity to seek the views of the Civil Rules Committee or the Civil / Appellate Subcommittee. Professor Struve noted that this project, as it develops, may be of interest to the Bankruptcy Rules Committee for several reasons. First, Bankruptcy Rule 7058 incorporates by reference the terms of Civil Rule 58. Second, it would be useful for participants to consider whether the issue that gave rise to the Appellate Rule 4(a)(4) project is salient in the bankruptcy context. Is a similar time lag (between entry of an order disposing of the last remaining tolling motion under current Bankruptcy Rule 8015 and entry of any resulting altered or amended judgment) a problem in bankruptcy practice? Professor Gibson noted an additional reason for coordination on this issue: Proposed Bankruptcy Rule 8002 includes a subdivision modeled on Appellate Rule 4(a)(4). As to Appellate Rule 6(b)(2)(A), Professor Gibson observed that this Rule may present fewer current problems than Appellate Rule 4(a)(4) because Appellate Rule 6(b)(2)(A) treats only one type of tolling motion (namely, rehearing motions). Professor Gibson observed that current Bankruptcy Rule 8015 might provide a useful model for resolving any timing issue that arises from the disposition of such motions.

Judge Sutton asked the meeting participants for their thoughts on Civil Rule 58's separate document requirement. A participant responded that in bankruptcy, the separate document requirement becomes a trap for the unwary. To impose the separate document requirement, this participant suggested, could in effect be to extend appeal time in the name of clarity. Professor Struve asked whether compliance with the separate document requirement might increase if the

requirement applied across the board (in contrast to the present system, which exempts dispositions of tolling motions). A participant predicted that such a change would not result in greater compliance. This participant observed that there used to be a brighter line for the separate document requirement in bankruptcy, but now the rules only impose the separate document requirement in adversary proceedings and not in contested matters. Another participant observed that adversary proceedings are very like civil actions; contested matters, however, can be a hodgepodge, and the operation of the separate document requirement in that context could be confusing. A bankruptcy judge member expressed gratitude for the fact that the separate document requirement no longer applies in contested matters.

Professor Gibson noted that another point of intersection between the Bankruptcy Rules and the Appellate Rules concerns indicative rulings. Proposed Bankruptcy Rule 8008 is intended to serve two functions. With respect to appeals pending in the court of appeals, it is the equivalent of Civil Rule 62.1 – namely, it tells the trial court what to do if someone seeks relief that the trial court lacks authority to grant due to a pending appeal. Proposed Bankruptcy Rule 8008 is also designed to address the indicative-ruling procedure for the appellate court when the appellate court in question is a district court or a BAP. Professor Gibson noted a further issue: Should the procedures set out in proposed Bankruptcy Rule 8008 apply when an indicative ruling is sought in the bankruptcy court while a non-direct appeal is pending in the court of appeals under Section 158(d)(1)? A participant responded that she thought the Rule should apply in that context as well.

Professor Gibson raised a question concerning the source of the authority to promulgate local rules for BAPs. She noted that it would be useful to determine whether that authority resides in the court of appeals, in the circuit judicial council, or in the BAP. Perhaps, she suggested, it would make sense that the body that creates the BAP also has the authority to promulgate rules for the BAP. Mr. Green reported that the Sixth Circuit BAP relies on the circuit council for promulgation of its local rules; the proposed rules are sent out for comment during the development of the proposals, and are ultimately sent to the circuit judicial council for approval. Another participant observed that in the Ninth Circuit, the Circuit's standing rules committee handles the task of obtaining public comment on proposed BAP rules; this participant noted the importance of public comment.

Professor Gibson noted that the Appellate Rules contain a high level of detail concerning briefs, and she stated that it would be useful to get a sense whether participants favor a similar approach for the Part VIII Rules. An attorney member of the Appellate Rules Committee noted that detailed rules are useful to practitioners because such rules provide guidance. On the other hand, this member questioned whether district judges really want to receive briefs that conform to the Appellate Rules. A participant responded that the district court cares less about formalities than about simplicity and speed; the goal is to get the briefs in and resolve the case quickly. A court of appeals judge stated that it would be useful for the rules to evolve so that they do not specify the colors of brief covers. Another participant noted that Mr. Brunstad had proposed setting a default rule for the color of brief covers when the briefs are filed in paper form.

Professor Gibson also noted the potential importance of maintaining similar length limits for briefs at both stages of the appellate process (in the district court or BAP, and in the court of appeals). A bankruptcy judge agreed, and observed that Mr. Brunstad had expressed concern with the "dumbbell problem" – namely, that if the district court's length limit is tighter than the one that applies in the court of appeals, a party may find it difficult to preserve adequately all the points that it wishes to argue on appeal. A bankruptcy judge member stated that he likes the idea of specific requirements because they provide attorneys with structure; and he favors ensuring that the length limits are consistent at the two levels of appeal. An attorney participant agreed that he favors consistency between the two levels of appeal.

A district judge member of the Appellate Rules Committee expressed agreement with the idea that detailed briefing rules make things fairer for the lawyers. He noted that his district has a local rule that imposes a low page limit. Another district judge observed that bankruptcy cases are sufficiently challenging to begin with, and that it would be helpful for the briefs to be consistent from case to case.

Professor Gibson drew the Committees' attention to proposed Bankruptcy Rule 8009(f), concerning the treatment of sealed documents on appeal. The Appellate Rules do not currently address that issue. Professor Struve noted that the local rules in some circuits do address some issues relating to sealed documents. She also observed that another question might be whether all the circuits are ready to handle sealed documents electronically. Mr. Green responded that some circuits are prepared but that others are not. Another participant observed that it would be a good idea to look into the way in which the CM/ECF system handles sealed documents; she noted that the relevant technology is changing. A bankruptcy judge suggested that the Rule be drafted so as to incorporate by reference whatever the current CM/ECF technology and practice are.

In closing, Professor Gibson predicted that the Bankruptcy Rules Committee would discuss a portion of the project at its fall 2011 meeting and another portion at the spring 2012 meeting. In the meantime, the Bankruptcy Rules Committee's working group will further refine the proposals. She expressed the Bankruptcy Rules Committee's desire to continue coordinating efforts with the Appellate Rules Committee. Judge Sutton promised to appoint one or two members of the Appellate Rules Committee to the working group, and expressed commitment to coordinating the two Committees' work going forward.

Judge Sutton thanked Judge Wedoff and the Bankruptcy Rules Committee for inviting the Appellate Rules Committee to join them. Judge Sutton noted that this was Judge Rosenthal's last meeting with the Appellate Rules Committee. He thanked her for her prodigious efforts and superb work as Chair of the Standing Committee. He observed that during her time as Chair she has attended the meetings of the Advisory Committees and the Standing Committee and the Judicial Conference. Judge Rosenthal thanked the Advisory Committees for their thorough, thoughtful, and innovative work. Judge Wedoff thanked the Appellate Rules Committee for their participation in the joint meeting.

IX. Adjournment

The Appellate Rules Committee adjourned at 10:25 a.m. on April 7, 2011.

Respectfully submitted,

Catherine T. Struve
Reporter

Advisory Committee on Appellate Rules
Table of Agenda Items — May 2011

FRAP Item	Proposal	Source	Current Status
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Discussed and retained on agenda 04/08 FRAP 40(a)(1) amendment approved 11/08 for submission to Standing Committee FRAP 40(a)(1) proposal remanded to Advisory Committee 06/09 Discussed and retained on agenda 11/09 Draft approved 05/10 for submission to Standing Committee Approved by Standing Committee 06/10 Approved by Judicial Conference 09/10 Approved by Supreme Court 04/11
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09

FRAP Item	Proposal	Source	Current Status
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-D	Delete reference to judgment's alteration or amendment from FRAP 4(a)(4)(B)(ii)	Peder K. Batalden, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Draft approved 10/10 for submission to Standing Committee Approved for publication by Standing Committee 01/11

FRAP Item	Proposal	Source	Current Status
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-A	Consider treatment of premature notices of appeal under FRAP 4(a)(2)	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11

FRAP Item	Proposal	Source	Current Status
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10
10-AP-I	Consider issues raised by redactions in appellate briefs	Paul Alan Levy, Esq.	Discussed and retained on agenda 04/11
11-AP-B	Consider amending FRAP 28 to provide for introductions in briefs	Appellate Rules Committee	Awaiting initial discussion

TAB 7-A-D

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: May 12, 2011

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

FROM: Honorable Richard C. Tallman, Chair, Advisory Committee on Federal Rules of Criminal Procedure

RE: Report of the Criminal Advisory Committee

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on April 11-12, 2011, in Portland, Oregon, and took action on a number of proposals. The Draft Minutes are attached.

This report presents four action items:

(1) approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (initial appearance in extradition cases and consular notification);

(2) approval to transmit to the Judicial Conference a proposed Rule 37 (indicative rulings);

(3) approval to transmit to the Supreme Court Rule 15 (depositions in foreign countries when the defendant is not physically present); and

(4) approval to publish a proposed amendment to Rule 12 (motions that must be made before trial), and a conforming amendment to Rule 34.

The report also includes a discussion of the Committee's decision not to move forward at this time with an amendment to Rule 16 dealing with discovery practices and exculpatory evidence. Instead, the Committee will work with the Federal Judicial Center on recommendations for amending the DISTRICT JUDGES BENCHBOOK, preparation of a Best Practices Guide for Criminal Discovery, and in-service training for judges on improving pretrial criminal discovery practices.

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

1. ACTION ITEM—Rules 5 and 58

The proposed amendments to Rule 5 and Rule 58 were designed to (1) deal with unique aspects of the international extradition process and (2) ensure that certain treaty obligations of the United States are fulfilled. After reviewing public comments concerning these amendments, the Advisory Committee recommends that they be transmitted to the Judicial Conference as published.

Rule 5(c)(4)

The amendment to Rule 5(c) clarifies where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition request to a foreign country. The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person's transportation for the purpose of holding an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending. It should also be noted that during foreign extradition proceedings, the extradited person, assisted by counsel, has already been afforded an opportunity to review the charging document, United States arrest warrant, and supporting evidence.

The Committee received two comments on this rule. The National Association of Criminal Defense Lawyers (NACDL) and the Federal Magistrate Judges Association (FMJA) suggested that the amendment be revised to require the initial appearance to be held "without unnecessary delay." The Advisory Committee declined to make this revision because the rule itself already makes this clear. Subdivision (a) of Rule 5 contains the timing requirements for all initial appearances, and subdivision (c) governs the place of initial appearances. Rule 5(a)(1) already requires all defendants who have been arrested to be taken before a magistrate judge "without unnecessary delay," and

contains a provision that directly addresses cases in which the defendant has been arrested outside the United States.

Rule5(a)(1)(B) now provides:

> (B) A person making an arrest outside the United States must take the defendant *without unnecessary delay* before a magistrate judge, unless a statute provides otherwise.

(Emphasis added). The Advisory Committee concluded that this provision—which is referred to in the Committee Note—addresses the concerns noted by the NACDL and FMJA. The Committee declined to add an additional statement regarding timing to subdivision (c), which governs only the *place* of the initial appearance, not its timing.

Rules 5(d) and 58

The proposed amendments to Rules 5(d) and 58(b) are designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. Many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment—which was proposed by the Department of Justice after consultation with the State Department—does not address those questions.

Comments were received from the NACDL and the FMJA. The NACDL endorsed the proposed amendment in principle, but suggested modifications to define "held in custody," to expand on the warnings given to defendants, and to make it clear that consular notification should not be delayed until the initial appearance. The Advisory Committee concluded that the term "held in custody" was sufficiently clear for this purpose, and declined to require a more detailed explanation or colloquy about consular notification at the initial appearance.

The Committee also concluded that the rule need not be revised to address administrative warnings that should take place prior to the initial appearance. The amendment was designed to be an additional assurance, in the nature of a "failsafe" provision, not the primary means of satisfying the United States' obligations under the Vienna Convention and other bilateral treaties. Consular notification advice is required to be given "without delay," and arresting officers are primarily responsible for providing this advice. *See* 28 C.F.R. 50.5 (requiring Department of Justice officers to inform foreign nationals they arrest of policies regarding consular notification). The Committee was advised that the government has taken substantial measures to ensure prompt compliance with the notification requirements, including implementing Justice Department regulations establishing

a uniform procedure for consular notification when non-United States citizens are arrested or detained by officers of the Department; State Department instructions for federal, state, and local law enforcement officials on providing consular notification advice, which are available on a public website and published in a booklet; and which are regularly covered in training of law enforcement authorities provided by the State Department.

The Committee also took note of two FMJA observations: (1) reservations about the necessity of procedural rules concerning consular notification, which is principally an executive function, and (2) the need to take great care to insure that the new procedures do not result in defendants being asked to incriminate themselves. The FMJA concluded that the proposed amendment was adequate.

The Committee voted unanimously to recommend that the amendment be approved as published and forwarded to the Judicial Conference.

Recommendation–The Advisory Committee recommends that the proposed amendments to Rules 5 and 58 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 37

Appellate Rule 12.1 and Civil Rule 62.1, both of which went into effect on December 1, 2009, create a mechanism for obtaining "indicative rulings." They establish procedures facilitating the remand of certain post-judgment motions filed after an appeal has been docketed in a case where the district court indicated it would grant the motion. Proposed Rule 37, which was published for comment in 2010, parallels Civil Rule 62.1 and clarifies that this procedure is available in criminal cases. After reviewing the comments received following publication, the Advisory Committee recommends that the amendment be approved as published and forwarded to the Judicial Conference.

The Committee received two comments concerning Rule 37. The FMJA stated that it "endorses the proposed changes." Writing on behalf of the NACDL, Peter Goldberger expressed support for the proposal and suggested two additions to the Committee Note that might be helpful to practitioners with little experience in appellate procedures:

(1) a parenthetical mentioning the possibility that the conditions of release or detention pending execution of sentence or pending appeal may be modified in the district court without resort to the new procedure; and

(2) a reference to the availability of the procedure in Section 2255 cases. The NACDL proposed adding such a reference to the portion of the Committee Note that reads:

In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule

33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal.

After discussion, the Advisory Committee declined both of the NACDL's suggestions . The Committee determined that the first suggestion went substantially beyond the focus of the amendment itself, running the risk of being either over- or under-inclusive and violating the Standing Committee's policy of keeping Committee Notes short. Regarding the NACDL's second suggestion, the language the NACDL identified for purposes of adding a Section 2255 reference tracks the language of the Committee Note accompanying Appellate Rule 12.1, which was approved by the Standing Committee after considerable discussion. Prior to publishing proposed Criminal Rule 37, the Advisory Committee wrestled with whether to include a reference to the use of the indicative rulings procedure in Section 2255 cases. It eventually decided that the Committee Note as written already makes clear that the identified uses are not exclusive. The Advisory Committee maintained that conclusion after considering the NACDL's comments.

At the conclusion of this discussion, the Advisory Committee voted unanimously to recommend that Rule 37 be forwarded to the Standing Committee as published.

Recommendation–The Advisory Committee recommends that proposed Rule 37 be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 15

The proposed amendment to Rule 15 would authorize the taking of depositions outside the United States without the defendant's presence in special limited circumstances with the district judge's approval.

The purpose of the amendment

The amendment, which applies only to depositions taken outside the United States, provides a procedural mechanism to address cases in which important witnesses—both government and defense witnesses—live in, or have fled to, countries where they cannot be reached by the court's subpoena power.

The amendment authorizes *only* the taking of pretrial depositions; it does not speak to their ultimate admissibility at trial. As stated in the Committee Note, questions of admissibility are left to the courts to resolve on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

Issues concerning the propriety of allowing depositions for witnesses outside the United States and the procedures under which such depositions may be taken have arisen, and will continue

to arise, in cases such as *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 1312 (2009).[1] The Committee concluded that it was appropriate to distill the analysis in cases such as *Ali* and use it to set forth a procedural framework in the Federal Rules of Criminal Procedure.

The amendment requires case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

The new procedure does not apply if it is possible to bring the witness to the United States for trial or for a deposition at which the defendant can be present, or if it is feasible for the defendant to be present at a deposition outside the United States. The proposal thus creates a very limited exception to the requirement that the defendant must be present at any deposition under Rule 15 unless the defendant waives the right to be present or is excluded by the court for being disruptive.

Although the amendment would not predetermine the admissibility of any deposition taken pursuant to it, in drafting the amendment the Committee was attentive to both criteria developed in the lower courts and to Supreme Court Confrontation Clause precedent.

The history of the amendment

The Department of Justice wrote to the Advisory Committee in 2006 proposing that Rule 15 be amended. After a period of study and discussion from 2006 to 2008, the Advisory Committee sought and received Standing Committee approval to publish the proposed amendment for public comment in 2008.

After making several changes in response to public comments, in April 2009 the Advisory Committee recommended that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Four comments were received in response to the publication

[1] The defendant in *Ali* was convicted of multiple crimes arising from his affiliation with an al-Qaeda terrorist cell and its plans to carry out terrorist acts in United States. Before trial Ali sought to suppress a confession he made in Saudi Arabia, alleging it was the product of torture by Mabahith security officials. As Saudi citizens residing in Saudi Arabia, the Mabahith officers were beyond the district court's subpoena power. The Saudi government denied the United States's request to allow the officers to testify at trial in the United States but permitted the officers to sit for depositions in Riyadh. The Saudi government had never before allowed such foreign access to a Mabahith officer. After finding it was not feasible for Ali (who was in custody following his earlier extradition from Saudi Arabia) to be transported to Riyadh for the depositions, the district court adopted procedures similar to those outlined in the proposed amendment. Ali had defense counsel both in Riyadh and with him in the United States, the Saudi officials testified under oath, defense counsel was able to cross-examine the Mabahith witnesses extensively, and a two-way video link allowed the defendant, judge, and jury to observe the demeanor of the witnesses. At trial the videotape presented side-by-side footage of the Mabahith officers testifying and the defendant's simultaneous reactions to the testimony. On appeal the Fourth Circuit held that introduction of deposition testimony taken under those procedures did not violate the Confrontation Clause.

of the proposed amendment, and one witness representing the Federal Defenders testified concerning the amendment. The Magistrate Judges Association endorsed the proposal. The General Counsel of the Drug Enforcement Administration raised some issues concerning the drafting of the rule. The Federal Defenders and the National Association of Criminal Defense Lawyers opposed the rule and urged that it be withdrawn, or, at a minimum, substantially redrafted.

The principal arguments in the lengthy submissions from the Federal Defenders and NACDL concerned the effect of the proposed amendment on the defendant's rights under the Confrontation Clause of the Sixth Amendment. They argued that *Crawford v. Washington*, 541 U.S. 36 (2004), interprets the Confrontation Clause as providing an unqualified right to face-to-face confrontation that would preclude the admission of testimony preserved by a deposition taken under the proposed rule. There is no indication that the Supreme Court will continue to allow any exception to the right of face-to-face confrontation even when this would serve an important public policy interest and there are guarantees of trustworthiness. Moreover, the proposed amendment may not be confined to a small number of exceptional cases. The amendment is not, in the opponents' view, limited to cases where an interest as significant as national security is at issue, nor does it guarantee the level of participation by the defendant that was provided in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 1312 (2009).

Specifically, as published the amendment (1) was not limited to transnational cases, (2) was not limited to felonies, (3) did not require a showing that the evidence sought is "necessary" to the government's case, and (4) imposed no obligation on the government to secure the witness's presence.

NACDL argued that the real significance of the amendment is not the taking of the depositions per se, but rather that it would enable the prosecution to present evidence at trial that has not been subject to confrontation. They argued that the amendment would in effect create a right to introduce the resulting deposition at trial, and as such exceed the authority of the Rules Enabling Act. It would also be a back door means of achieving the goals of the failed 2002 attempt to amend Rule 26. Rather than create inevitable constitutional challenges, they urge the Committee to await either legislation or further clarification from the case law. They also urged that the safeguards and limits in the proposed amendment are insufficient to restrict its scope and to guarantee the defendant's participation. In their view, "meaningfully participate . . . through reasonable means" creates only a vague and subjective test that offers little real protection. Similarly, the showing required would encompass every witness beyond the court's subpoena power. Finally, they noted there is reason to doubt the credibility and reliability of the testimony of the potential witnesses who are willing to be deposed, but not travel to the United States to testify. These will include, for example, persons who have fled justice in this country and know that their oath taken abroad will have no practical significance.

The Committee also heard testimony stressing the frequency with which the technology is inadequate or fails, as well as other problems that defense attorneys experience in taking foreign

depositions, such as the requirement in some countries that only local counsel can question witnesses.

The Advisory Committee adopted several amendments intended to address some of the issues raised during the comment period. It explicitly limited the amendment to felonies. After discussion, the Committee declined to adopt a requirement that the Attorney General or his designee certify or determine that the case serves an important public interest. Although there was support for a mechanism that would guarantee that requests under the new rule would be rigorously reviewed within the Department of Justice and made only infrequently, members were concerned that adding a provision in the rules requiring the action by the Attorney General might raise separation of power issues. (The Committee did add a provision requiring the attorney for the government to establish that the prosecution advances an important public interest, but this provision was deleted by the Standing Committee.)

The Committee also incorporated several minor changes suggested during the comment period and by the style consultant to improve the clarity of the proposed amendment.

The Committee did not adopt three other suggestions. First, it declined to limit the rule to government witnesses, though it recognized that there will be only a small number of cases in which a defendant will wish to use this procedure.[2] Second, the Committee declined to require the government to show that the deposition would produce evidence "necessary" to its case, viewing that standard as unrealistic when the government is still assembling its case. Third, the Committee declined to add a requirement that the government show it had made diligent efforts to secure the witness's testimony in the United States. In the Committee's view, this might actually water down the requirement in the rule as published that the witness's presence "cannot be obtained."

The Committee discussed the Confrontation Clause issues at length. Members emphasized that when that the government (or a codefendant) seeks to introduce deposition testimony, the court will rule on admissibility under the Rules of Evidence as well as the Sixth Amendment. Members stressed that providing a procedure to take a deposition did not guarantee its later admission, which could turn on a number of factors. For example, if the technology does not work well enough to allow the defendant to participate or to create a high quality recording, the deposition would likely not be admitted. Similarly, the situation might change so that it would be possible for the witness to testify at the trial. The decision to allow the taking of the deposition in no way forecloses a Confrontation Clause challenge to admission or one based on the Rules of Evidence. The Committee Note was amended to make this point clear.

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[2] In cases involving a single defendant, Rule 15 would pose no difficulties if the defendant consented not to be present at the deposition of his witness, and there would be no Confrontation Clause barrier to the introduction of the deposition. However, in a case involving multiple defendants, one defendant might wish to depose a witness overseas, and another defendant who could not be present at the deposition might object to the admission of the evidence.

The proposed amendment is intended to meet the criteria developed in lower court decisions such as *Ali*, as well as the Supreme Court's Confrontation Clause decisions. Although there will undoubtably be issues arising from the use of technology, members felt that the district courts have ample authority and experience to handle those issues on a case by case basis.

The Advisory Committee voted, with three dissents, to approve the proposed amendment to Rule 15, as revised, and to send it to the Standing Committee. The Standing Committee approved the amendment in June 2009, and the Judicial Conference approved it in September 2009.

In 2010 the Supreme Court remanded the proposed amendment to the Advisory Committee for further consideration. No statement accompanied the Court's action.

The Committee's recommendation

At its April meeting the Committee voted, with one dissent, to recommend that the Standing Committee approve and transmit a revised Rule 15 proposal to the Judicial Conference. The revised proposal makes no change in the text of the amendment approved in 2009, but the Committee Note has been substantially revised to clarify that compliance with the procedural requirements for the taking of the foreign testimony does not predetermine its admissibility at trial. Because the text of the amendment remained unchanged, there was no need for republication.

As revised, the Committee Note emphasizes that the proposed amendment does not predetermine whether depositions conducted outside the presence of the defendant would be admissible at trial. Rather, it is limited to providing assistance in pretrial discovery. As is the case with all depositions, courts determine admissibility on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

The revised Committee Note emphasizes the limited scope of the proposed amendment, which is significantly different from an earlier amendment to Rule 26 that the Supreme Court declined to transmit to Congress. *See* 207 F.R.D. 89, 93-104 (2002). The focus of the proposed 2002 amendment to Rule 26 was the admissibility of evidence at trial; the amendment would have authorized the use of two-way video transmissions in criminal cases in (1) "exceptional circumstances," with (2) "appropriate safeguards," and if (3) "the witness is unavailable."

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 15 be approved as revised and forwarded to the Judicial Conference.

4. ACTION ITEM—Rule 12

With one dissent, the Advisory Committee voted to recommend that a proposed amendment to Rule 12 be published for public comment. Because the discussion of this recommendation is lengthy and includes an appendix which sets forth the research basis for the recommendations in greater detail, it is provided in a separate document and electronic file.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 12 be approved for publication.

III. Discussion Items

A. Rule 16

In its consideration of whether Rule 16 should be amended and whether such an amendment could or should do more than restate existing Supreme Court authority on a prosecutor's disclosure obligations, the Advisory Committee conducted the largest survey in the Federal Judicial Center's history and held a special mini-conference in Houston, Texas, to discuss the survey's results and solicit feedback. Participants included defense counsel, prosecutors, judges, academics, agency counsel, and crime victims representatives. Judge Emmet Sullivan accepted the Committee's invitation to attend three of its meetings and to discuss the results of the Committee's ongoing study efforts. Chief Judge Mark Wolf also participated in Committee meetings. Additionally, the Committee heard from the Department of Justice's national discovery coordinator and other Department representatives regarding changes the Department is making internally to address the concerns Judge Sullivan raised.

After extended discussion at its April 2011 meeting, the Advisory Committee voted 6 to 5 not to pursue an amendment to Rule 16 at this time. The reasons for the Committee's decision can be summarized as follows:

First, the survey shows there is a lack of consensus among the federal judiciary as to whether an amendment is necessary.

Second, the Committee was impressed with the extent of institutional structural changes in policies, procedures, and training the Department of Justice has implemented following the *Stevens* case and the Committee was not persuaded that a rule change was required to ensure that those changes will carry over from one administration to the next.

Third, the Committee was not convinced that the problem is so severe as to warrant a rule change when existing Supreme Court authority on a prosecutor's disclosure obligations is clear and for which substantial sanctions are available for non-compliance. No rule can effectively prevent intentional misconduct by prosecutors who knowingly withhold exculpatory information. While people agree that it is important to have the disclosure obligation effectively implemented, it is unclear that merely repeating a long-standing constitutional requirement in a rule would be an effective way to improve compliance. On the other hand, drafting a rule that goes beyond the existing constitutional obligations proved enormously difficult in ways that would clearly defeat the support necessary for such a rule change.

The Committee wrestled with several drafts of amendments. In doing so, some of the specific challenges the Committee encountered include:

- A conflict in timing. Through the Jencks Act, 18 U.S.C. § 3500, Congress has clearly restricted when actual witness statements may be disclosed, which may contain impeachment material. It is Judicial Conference policy to try to avoid making rule changes that create conflicts with existing law, so the Committee was reluctant to propose a rule that would conflict with the statutory timing under the Jencks Act and invite congressional rewriting of a carefully drafted discovery rule.

- Districts take a variety of approaches in this area and, especially in light of the lack of consensus, the Committee was reluctant to propose a rule that might interfere with each district's continuing ability to experiment with different discovery techniques.

- The Committee could not reach a consensus on the extent to which the rule needed to be amended to accommodate everyone's concerns. For example, the Committee struggled to find ways to amend the rule that would not jeopardize the government's ability to protect witnesses from harm, or to promote national security without creating an exception that some thought was too broad and fraught with danger. There was also concern that an amendment might discourage foreign governments from cooperating with the United States during international criminal investigations.

- The Committee could not reach consensus on a mechanism for unilateral withholding of discovery by prosecutors where witness safety concerns exist but are supported by less than evidence of probable harm.

- The Committee recognized that while any rule would generate litigation about its precise terms in the myriad of circumstances presented by criminal cases, a rule that attempted to codify a constitutional obligation could generate excessive litigation.

- The Department of Justice opposed any new rule and argued that pretrial disclosure should be bilateral, which would have raised significant issues.

- A rule attempting to restate the constitutional obligations stated in *Brady/Giglio* may not fit well with the common-law development of those obligations. Further, the *Brady/Giglio* obligations are not easily reduced to a list that parties and judges can reference and thereby know their obligation—the presumed object of a rule of procedure.

- The Committee was concerned that trying to avoid some of the *Brady/Giglio* problems by

> eliminating the materiality requirement would significantly expand disclosure requirements beyond those constitutionally required and invite more litigation in any case of non-disclosure: (1) was there constitutional error from the non-disclosure; and (2) even if not, was there Rule error? If so, what should the consequences be?

The Committee is not, however, abandoning efforts to make improvements in this area and it also gave extended consideration to alternatives that could be implemented more quickly and effectively. After its most recent meeting, the Committee proposed to the Federal Judicial Center the creation of a Best Practices Guide for Criminal Discovery, inclusion of a discovery checklist in the DISTRICT JUDGES BENCHBOOK, and implementation of more educational programs for district judges on overseeing pretrial criminal discovery. These are alternatives that can be implemented more quickly than a rule change and which experience has shown are likely to be effective.

AGENDA ACTION ITEM—RULE 12

Criminal Rules Advisory Committee

May 2011 Report to Standing Committee

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A. INTRODUCTION

The Criminal Rules Committee has been studying a proposal to amend Fed. R. Crim. P. 12 since 2006. It returns for the third time to the Standing Committee seeking authorization to publish for notice and comment a substantially revised rule. In response to the Standing Committee's suggestions and concerns raised in January 2011, the Advisory Committee undertook at its Spring meeting a final and more fundamental revision of Rule 12. The current proposal responds to each of the three major issues raised by the Standing Committee six months ago. It makes the following new changes:

1. Deleting use of the terms "waiver" and "forfeiture"

The revised proposal no longer employs the terms "waiver" or "forfeiture." Numerous participants at the Standing Committee expressed concern that even as restructured in January 2011, subdivision (e) ("Consequences of Not Making a Motion Before Trial as Required") still used the problematic terms "waiver" and "forfeiture." Because the ordinary meaning of waiver is a knowing and intentional relinquishment of a right, the non-standard use of that term in Rule 12 creates unnecessary confusion and difficulties. The Advisory Committee was urged to consider revising the rule to avoid using these terms.

After discussion the Advisory Committee concluded that it would be feasible and desirable to revise the rule to avoid these terms. Although the elimination of these terms was not part of the purpose of the amendment as originally envisioned by the Advisory Committee, there was agreement that the use of the term "waiver" has been a source of considerable confusion (see cases discussed in the Appendix to this report). Redrafting to avoid the terms "waiver" and "forfeiture" will achieve clarity and avoid traps for the unwary.

2. The standard for review of late-raised claims and the relationship to Rule 52

The revised proposal, like the earlier proposal in June 2009 and the January 2011 proposal, bifurcates the standard applicable when a defense, claim, or objection subject to Rule 12(b)(3) is raised in an untimely fashion, depending upon the type of claim at issue.

Omitting any reference to the term waiver, the Rule specifies that for all but two specific types of claims, an untimely claim may be considered only if the party who seeks to raise it shows "cause and prejudice." As explained in detail below, the Committee replaced the phrase "good cause" with "cause and prejudice" to reflect the Supreme Court's interpretation of the current rule.

For claims of failure to state an offense or double jeopardy, the amendment provides that the court may consider the claim if the party shows "prejudice only." This is a more generous test than that applicable to other claims raised late under Rule 12, because it does not require the objecting party to demonstrate "cause," i.e. the reason for failing to raise the claim earlier. It is also intended to be a more generous test than plain error under Rule 52(b) – the standard included in the January 2011 proposal – because it does not require the objecting party to show, in addition to prejudice, that the error was "plain" or that "the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Olano*, 507 U.S. 725, 731-32 (1993).

Finally, the amendment directly addresses the relationship between these provisions and Rule 52. It provides that "Rule 52 does not apply."

3. Outrageous government conduct and reorganization

The revised amendment also reflects two other changes responsive to the comments of the Standing Committee and its style consultant in January 2011. First, because at least one circuit (the Seventh) does not recognize the defense of outrageous government conduct, the proposal omits any reference to the defense of outrageous government conduct. Second, the current proposal reflects some reorganization recommended by Professor Joseph Kimble to solve an organizational problem present in the current rule. Currently subdivision (d) (ruling on the motion) comes between the timing provisions in (c) and the consequences of failing to meet the timing requirements in (e). Professor Kimble recommended moving the provision on the consequences of failing to meet the deadline to solve this organizational problem. The current proposal bifurcates subdivision (c) and moves the redrafted provisions governing the consequences of failure to make a timely motion from Rule 12(e) to new paragraph (c)(2). Although the new proposal deletes current subdivision (e), it avoids renumbering the remainder of the rule by reserving subdivision (e).

The remainder of the memorandum will discuss in detail the Committee's rationale for each aspect of the amended proposal. An Appendix providing case authority and the Advisory Committee's current and prior proposals are provided at the end of the memorandum.

B. THE DECISION TO CLARIFY THE STANDARDS OF REVIEW IN RULE 12

Several reasons prompted the Advisory Committee to propose a clarification of the standard for consideration of claims and defenses not raised within the time prescribed by Rule 12(b)(3). The Advisory Committee expanded the scope of its initial proposal and explored the relationship between Rule 12 "waiver," on the one hand, and the concepts of forfeiture and plain error under Rule 52(b) at the urging of the Standing Committee. The results of the Advisory Committee's research have been described in the Appendix. Although the Supreme Court defined "good cause" under Rule 12 in its decisions in *Davis v. United States*, 371 U.S. 341, 364 (1963), and *Shotwell Mfg. Co. v. United States*, 411 U.S. 233 (1973), there has been a great deal of litigation and a multiplicity of approaches have developed in different circuits. The Advisory Committee concluded that an amendment clarifying the standard of review would benefit courts and litigants, and would eliminate the current disparity in treatment of similar cases that arise in different circuits.

1. The Standing Committee's role in the development of the current proposal

Although the Advisory Committee initially proposed a very narrow amendment to Rule 12 dealing solely with failure-to-state-an offense claims, the Standing Committee twice urged the Advisory Committee to undertake a more comprehensive examination of the Rule. The amendment proposed by the Advisory Committee in 2009 merely added a new standard of relief from waiver for claims of a failure to state an offense if a defendant showed prejudice to his substantial rights. The Standing Committee remanded this proposal with instructions to give additional consideration to the concepts of "waiver" and "forfeiture" and how Rule 12 interacted with Rule 52. After the Advisory Committee reworked the rule more substantially, allowing for certain claims to be considered "forfeited," not waived, and to be considered for relief on a showing of plain error, the Standing Committee again remanded. Members urged the Advisory Committee to consider not using the terms "waiver" and "forfeiture." They also expressed concern that using plain error review for more favored claims might be too demanding a standard. The Advisory Committee responded to the latest Standing Committee remand by eliminating the terms "waiver" and "forfeiture" and instead simply specifying the circumstances under which a late-filed motion may be considered, adding that the Rule 12 standards are to be used and not those of Rule 52. Thus the Advisory Committee's latest clarification of the Rule 12 standards is in answer to specific suggestions of the Standing Committee.

2. The need for clarification

There is applicable Supreme Court precedent interpreting the current Rule 12(e), and in particular its "good cause" standard, which some lower courts have been failing to follow. In *Shotwell Mfg. Co. v. United States* ,[1] reviewing on direct appeal the defendants' untimely objection to jury selection, the Court held that the standard for relief from waiver under Rule 12 included an inquiry into prejudice. And in *Davis v. United States*,[2] the Court held that "a claim once waived pursuant to [Rule 12] may not later be resurrected, *either in the criminal proceedings* or in federal habeas, in the absence of the showing of 'cause' which that Rule requires."[3] The Court has never questioned the interpretations of Rule 12's "good cause" standard that it announced in *Shotwell* and *Davis.* Indeed, in later cases it has reiterated both key points about that standard: First, the standard is cause *and prejudice*,[4] and second, the standard applies on direct appeal as well as in the district court.[5]

Despite *Shotwell* and *Davis*, courts of appeals have divided over the standard for reviewing claims that should have been raised before trial under Rule 12, but were instead raised for the first time on appeal. Although none of the Court's cases discussing Rule 52 – including *Olano v. United*

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[1]371 U.S. 341, 364 (1963).

[2]411 U.S. 233 (1973).

[3]*Id.* at 242 (emphasis added).

[4]*See Murray v. Carrier*, 477 U.S. 478, 494 (1986) ("the former Rule 12(b)(2) . . . as interpreted in [*Shotwell* and *Davis*] treated prejudice as a component of the inquiry into whether there was cause for noncompliance with that rule"); *United States v. Frady*, 456 U.S. 152, 185 (1982) (Brennan, J., dissenting) (stating that the Court in *Shotwell* "construed the cause exception to Rule12(b)(2) as encompassing an inquiry into prejudice.")

[5]*See Wainwright v. Sykes*, 433 U.S. 72, 84 (1986) (noting that in *Davis*, "we concluded that review of [a claim waived under Rule 12] should be barred on habeas, *as on direct appeal*, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation").

States[6] – even mention Rule 12, some courts of appeals have applied plain error review to such claims. Four approaches have emerged:

> (1) The majority of circuits will not consider the claim unless the defendant can meet the Rule 12 exception for "good cause" and do not apply plain error;
>
> (2) Several decisions from the Seventh Circuit require the appellant to establish first "good cause" under Rule 12 and then, in addition, establish plain error under Rule 52(b);
>
> (3) Cases from the Fifth Circuit, and a number of cases from various circuits, reason that even without showing of cause under Rule 12, the claim should be remedied if it amounts to plain error; and
>
> (4) Several recent decisions of the Seventh Circuit require the appellate court to ask whether it *would have been* within the trial court's discretion to have denied a claim as untimely if the claim *had been* raised in the trial court.

These approaches and cases following each are explained in more detail in the Appendix.

Clarifying the rule's standards will benefit litigants and courts alike, giving litigants clearer expectations regarding the precise consequences of a failure to timely file their required motions and guiding courts out of the present disagreement. Recent appellate decisions have noted the need for clarification.[7] Finally, clarifying the rule's standards will promote a uniformity of treatment for Rule 12 motions in place of the current confusion, which has resulted in similar situations receiving different treatment depending on the particular circuit and even sometimes based on the particular panel within the same circuit.

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[6] 507 U.S. 725 (1993). The Supreme Court cases reviewing late-raised error, including *Shotwell, Davis,* and *Olano,* are examined in more detail in the Appendix.

[7] *See United States v. Burke*, 633 F.3d 984, 988 (10th Cir. 2011) (noting "confusion in this area" and deciding to "clarify" by holding that Rule 12 and not Rule 52 applies to suppression motions raised for the first time on appeal); *United States v. Rose*, 538 F.3d 175, 183–84 (3d Cir. 2008) (noting that court has chosen to "analyze and resolve explicitly the tension between Rule 52(b) and Rule 12 where suppression motions are concerned").

C. THE CHOICE OF "CAUSE AND PREJUDICE" AS THE SHOWING REQUIRED TO OBTAIN CONSIDERATION OF MOST LATE-FILED RULE 12 MOTIONS

1. Retaining (but clarifying) the Current Standard

Rule 12 as presently written provides that a party "waives" any defense, objection, or request that he has not timely filed, but that "[f]or good cause, the court may grant relief from the waiver." Fed. R. Crim. P. 12(e). There are two important aspects of this standard: (1) the notion of "waiver" as stated in the present rule was intended to bar any consideration of a late-filed motion unless the court found an adequate basis to excuse the waiver (for "good cause"); and (2) the "good cause" standard for relief from the waiver as interpreted by the Supreme Court encompasses a showing of both "cause," – *i.e.*, a satisfactory reason for the party's meeting the deadline – and prejudice. The Advisory Committee found no reason to change either aspect of the standard as applied to the majority of motions that fall within the Rule (though it did slightly modify the language to more clearly state that standard).

a. The "Waiver" standard of the present Rule 12

It is clear from the present rule that it was meant to extinguish and bar judicial consideration of a late-filed motion, absent a court's finding of "good cause." As discussed in detail in *United States v. Chavez-Valencia*, 116 F.3d 127, 130–31 (5th Cir. 1997), and *United States v. Rose*, 538 F.3d 175, 177–79 (3rd Cir. 2008), both the text and history of the Rule demonstrate that it was meant to require certain motions to be raised before trial, and that the failure to do so would result in a waiver of that claim, not a mere forfeiture. The Supreme Court has confirmed that meaning of the Rule in *Davis v. United States*, 411 U.S. 233 (1973). In that case, the Supreme Court described the question before it as a construction of Rule 12's waiver provision, when it said, "We are called upon to determine the effect of Rule 12(b)(2) of the Federal Rules of Criminal Procedure on a postconviction motion for relief which raises for the first time a claim of unconstitutional discrimination in the composition of a grand jury." *Id*. at 234. The district court denied Davis's habeas petition, finding that he had waived the claim by not raising it under Rule 12(b), and that there was no cause to excuse the waiver. *Id*. at 235–36.

On Supreme Court review, the defendant argued that a fundamental constitutional right cannot be waived absent a finding after a hearing that the defendant had understandingly and knowingly relinquished the right. *Id*. at 236. The Supreme Court rejected that argument, noting that "[b]y its

terms," the Rule "applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction of the trial court." *Id*. at 236–37. The Court found defendant's reliance on other Supreme Court precedent on waiver inapposite where a specific rule, "promulgated by this Court and, pursuant to 18 U.S.C. § 3771, 'adopted' by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived." *Id*. at 241. The Court therefore held that an untimely claim under Rule 12 "once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires." *Id*. at 242.

Davis thus makes clear that Rule 12 was intended to completely bar consideration of a claim that the Rule requires a party to raise before trial when the party fails to raise it on time, unless the party has shown cause and prejudice for his omission. While it is true that the notion of waiver often means a knowing and intentional relinquishment, the Supreme Court explained in *Davis* that that concept of waiver did not apply where the express waiver provision of Rule 12 governed to warn a litigant that his failure to comply with the rule would result in its waiver. *Davis*, 411 U.S. at 239–40.[8]

Several members of the Standing Committee suggested that it would avoid confusion if Rule 12 omitted use of the term "waiver" because the Rule's concept of waiver is different from the definition most people consider typical of a waiver. The Advisory Committee's current draft omits the term "waiver" and avoids using the word "forfeiture," and instead expresses the same idea in different language. In doing so, the Advisory Committee did not intend to change the basic policy of the Rule with respect to the majority of motions the Rule requires to be raised pretrial: that is, that a claim not raised by the deadline the court sets is extinguished, absent a showing of cause and prejudice. Indeed, no one advocated a change in this standard; as a previous memo to the Advisory Committee explained, the Rule 12 Subcommittee found no basis for replacing the Rule's present

[8] In *United States v. Olano*, 507 U.S. 725, 733 (1993), the Supreme Court described the concept of waiver as "the 'intentional relinquishment or abandonment of a known right,'" but it went on to clarify that certain features of a waiver, including "whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." Lower courts have thus found that *Olano* and *Davis* are not inconsistent with each other, and that *Olano*, which never mentioned Rule 12 or *Davis*, did not overrule *Davis*. *See United States v. Weathers*, 186 F.3d 948, 957 (D.C. Cir. 1999) (finding no indication that *Olano* meant to redefine the meaning of Rule 12 as established in *Davis*); *see also Rose*, 538 F.3d at 183 (finding no indication that the Rule 12 concept of waiver—extinguishing an unraised claim—is at odds with *Olano*).

standard with plain error review, finding that "the reasons for denying relief for untimely claims absent a showing of cause and prejudice remain unchanged." March 14, 2010, Memo Regarding Proposed Amendments to Rules 12 and 34 from Reporters Sara Beale and Nancy King to Criminal Rules Committee.

The Supreme Court explained one rationale for Rule 12's waiver provision in *Davis*, 411 U.S. at 241, describing the kind of "sandbagging" that the Rule seeks to avoid:

> If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

In addition, quite apart from the concern about "sandbagging," considerations of judicial efficiency and economy also favor requiring litigants to file in advance of trial certain motions that are collateral to the merits and that can be resolved before trial. Moreover, for some motions that seek suppression of evidence or dismissal of an indictment, pre-trial resolution is important in order to allow for the possibility of an interlocutory appeal by the government, no longer available once jeopardy has attached (*see* 18 U.S.C. § 3731). *See United States v. Pope*, 467 F.3d 912, 919 (5th Cir. 2006). And in the case of suppression motions, if no motion has been made before trial, the government may rely on that in choosing the quantity or quality of evidence it introduces, a decision that might be quite different if it knew that a suppression motion could be entertained later. *United States v. Chavez-Valencia*, 116 F.3d 127, 132 (5th Cir. 1997). For all these reasons, the Advisory Committee saw no basis for making any substantive change in the "waiver" except for "good cause" standard of Rule 12 for the majority of motions governed by the Rule. Avoiding the term "waiver," the proposed amendment now speaks in terms of "consequences" of an untimely motion under Rule 12(b)(3), and states that a court "may consider the defense, objection or request" only under certain specified circumstances.

b. The "Good Cause" standard of the present Rule 12

The second aspect of the present Rule 12 is the feature that allows relief from the waiver of a claim if the party shows "good cause." The Advisory Committee also saw no reason to change that aspect of the Rule's standard, believing that the Rule was intended – and should continue – to significantly restrict relief for untimely claims. The Advisory Committee did, however, conclude that the language of the Rule should be modified slightly to bring it in line with the Supreme Court's reading of the Rule in *Davis*. As noted above and described in more detail in the Appendix, the Supreme Court was quite clear in *Davis*, drawing from its decision in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963), that the "good cause" provision of Rule 12 must include a showing of actual prejudice as well as a reason for the late filing (*see Davis*, 411 U.S. at 243–45; *Shotwell*, 371 U.S. at 363 (finding it "entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of [Rule 12(b)(3)]")).

In later cases involving the "cause and prejudice" standard as applied to other types of defaulted claims brought on collateral attack, the Court referred to *Davis*, reiterating that the same test applied in the Rule 12(b) context. In *Murray v. Carrier*, 477 U.S. 478 (1986), for example, both Justice O'Connor's opinion for the Court and Justice Stevens' opinion concurring in the judgment agreed on the content of Rule 12's "cause" standard. 477 U.S. at 494 ("the former Rule 12(b)(2) of the Federal Rules of Criminal Procedure, as interpreted in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 83 S. Ct. 448, 9 L.Ed.2d 357 (1963), and *Davis v. United States*, 411 U.S. 233, 93 1577, 36 L.Ed.2d 216 (1973), treated prejudice as a component of the inquiry into whether there was cause for noncompliance with that rule") (opinion of the Court); *id*. at 502–03 (though "[t]he term 'prejudice' was not used in Rule 12(b)(2)," the Court in *Shotwell* "decided that a consideration of the prejudice to the defendant, or the absence thereof, was an appropriate component of the inquiry into whether there was 'cause' for excusing the waiver that had resulted from the failure to follow the Rule") (Stevens, J., concurring in the judgment). *See also Coleman v. Thompson*, 501 U.S. 722, 745 (1991) (noting that *Davis* had held that a defaulted Rule 12 claim could not be heard absent a showing of cause and actual prejudice).

The Advisory Committee found, however, that some confusion had developed in the federal appellate courts regarding the meaning of the "good cause" requirement in Rule 12. Many courts have

held, consistently with *Davis*, that a party must show both a reason for failing to raise the claim and prejudice to his case in order to have his late-filed claim considered by the court.[9] But other opinions reflect confusion about the need for a showing of prejudice. See *Rose*, 538 F.3d at 184; *United States v. Anderson*, 472 F.3d 662, 670 (9th Cir. 2006); *United States v. Campbell*, 999 F.2d 544 (9th Cir. 1993), 1993 WL 263432, *6 n.2 (unpublished); *United States v. Cathey*, 591 F.2d 268, 271 n.1 (5th Cir. 1979).

The Advisory Committee saw no reason to depart from the standard of "good cause" as interpreted by the Supreme Court and applied by the majority of courts of appeals. If the Rule's policy of strictly requiring timely motions is to have any teeth, a party should not be permitted to raise an untimely claim unless he can show both a good reason not to have met the deadline and some actual prejudice to his case if his claim is not heard. As the Supreme Court explained in *Davis*, there are good reasons to require that certain motions be raised and resolved in the district court when objections can be remedied before a trial commences. If a required motion is not timely filed, and a sufficient reason is shown for a party's failure to abide by the Rule, but the party has suffered no prejudice from the failure to address his claim, the same reasons that motivated the rule – the concern for preventing "sandbagging" as a defense tactic, judicial economy and the desire not to interrupt a trial for auxiliary inquiries that should have been resolved in advance, and the resulting prejudice, in some cases, to the government's interests in having one fair chance to convict (*see* 6 Wayne R. La Fave, *Search and Seizure* § 11.1(a) at 8 (2004 ed.)) – all argue against allowing consideration of the motion. *See, e.g.*, *Kopp*, 562 F.3d at 143 (even if cause were shown, no prejudice demonstrated where defendant testified and admitted substance of statements he sought to have suppressed).

Because, however, of the disagreement that has developed among some courts as to whether "good cause" includes a requirement to show prejudice, and because this particular use of the term "good cause"—to include both a sufficient reason and prejudice—is not obvious from the face of the rule, the Advisory Committee thought it advisable to modify the language of the rule to ensure that

[9] *See United States v. Kopp*, 562 F.3d 141, 143 (2d Cir.), *cert. denied*, 130 S. Ct. 529 (2009); *United States v. Santos Batista*, 239 F.3d 16, 19–20 (1st Cir. 2001); *United States v. Oldfield*, 859 F.2d 392, 397 (6th Cir. 1988); *United States v. Hirschhorn*, 649 F.2d 360, 364 (5th Cir. 1981); *United States v. Williams*, 544 F.2d 1215, 1217 (4th Cir. 1976).

the current standard is read as construed by *Davis* and *Shotwell*. Thus the proposed amendment provides that an untimely motion may still be considered if "the party shows cause and prejudice."[10]

2. The "Cause and Prejudice" Standard Also Applies in the Courts of Appeals

Although there has been no question that the "good cause" or "cause and prejudice" standard of Rule 12 applies whenever a late-filed motion is presented to the district court, the appellate courts are divided on the question of the applicable standard when a party raises a Rule 12 motion for the first time in the court of appeals. As discussed in the Appendix, eight circuits have applied Rule 12's "good cause" standard when a party raises for the first time on appeal a claim that Rule 12 requires to be raised before trial.[11] But other courts have decided or assumed that at the appellate level Rule 52(b)'s plain error rule applies, although sometimes in combination with Rule 12's good cause standard.[12] (And some courts take differing views even within the same circuit.[13])

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[10] No other similar example of the use of the term "good cause" with this particular meaning has been brought to the Advisory Committee's attention; thus it did not appear necessary to change that term as it appears elsewhere in the rules.

[11] *E.g.*, *United States v. Weathers*, 186 F.3d 948, 954–58 (D.C. Cir. 1999); *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003); *United States v. Rose*, 538 F.3d 175, 182–85 (3d Cir. 2008); *United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004); *United States v. Collier*, 246 Fed. Appx. 321 (6th Cir. 2007) (unpublished); *United States v. Anderson*, 472 F.3d 662, 668–69 (9th Cir. 2006); *United States v. Burke*, 633 F.3d 984, 988–91 (10th Cir.), *cert. denied*, 2011 WL 939018 (2011); *United States v. Nix*, 438 F.3d 1284, 1288 (11th Cir. 2006).

[12] *See United States v. Lugo Guerrero*, 524 F.3d 5, 11 (1st Cir. 2008) (assuming claim could be reviewed for plain error despite Rule 12 waiver); *United States v. Scroggins*, 599 F.3d 433, 448 (5th Cir.), *cert. denied*, 131 S. Ct. 158 (2010); *United States v. Johnson*, 415 F.3d 728, 730–31 (7th Cir. 2005).

[13] *Compare Nix*, 438 F.3d at 1288 (finding claim waived) *with United States v. Sanders*, 315 Fed. Appx. 819, 821 (11th Cir. 2009) (using plain error); *and compare Scroggins*, 599 F.3d at 448 (using plain error) *with United States v. St. Martin*, 119 Fed. Appx. 645, 649 (5th Cir. 2005) (using cause); *and compare United States v. Wilson*, 962 F.2d 621, 626–27 (7th Cir. 1992) (finding multiplicity claim waived), and *United States v. Welsh*, 721 F.2d 1142, 1145 (7th Cir. 1983) (finding suppression

The Advisory Committee concluded that it would be desirable to clarify the rules to promote uniformity on this important point, and that the amendment should make it clear that Rule 12's "good cause" standard – rather than the plain error standard of Rule 52(b) – applies when a party raises for the first time on appeal a claim that Rule 12 requires to be raised before trial. In so doing, the proposed amendment adopts the position taken by the majority of circuits.[14]

There are a number of reasons for specifying that Rule 12's standard must be applied both at the district court level and in the court of appeals, and that Rule 12 rather than Rule 52(b)'s plain error standard governs in the court of appeals.

Applying Rule 52(b) rather than Rule 12(e) would undercut the policy expressed in Rule 12[15] and create a perverse incentive to raise late claims on appeal rather than in the district court. Indeed, in *Davis* the Supreme Court emphasized that it was important to continue using Rule 12's scheme of waiver/good cause beyond the trial court proceedings in order to preserve the policy of the Rule. It was argued in *Davis*, a proceeding under Section 2255, that Rule 12's waiver standard did not apply to bar consideration of the defendant's claim on collateral attack. After noting that "Congress did not deal with the question of waiver in the federal collateral relief statutes," the Court determined that Rule 12's express waiver standard must apply throughout the criminal proceedings in order give effect to the Rule. It explained:

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claim waived), *with United States v. Percival*, 756 F.2d 600, 611 (7th Cir. 1985) (finding plain error), and *United States v. Clarke*, 227 F.3d 874, 880-881 (7th Cir. 2000) (using plain error in the alternative).

[14]*See, e.g., Weathers,* 186 F3d at 954–58*; Rose,* 538 F.3d at 182–85; *Anderson,* 472 F.3d at 668-669; *Burke*, 633 F.3d at 988-991.

[15]A related line of analysis has been persuasive to many appellate courts, which have concluded that the more specific provisions of Rule 12, rather than the more general provisions of Rule 52(b), should be controlling when appellate courts review claims not raised before trial as required by Rule 12(b)(3). *See Rose*, *supra*, 538 F.3d at 183; *Burke*, 633 F.3d at 989; *Weathers*, 186 F.3d at 955. These cases reflect a recognition that the more specific standard of Rule 12(e) that is expressed as waiver with relief for good cause is not consistent with the more general plain error/forfeiture standard of Rule 52(b), and application of Rule 52(b) would nullify Rule 12.

> We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires. We therefore hold that the waiver standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review.

411 U.S. at 242.

It would be odd indeed if the waiver/good cause standard of Rule 12 applied in the district court and again on collateral review, but the more generous plain error standard applied in the court of appeals. If it would "perversely negate the Rule's purpose" to use a different standard on collateral review, surely it would also be perverse to use a different standard on direct review. The Court must have meant, when it said that a "claim once waived . . . may not later be resurrected either in the criminal proceedings or in federal habeas" that "criminal proceedings" includes direct appeal.

And it is quite clear, also from Supreme Court case law, that a plain error standard is both different from and more lenient than the "waiver except for cause and prejudice" standard of Rule 12. In *United States v. Frady*, 456 U.S. 152 (1982), the Court considered a claim of error in the jury instructions, a claim that the defendant had failed to raise either in the trial court or on appeal. On collateral attack, he argued that his default should be reviewed according to the plain error standard of Rule 52(b), but the Supreme Court disagreed and held that the court of appeals was wrong to have used that standard, which is appropriate for correcting obvious injustices on direct appeal, but is not for use on collateral review. Instead, referring to previous cases that had made the same point, the Court reiterated that a defendant must "clear a significantly higher hurdle" on collateral review "than would exist on direct appeal" and that the plain error standard was not sufficiently stringent at the collateral stage. *Frady*, 456 U.S. at 166. The Court then referred back to *Davis* and held that the proper standard was the "cause and actual prejudice" standard enunciated there, which it had later

confirmed applied not only in the Rule 12 context but in other cases when a defendant sought relief on collateral attack from a trial error to which no objection had previously been made. *Id*. at 167–68.

See also United States v. Evans, 131 F.3d.1192, 1193 (7th Cir. 1997) ("'Cause' is a more stringent requirement than the plain-error standard of Fed. R. Crim. P. 52(b)" (citing *Frady*)).

In short, the Supreme Court has unequivocally stated that the same "cause and actual prejudice" standard described in *Davis* is a far harder standard to meet than Rule 52's plain error standard. Thus, the reasoning in decisions of the courts cited in the Appendix, *infra*, is correct: if the courts of appeal revert to Rule 52's plain error standard when a Rule 12 claim is raised for the first time on appeal, the effect is to give the defendant a more lenient standard to satisfy than he would have faced if his motion were late but still made in the district court. This is an illogical result if Rule 12's policy of requiring certain motions to be made before trial is to have any real meaning. And such a result would also mean that Rule 12's stringent standard actually adds nothing to Rule 52(b)'s forfeiture standard, rendering Rule 12 entirely ineffective. This is true whether plain error is used exclusively on appeal or if it is used as an alternative to Rule 12's good cause requirement. Once it is established that good cause has not been shown, Rule 12 should allow no further consideration of the claim, even for plain error, or the effect of the waiver is nullified.

Nor should the two standards, "cause and prejudice" and plain error, be applied in combination, as some courts have done.[16] *Frady* itself indicates that the two standards are distinct – either one or the other is appropriate, but not both – and mutually exclusive. If only one of the two standards, not both, is appropriate on collateral review, it is hard to see why they should be combined on direct appeal. In addition, overlaying the two standards forces an appellant to satisfy *two* demanding standards instead of just one, a result that seems even harsher than Rule 12's policy of allowing relief from a waiver if the litigant can satisfy the stated standard.

One major concern prompting an appellate court's refusal to apply Rule 12's cause and prejudice standard is the view that Rule 12's cause and prejudice standard must apply only at the trial court level because "cause and prejudice" is the sort of factually based determination that can only be

[16] *See, e.g. United States v. King*, 627 F.3d 641, 647 (7th Cir. 2010) ("King has not established good cause for his failure to present the illegal entry argument previously. And even if he passed that threshold, King has not shown error, much less plain error, in the district judge's decision.").

made by a district court. *See United States v. Acox*, 595 F.3d 729, 731 (7th Cir. 2010). *Acox*, while recognizing that Rule 52(b) should not be used "to undercut an express provision of Rule 12(e)" (*id.* at 731), went on to conclude that Rule 12's waiver provision is for the district court only. Though the Rule says that "the court" may grant relief from the waiver, not specifically "the district court," *Acox* reasoned that it must mean the district court because "Rule 12 as a whole governs pretrial proceedings in federal district courts." *Id*. at 731. The court then determined that the court of appeals could only review what the district court had decided regarding whether to find "good cause," and if no relief from the waiver was requested of the district court, the court of appeals would determine whether, had a motion for relief been made and denied, the district court would have abused its discretion in finding no good cause. *Id*. at 732.

But when the text of the rule is not limited to consideration of "good cause" by district courts alone, it seems odd to conclude that Rule 12 contemplates appellate review of a district court action that did not occur. And in other decisions, the Seventh Circuit has indicated that the appellate court could indeed assess cause itself.[17] Thus the concerns expressed in *Acox* have not deterred that court from using the cause standard in other cases. And while *Acox* distinguished a "handful" of that court's prior decisions assessing cause in the first instance, it did not distinguish or even mention the decisions in footnote 17. So it is not at all clear that *Acox* represents the settled view of the Seventh Circuit on this point.

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[17] *See United States v. Dimitrova*, 266 Fed. Appx. 486, 489 (7th Cir. 2008) ("Dimitrova has offered no cause or explanation for her failure to raise the suppression issue before trial . . . [She] did not offer a 'good cause' explanation sufficient under Rule 12(e) and *Johnson* in her posttrial motion, nor has she done so on appeal."); *United States v. Quintanilla*, 218 F.3d 674, 678–79 (7th Cir. 2000) ("Although it is the appellant's burden to establish 'cause' for his failure to raise the no-knock issue in a motion to suppress, Quintanilla's brief fails to even suggest a reason for the failure . . . Furthermore . . . [g]iven the circumstances surrounding the actual entry into the defendant's home . . . [w]e are convinced that Quintanilla has failed to establish cause for his failure to raise the authorization of a no-knock entry in a motion to suppress. "); *United States v. Evans*, 131 F.3d 1192, 1193 (7th Cir. 1997) ("Evans has not tried to establish 'cause' for neglecting this subject earlier; indeed, his opening brief does not mention the fact that the issue was not presented to the district court. His reply brief halfheartedly contends that trial counsel was ineffective for failing to make the necessary motion to suppress, but this argument is too late and too undeveloped to be considered.").

Record concerns have not prevented most appellate courts from applying the Rule 12 cause and prejudice standard. When the record does contain enough information, courts have either reviewed the record to evaluate the propriety of the district court's determination,[18] or reviewed the record themselves to evaluate the cause claimed for the first time on appeal.[19] When no record on cause and prejudice exists, either because no attempt was made to show good cause to the district court or because no motion was ever made in the district court, some courts of appeals seem to invite a showing of good cause on appeal by either noting that appellant has made no attempt to

[18]*United States v. Rodriguez-Lozada,* 558 F.3d 29, 37–38 (1st Cir.) (record showed no abuse of discretion in district court's rejection of claim of good cause), *cert. denied,* 130 S. Ct. 283 (2009); *United States v. Mendoza-Acevedo,* 950 F.2d 1, 3 (1st Cir. 1991) (same); *United States v. Blair,* 214 F.3d 690, 699–701 (6th Cir. 2000) (upholding district court's rejection of good cause because "George has failed to demonstrate an objective external factor that prohibited him from raising an objection to the jury selection plan prior to his trial"); *United States v. Moore,* 98 F.3d 347, 351 (8th Cir. 1996) (district court correctly denied claim of good cause when defendants were personally present during the stop they belatedly challenged and they were responsible for informing counsel of those facts).

[19]*United States v. Heilman,* 377 Fed. Appx. 157, 201 n.33 (3d Cir.) ("we are not persuaded by Napoli's argument that the second superseding indictment was so vague as to preclude a misjoinder argument" when defense counsel received relevant materials a month before trial, allowing plenty of time to develop a basis for a severance motion), *cert. denied,* 131 S. Ct. 490 (2010).

show cause or evaluating in the first instance the proffered showing.[20] Other courts suggest a remand for an evidentiary hearing on the issue.[21] And some decisions state that attorney ineffectiveness as cause should be presented in a motion under 28 U.S.C. § 2255.[22] Finally, some appellate courts have decided that in the absence of a record on cause, the appellant simply loses on his request for relief from waiver.[23]

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[20]*See United States v. Howard*, 998 F.2d 42, 52 (2d Cir. 1993) ("counsel offers no reason for her failure to discuss with her client the circumstances of his arrest before the court's April 26 deadline" and in the absence of "a demonstration of cause, we need not address the merits of Santana's fourth amendment argument"); *United States v. Collier*, 246 Fed. Appx. 321, 335 (6th Cir. 2007) (unpublished) ("record reflects no attempt on Defendant's part to demonstrate good cause before the district court, or even to assert these challenges during trial. Nor does Defendant's brief on appeal address or explain his Rule 12(e) waiver."); *United States v. Anderson*, 472 F.3d 662, 668–69 (9th Cir. 2006) (though appellant never asked district court for relief from waiver, appellate court has "authority to decide whether there is good cause;" based on representations in reply brief and absence of document necessary to appellant's claim in the docket, court of appeals found good cause and granted relief from waiver); *United States v. Suescun*, 237 F.3d 1284, 1286–87 (11th Cir. 2001) (noting that appellant did not ask district court for relief from his waiver, and that "[a]rguably, he could have asked us to grant relief from the waiver, but he has not done so").

[21]*See Weathers*, 186 F.3d at 958–59 (where appellant claimed ineffective assistance of counsel as cause for waiver of claim, court remanded to district court for factual development of ineffectiveness claim); *Rose*, 538 F.3d at 184 (where cause argued for first time on appeal, court could remand for evidentiary hearing, but no need here where appellant offered no colorable explanation for his failure to file timely claim).

[22]*See Evans*, 131 F.3d at 1193; *United States v. Nix*, 438 F.3d 1284, 1288 (11th Cir. 2006); *Rudisill v. United States*, 222 Fed. Appx. 844, 846 (11th Cir. 2007).

[23]*See United States v. Nunez*, 19 F.3d 719, 722 (1st Cir. 1994) ("we have not had occasion, nor are we disposed, *sua sponte*, to conjure relief from waiver under Rule 12(f) in circumstances where no cause for relief appears and the district court record does not enable reliable appellate review on the merits"); *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003) ("Murad had ample opportunity to raise and develop this argument before the District Court and he has not provided, much less established, any reasonable excuse for his failure to do so. Accordingly, we hold that Murad has waived this argument."); *United States v. Crowley*, 236 F.3d 104, 109–10 (2d Cir. 2000) (where

In sum, for all the reasons explained above, the Advisory Committee concluded that the better-reasoned view was that Rule 12's cause and prejudice standard should apply both at the district court level and on appeal, and the Advisory Committee therefore chose to clarify the Rule so that courts and litigants will clearly understand that any request for relief from the waiver must be judged by the same standard whenever it is presented.

3. The Decision to Specify in the Rule that Rule 12 Controls, Not Rule 52

Finally, the Advisory Committee chose to state explicitly in Rule 12 that Rule 52 does not apply, making it clear that the new standards in Rule 12 *substitute* for the default standards provided in Rule 52. Providing more clarity about the relationship between the two Rules is something the Standing Committee requested in 2009.

The Advisory Committee wanted to foreclose any argument that by including the language drawn from Rule 52(a), while being silent about plain error and Rule 52(b), the Rule would leave open the possibility of applying plain error. In *United States v. Vonn*, 535 U.S. 55 (2002), the Court held that plain error review under Rule 52(b) applies to untimely Rule 11 errors, despite the language in Rule 11(h), which provides: "A variance from the requirements of this rule is harmless error if it does not affect substantial rights." The Court concluded (with only Justice Stevens dissenting), that "there are good reasons to doubt that expressing a harmless-error standard in Rule 11(h) was meant to carry any implication beyond its terms. At the very least, there is no reason persuasive enough to think 11(h) was intended to repeal Rule 52(b) for every Rule 11 case." *Vonn*, 535 U.S. at 74. Although the present amendment could be distinguished from the provision interpreted in *Vonn*, the Advisory Committee concluded that *Vonn* demonstrates the value of explicitly addressing the relationship between the proposed amendment and Rule 52.

Furthermore, addressing this issue in the text of the rule is preferable to addressing it in the Committee Note. As a policy matter, any substance should be addressed in the rules rather than in the

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district court gave no explanation of how defendants had shown cause for non-compliance with Rule 12 "and we have found nothing in the record that would explain why defendants did not raise their objection to the specificity of the indictment before trial," district court's decision to grant relief from waiver was legal error).

accompanying note. Addressing the applicability of Rule 52(b) in the text of the rule is particularly appropriate because of the continuing confusion in the lower courts, as noted above, about what standard of review Rule 12 requires for untimely claims. Adding language to the text of the Rule would eliminate uncertainty and resulting litigation costs.

D. WHY THE COMMITTEE USED A DIFFERENT STANDARD FOR MOTIONS CHALLENGING THE INDICTMENT FOR FAILURE TO STATE AN OFFENSE

1. The Committee's Original Proposal to Amend Rule 12

The proposal to amend Rule 12 had as its genesis a proposal in 2006 from the Department of Justice. The Department urged Rule 12 to be amended to take account of the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), which held that an indictment's failure to state an offense does not deprive the court of jurisdiction. One justification for the present Rule 12's provision that allows such claims to be raised at any time, even on appeal, was that they were thought to be jurisdictional defects. The *Cotton* decision undercut this rationale for not requiring that this particular error in the indictment be raised prior to trial. The Department therefore proposed that claims challenging the indictment for failure to state an offense should be added to the list of motions that must be raised before trial.

In April 2009, the Advisory Committee approved a proposal to amend Rule 12, but its proposal did not simply move failure-to-state-an-offense claims to the list of motions that must be filed before trial or be subject to the same waiver provision in current Rule 12(e). Rather, the Advisory Committee's proposed amendment provided for two different standards for obtaining relief from the waiver. The amendment would have allowed the court to grant relief from the waiver for good cause – as in the current rule – *or* "when a failure to state an offense in the indictment or information has prejudiced a substantial right of the defendant."

The more generous standard for relief from waiver of a late-filed Rule 12 claim was chosen in recognition that an indictment's failure to state an offense could at times implicate important constitutional rights of a defendant, such as due process, the need for adequate notice of the offense charged, or the ability to present a defense. *See, e.g., United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003) (where indictment contained no language to indicate offense charged was felony assault, late Rule 12 objection allowed to prevent defendant from being sentenced as a felon); *United States v. Hosseini*, 506 F. Supp. 2d 269, 270–71 (N.D. Ill. 2007) (one count of indictment challenged as

failing to state an offense after jury sworn; though indictment could have been cured if motion made earlier, no question that it failed to allege each element of the offense and count was dismissed). Because of these qualitatively different and potentially more serious consequences, the Advisory Committee has consistently taken the position that a defendant should face an easier standard for relief from the consequences of a late-filed Rule 12 motion if his late motion claims that the indictment fails to state an offense. Specifically, recognizing that an oversight by a defendant's attorney will generally not qualify as "cause" under the standard of review applied by most courts to other untimely claims under Rule 12, the Advisory Committee decided that requiring a showing of "cause" as well as prejudice would be inappropriate if an indictment failed to state an offense.

2. The Committee's Revised Proposals in Response to Standing Committee Concerns

As explained more fully in the Appendix, the Standing Committee remanded the Advisory Committee's 2009 proposal for further study of the concepts of "waiver" and "forfeiture" and how Rule 12 interacts with Rule 52. The Advisory Committee determined that the Rule would in fact benefit from a broader reworking so as to clarify several aspects of the Rule, but it continued to believe that the standard for obtaining consideration of a late-filed claim that the indictment fails to state an offense should be a more lenient one for the defendant. The Advisory Committee first attempted to accomplish this by providing that untimely claims of failure to state an offense (as well as two others, double jeopardy and statute of limitations) could nevertheless be considered if the defendant met the requirements of plain error under Rule 52(b). While all other claims would continue to be considered waived if not timely raised, unless cause and prejudice were shown, this second category of claims would be considered merely forfeited if untimely raised. Because the plain error standard from Rule 52(b) did not include a showing of cause, the Advisory Committee believed that the choice of that standard would appropriately provide a less stringent showing to excuse the late filing.

The Standing Committee also remanded that proposal, concerned that the plain error standard might be too demanding for late-filed claims of failure to state an offense, in light of the Advisory Committee's expressed intention of making it easier to excuse the untimeliness of such claims. The Standing Committee also expressed concern about the continued use of the term "waiver" differently from the usual definition of that concept. After further discussion, the Advisory Committee agreed with both suggestions of the Standing Committee.

The Advisory Committee redrafted the Rule's language to delete the words "waiver" and "forfeiture" and instead to describe the *consequences* of untimely motions, a provision now moved to follow immediately after the timing provisions. And to best describe the circumstances under which untimely motions could still be considered, the proposal now provides that a party must show cause and prejudice, or, for claims of failure to state an offense, he may show prejudice only. This makes clear that for most untimely motions, a party must meet the demanding standard of cause and prejudice or his claim is foreclosed, but that for failure to state an offense, untimeliness may be more easily excused. The Advisory Committee agreed that a defendant might not be able to satisfy all four prongs of the plain error standard yet be deserving of relief from an indictment that fails to state an offense. It thus determined that its original notion — that a defendant should not suffer prejudice to his case from an untimely discovery that the indictment failed to state an offense — was the desired principle, and that it would be appropriate to allow consideration of such a claim on a showing of prejudice alone.[24] By making these additional changes, the Advisory Committee believes it has both

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[24]The Advisory Committee recognized that in *United States v. Cotton*, 535 U.S. 625, 634 (2002), the Supreme Court applied Rule 52(b) plain error review to the indictment error in that case, the failure to include drug quantity, a fact required under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for defendant's enhanced sentences. The Advisory Committee concluded that *Cotton* created no obstacle to its proposal to prejudice — rather than plain error — as the standard for review of late claims alleging the failure to state an offense. In applying the default provisions of Rule 52, the Court in *Cotton* did not consider what standard of review should apply to claims of failure to state an offense if such claims were added to the list of those that must be raised prior to trial in Rule 12, nor did it mention Rule 12 at all. The *Cotton* Court stated:

> "Freed from the view that indictment omissions deprive a court of jurisdiction, we proceed to apply the plain-error test of Federal Rule of Criminal Procedure 52(b) to respondents' forfeited claim. *See United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). "Under that test, before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' " *Johnson v. United States*, 520 U.S. 461, 466-467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (*quoting Olano, supra*, at 732, 113 S.Ct. 1770). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." 520 U.S. at 467, 117 S.Ct. 1544 (internal quotation marks omitted) (*quoting Olano, supra*, at 732, 113 S.Ct. 1770)."

clarified and simplified the rule, while achieving the original goal of requiring any defective indictment to be challenged before trial without sacrificing basic fairness to a defendant.

E. WHY THE COMMITTEE INCLUDED DOUBLE JEOPARDY CLAIMS IN THE CATEGORY SUBJECT TO A SHOWING OF PREJUDICE ONLY

After a study of the issue, the Advisory Committee decided to add one more type of claim to the category of those whose late filing would be excused more readily – claims of a double jeopardy violation. This was done to preserve as closely as possible the current treatment of such claims without adding further complexity with a third standard of review.

Many courts of appeals currently apply plain error review, rather than cause and prejudice, to double jeopardy challenges to the charge that were available, but not raised, before trial.[25] Moreover, cases reviewing double jeopardy claims after a guilty plea have expressly recognized that a double jeopardy violation clear on the face of the indictment is not waived by the plea. In this situation courts have reviewed the double jeopardy claims either de novo[26] or using plain error.[27] Designating the

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[25]*See United States v. Mahdi*, 598 F.3d 883 (D.C. Cir. 2010); *United States v. Robertson*, 606 F.3d 943 (8th Cir. 2010) (collecting authority); *United States v. Mungro*, 365 Fed. Appx. 494 (4th Cir. 2010); *United States v. Hansen*, 434 F.3d 92 (1st Cir. 2006). *But compare United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009) (stating that unraised double jeopardy objection is waived, but assuming arguendo that plain error and not waiver applies); *United States v. Flint*, 394 Fed. Appx. 273 (6th Cir. 2010) (describing as waived and declining to reach merits of double jeopardy claim raised for the first time on appeal by defendant found guilty after trial).

[26]*See, e.g., United States v. Moreno-Diaz*, 257 Fed. Appx. 435 (2d Cir. 2007) (quoting *Menna* and noting that guilty plea does not waive double jeopardy claim when, judged on its face, charge is one that government may not constitutionally prosecute); *United States v. Poole*, 96 Fed. Appx. 897, 899 (4th Cir. 2004) (granting relief on defendant's unraised double jeopardy claim, despite defendant's guilty plea: "Because on its face the superseding indictment exposed Poole to multiple sentences for a single offense, we conclude that Poole has not waived his claim of multiplicity on appeal"); *United States v. Saldua*, 120 Fed. Appx. 553 (5th Cir. 2005) (remanding to vacate one of defendant's convictions and noting that the government chose not to argue that appeal waiver barred relief); *United States v. Zalapa*, 509 F.3d 1060, 1063 (9th Cir. 2007) ("we recognize the distinction between objections to multiplicity in the indictment, which can be waived, and objections to multiplicitous sentences and convictions, which cannot be waived. *See United States v. Smith*, 424 F.3d 992, 1000

& n.4 (9th Cir. 2005) ("Multiplicity of sentences is unlike the issue of multiplicity of an indictment which can be waived if not raised below.") This conclusion is consistent with our holding in *Launius v. United States*, 575 F.2d 770 (9th Cir. 1978). In that case, we held that a defendant's guilty plea to a multiplicitous indictment did not constitute a waiver of the right to raise a double jeopardy claim as to his multiplicitous convictions and sentences. *Id*. at 771–72. We also recognized that Rule 12 of the Federal Rules of Criminal Procedure, the rule relating to pretrial motions, "'applies only to objections with regard to the error in the indictment itself.'" *Id*. at 772."); *United States v. Williams*, 2011 WL 462156, *1 (11th Cir. 2011) ("Williams's appeal is not waived because he does not seek to introduce evidence from outside of the plea hearing to demonstrate that the conduct at issue in the sentencing phase of the first trial and the conduct at issue in the indictment of the second trial were the same offense."); *United States v. Bonilla*, 579 F.3d 1233 (11th Cir.2009) (defendant can raise double jeopardy claim if he does not need to go outside record at plea hearing, the case here as to indictment with multiplicitous charges of both identity theft and aggravated identity theft); *United States v. Harper*, 398 Fed. Appx. 550, 553 (11th Cir. 2010) (noting that entering a guilty plea generally waives all non-jurisdictional challenges to a conviction, with a few exceptions, including one for certain double jeopardy challenges, when the government is precluded from haling the defendant into court at all, citing *Menna v. New York*, 423 U.S. 61, 62 (1975)).

[27]Several appellate decisions apply plain error review in this situation, including *United States v. Kelly*, 552 F.3d 824 (D.C. Cir. 2009); *United States v. Cesare*, 581 F.3d 206 (3d Cir. 2009) (finding plain error); *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010) (holding that even if claim was not waived by guilty plea, it could not, in circumstances of this case, survive plain error review); *United States v. Lebreux*, 2009 WL 87505 (6th Cir.2009) (considering claim but rejecting it on plain error review); *United States v. Plenty Chief*, 561 F.3d 846 (8th Cir. 2009) (court's review "limited to plain error").

Other appellate decisions, however, state that in guilty plea cases the appropriate standard is waiver rather than plain error. *See, e.g. United States v. Adams*, 256 Fed. Appx. 796, 798 (7th Cir. 2007) ("Adams entered unconditional guilty pleas and therefore waived his right to appeal the denial of any pretrial motions based on his indictment"); *United States v. Moreno-Diaz*, 257 Fed. Appx. 435, 436 (2d Cir. 2007).

plain error standard for untimely double jeopardy claims would preserve this current treatment. The Advisory Committee considered but rejected as unduly complex a proposal to have three tiers of review:

- prejudice alone for claims of failure to state an offense,
- "plain error" for double jeopardy claims, and
- "cause and prejudice" for everything else.

The Advisory Committee concluded that the standard of showing prejudice alone was appropriate for violations of the fundamental right not to be twice placed in jeopardy or punished more than once for the same offense. Allowing review for untimely double jeopardy claims on the basis of prejudice alone would simplify the analysis without changing the result in most or all double jeopardy cases. The second and fourth prongs of the *Olano* test – which look to whether the error is "plain" and whether it "seriously affects the fairness, integrity, or public reputation of judicial proceedings" – have not made much difference when courts review alleged double jeopardy violations.[28]

Although double jeopardy claims arise in a number of different situations,[29] we have been unable to identify a case in which the second and fourth prongs would not be satisfied if a defendant has been (or could be) convicted for an offense that judging from the indictment before trial should have been barred by double jeopardy. If indeed plain error review is applied whenever a defendant objects during trial, or after conviction, to a double jeopardy error available and resolvable before trial

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[28]*See, e.g., United States v. Robertson*, 606 F.3d 943, 952 (8th Cir. 2010) (concluding that failing to remedy such a clear violation of a core constitutional principle would be error so obvious that failure to notice it would seriously affect the fairness integrity, or public reputation of the judicial proceedings and result in a miscarriage of justice); *United States v. Ogba*, 526 F.3 214, 238 (5th Cir. 2008) (same); *United States v. Fortenberry*, 914 F.2d 671, 673 (5th Cir. 1990) (same) (reversing conviction on plain error review after finding a double jeopardy violation in part because the defendant was subjected to multiple special assessments).

[29]The Double Jeopardy clause bars a charge following an acquittal or conviction for the same offense, after an acquittal definitively rejecting a necessary element of the charged offense, or after an earlier mistrial lacking manifest necessity. It also bars a conviction on one count charging the same offense as another count of conviction.

and which he failed to raise before trial or plea, it appears to make sense to dispense with the second and fourth prongs of the *Olano* test and, for the sake of simplicity, to use the same "prejudice only" standard as for claims of failure to state an offense.

F. OTHER FEATURES OF THE PROPOSAL

As noted above, the core elements of the proposed amendment are that it deletes the language in Rule 12(b)(3)(B) that allows a failure to state an offense claim to be raised "at any time while the case is pending," and requires claims that an indictment fails to state an offense to be raised prior to trial. The amendment also clarifies the standard for consideration of claims not raised before trial as required by Rule 12(b)(3): except for failure to state an offense and double jeopardy – which may be reviewed whenever "prejudice" is shown – the courts may consider a claim only if the party who wishes to raise it can show "cause and prejudice."

Several other features of the proposed amendment also warrant some discussion. The proposal includes the following elements:

- It continues to provide that a jurisdictional error can be raised at any time while a case is pending and places the jurisdictional provision in a more prominent position.

- It enumerates in Rule 12(b)(3) a non-exclusive list of common claims that must be raised before trial.

- For all of the defenses, objections and requests listed in Rule 12(b)(3), it introduces a new criterion for determining which must be raised before trial: whether the "basis" for the defense/objection/request is "then available."

- It shifts from (b)(2) the requirement that motions raised prior to trial be those that "the court can determine without a trial of the general issue" to (b)(3), and also rephrases that limitation to provide that "the motion can be determined without a trial on the merits."

- It shifts the provisions on the consequences of failing to make a timely motion from subdivision (e) to subdivision (c), solving an organizational problem within the current rule.

- It provides a conforming amendment to Rule 34.

The discussion that follows explains each of these elements.

1. Jurisdictional Issues

At present, Rule 12(b)(3)(B) allows review of "a claim that the indictment or information fails to invoke the court's jurisdiction" at "any time while the case is pending." The Advisory Committee concluded that it was important to retain this provision, but that it should be moved to a separate subdivision. At present, it is stated as an exception to one of the defenses and claims subject to the timing requirements of Rule 12(b)(3).[30] The proposed amendment places this new subdivision in Rule 12(b)(2). This placement was possible because the Advisory Committee recommends the deletion of current (b)(2), as discussed below.

2. Deleting (b)(2)

Rule 12(b)(2) presently provides that "any defense, objection, or request that the court can determine without trial of the general issue" *may* be raised by a motion before trial. The 1944 Advisory Committee Notes explain that the purpose of this provision was to make clear that pretrial motions could be used to raise matters previously raised "by demurrers, special pleas in bar and motions to quash." The Advisory Committee concluded that the use of motions is now so well established that it no longer requires explicit authorization. The deletion of (b)(2) would be consistent with a decision made in 2002 as part of the restyling of the Criminal Rules. At that time, language in Rule 12(a) abolishing "all other pleas, and demurrers and motions to quash" was deleted as unnecessary.

The Advisory Committee was also concerned that there is, inevitably, some tension between (b)(2) and (b)(3) if (b)(2) is read literally. The drafters of the original Rule 12 envisioned two categories of motions, those that may and those that must be raised before trial.[31] See the 1944

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[30]This provision is now stated as an exception to the rule that "a motion alleging a defect in the indictment or information" "must be raised before trial." *See* Rule 12(b)(3)(B).

[31]The Advisory Committee note describes the two categories and explains that the defenses and objections that must be raised before trial are generally those that were generally raised before trial "by plea of abatement, demurrer, motion to quash, etc." The other group, which may but need not be raised before trial, were issues that "have been heretofore raised by demurrers, special pleas in bar, and motions to quash." 1944 Advisory Committee note to Rule 12(b)(1) and (2). The latter

Committee note to Rule 12(b)(1) and (2). As noted, (b)(2) says that any defense, objection, or request that is capable of being determined before trial "may" be raised by pretrial motion. The difficulty is that the permissive term "may" might be understood to indicate that each party has the *option* of bringing or not bringing *all* such motions before trial. This is in tension with (b)(3), which provides a list of motions that *must* be brought before trial.

Since the "may be raised" language now found in (b)(2) is no longer needed and it might create confusion, the Advisory Committee concluded it should be deleted. The limitation that the motion be one that can be determined without trial was shifted to (b)(3), as discussed in paragraph 5, below.

The decision to delete the language now found in (b)(2) raised the possibility that the subdivisions that followed (b)(2) would all be renumbered. The subdivisions of Rule 12 were reordered (or relettered) in 2002, and this has caused courts and litigants some difficulty in researching and writing about the rule. For that reason, several judges contacted members of the Advisory Committee to request that the current revision avoid another renumbering or relettering. The Advisory Committee was sensitive to this concern, and concluded that it was preferable to use this subdivision for the new separate jurisdictional provision, thereby avoiding the necessity of renumbering the later subdivisions.

3. Spelling Out the Claims That Must Be Raised Before Trial

The Advisory Committee's proposal retains the current categories of claims that Subdivision (b)(3) requires to be raised before trial: two general categories of claims (defects in "instituting the prosecution" and defects "in the indictment or information") as well as three specific categories (discovery, suppression, and joinder). For claims not specifically listed in Rule 12(b)(3) today, courts must determine whether a claim is a "defect in the indictment" or "the institution of the prosecution,"

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group was described as including some issues – double jeopardy and statute of limitations – that many courts now generally regard as falling within the terms of Rule 12(b)(3). See note 32 infra. As noted in point 3, public comments may address the advisability of including these or other defenses and claims in the text of Rule 12(b)(3).

to determine whether it must be raised prior to trial.[32] To add

[32]This has been an issue, for example, with claims based on the statute of limitations. Most courts have treated a statute of limitations claim as a defect in the institution of the prosecution or the sufficiency of the indictment, finding it is waived if not raised prior to trial. *See United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987); *United States v. Ramirez*, 324 F.3d 1225, 1227–28 & n. 6 (11th Cir. 2003); *United States v. Clark*, 319 Fed.Appx. 46, 48–49 (2d Cir. 2009); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir.1998); *United States v. Gaudet*, 966 F.2d 959, 962 (5th Cir. 1992). However, in *United States v. Baldwin*, 414 F.3d 791, 795–96 n.2 (7th Cir. 2005), the court noted that the Seventh Circuit had taken a different approach. Noting that the defendant raising a statute of limitations defense for the first time on appeal was entitled "at best" to review for plain error, the court explained:

> We say "at best" because there is an argument, not made by the government, that under Fed. R. Crim. P. 12(b)(3) Baldwin has waived and not merely forfeited his statute of limitations defense. Rule 12(b)(3) specifies motions that must be made before trial; the rule includes motions "alleging a defect in instituting the prosecution" or "a defect in the indictment or information." Rule 12(e) provides that matters covered by Rule 12(b)(3) that are not raised by the pretrial motion deadline set by the court are waived, subject to the district court's authority to grant relief from the waiver "[f]or good cause." Other circuits apply Rules 12(b)(3) and the waiver rule of (e) to statute of limitations arguments. *United States v. Ramirez*, 324 F.3d 1225, 1228-29 (11th Cir.2003); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir.1987). In this circuit, statute of limitations arguments not timely raised in the district court are considered forfeited, not waived, and are accorded plain-error review. United States v. Ross, 77 F.3d 1525, 1536 (7th Cir. 1996). The holding in *Ross* is premised upon certain language in the advisory committee note to Rule 12(b) suggesting that a statute of limitations defense is among those matters that *may*, not *must*, be raised by pretrial motion." Id. *The government has not argued that Ross should be revisited in light of the clear text of the rule and the apparent conflict with other circuits*; the government cited *Ross* for the proposition that Baldwin's statute of limitations argument should be considered forfeited and reviewed for plain error.

Id. (emphasis added). In contrast, concluding that "the plain language of Rule 12 dictates that defenses based upon the sufficiency of the indictment must be brought before trial," the Eleventh Circuit rejected the argument that the advisory committee note permits statute of limitations

clarity and provide guidance to litigants, the proposed rule lists the more common claims that fall into these two general categories, using the word "including" to make it clear that the lists are not exhaustive.[33] The Advisory Committee attempted to draft these lists broadly, to include all of the common claims that courts have found to be included in these general categories. If the proposed amendment is approved for publication, the lists might be expanded or trimmed on the basis of public comments.

In response to a comment at the January 2011 meeting of the Standing Committee, the Advisory Committee deleted the defense of "outrageous government conduct" from the list in Rule 12(b)(3)(A) because one circuit has held that the defense "does not exist." See *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995). Identification of the defense on the list of "defects in the institution of the prosecution" might imply that the defense does exist, despite case law to the contrary. Although the Seventh Circuit appears to be the only circuit that has flatly held that the defense of outrageous government conduct does not exist, other circuits have expressed doubt about the continued vitality

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defenses to be raised after trial begins. *United States v. Ramirez*, 324 F.3d 1225, 1227 n.6 (11th Cir. 2003).

Relying on the fourth prong of the *Olano* test, the court in *Baldwin* found no plain error and denied relief because the sentence for the allegedly time-barred charge was to run concurrently to a non-barred sentence and the government had missed the statute of limitations by only one day. 414 F.3d at 795–96. In *United States v. Parker*, 508 F.3d 434, 435 (7th Cir. 2007), the Seventh Circuit overruled *Baldwin* insofar as it held that concurrent sentences could not constitute plain error, but the court has not revisited the other issues concerning the statute of limitations discussed in *Baldwin*.

[33]The proposal includes "a violation of the constitutional right to Speedy Trial" as one of the defects in the institution of a prosecution that must be raised before trial under (b)(3)(A). *See, e.g., United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995). The Advisory Committee did not include statutory speedy trial violations because the Speedy Trial Act already specifies that a defendant must raise any claim under the act before trial. *See* 18 U.S.C. § 3162(a)(2).

of the defense or recognized but discouraged it. And there are few — if any — cases in which the courts have granted relief on this basis.[34] Under these circumstances, the Advisory Committee concluded it would be prudent to delete the defense from (b)(3)(A). Because the list is illustrative and not exhaustive, failure to list the outrageous government conduct defense would not suggest a position one way or the other on its continued viability. Inclusion, on the other hand, might generate opposition on the ground that it would imply the defense is viable.

4. The Availability Requirement

As a general rule, the types of claims and defenses subject to Rule 12(b)(3) will be available before trial and they can – and should – be resolved then. Except for jurisdictional errors, the proposal brings virtually all claims and defenses within subdivision (b)(3), which requires that they be raised by motion before trial. It provides that if (b)(3) claims and defenses – other than failure to state an offense and double jeopardy – are not raised before trial they are "untimely" and subject to further review only upon a showing of cause and prejudice.[35]

The Advisory Committee recognized, however, that in some exceptional cases, it may not be possible to raise particular claims that fall within the general categories subject to Rule 12(b)(3). If the basis for the motion was not available to a party before trial, some courts conclude the claim is not affected by Rule 12 and need not have been raised before trial.[36] Others conclude that the claim is

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[34]*See, e.g., United States v Luisi*, 482 F.3d 43, 59 (1st Cir. 2007) ("The outrageousness doctrine permits dismissal of criminal charges only in those very rare instances when the government's misconduct is so appalling and egregious as to violate due process by 'shocking ... the universal sense of justice.' While the doctrine is often invoked by criminal defendants, it has never yet been successful in this circuit.") (citations omitted).

[35]As discussed more fully in the Part E (text accompanying notes 25-28), claims of failure to state an offense and double jeopardy are subject to review if "prejudice" can be established.

[36]Decisions finding no waiver when ground for claim was not available before trial include *United States v. Sturdivant*, 244 F.3d 71, 76 (2d Cir. 2001) (". . . we will not find a defendant has waived a duplicity argument where the claimed defect in the indictment was not apparent on its face at the institution of the proceeding"); *United States v. Coiro*, 922 F.2d 1008, 1013 (2d Cir. 1991) (multiplicity challenge not waived when neither nature of defendant's conduct nor fact that counts charged same conduct was evident from face of indictment, and could only be known upon the

waived under Rule 12, but that there was good cause for not raising it earlier.[37] The Advisory Committee concluded that (1) the failure to raise a claim one could not have raised should never be considered waiver and (2) it would be desirable to make this point explicit in the rule rather than assuming that the courts that do not already exempt such claims from the requirements of (b)(3) will

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receipt of evidence); *United States v. Collins*, 372 F.3d 629, 632–633 (4th Cir. 2004) (if an indictment properly alleges venue, but the proof at trial fails to support the venue allegation, an objection to venue can be raised at the close of the evidence; a defendant does not waive venue unless the indictment clearly reveals the venue defect but the defendant fails to object); *United States v. Zalapa*, 509 F.3d 1060 (9th Cir. 2007) (by failing to object to the indictment before pleading guilty, defendant waived any objection to the form of the indictment but did not waive his right to object to his sentences and convictions as multiplicitous on appeal). *Cf. United States v. Pitt*, 193 F.3d 751, 760–761 (3d Cir. 1999) (defense of outrageous government conduct must be raised pretrial unless the evidence supporting the claim is not known to the defendant prior to trial).

[37]Decisions treating unavailability of grounds as "good cause" affording relief from waiver include *United States v. Anderson*, 472 F.3d 662, 668–670 (9th Cir. 2006) (granting relief from waiver for pro se defendant who had no access to translated copy of Costa Rican extradition order until after deadline set by the district court for pretrial motions); *United States v. Madeoy*, 912 F.2d 1486, 1490–91 (D.C. Cir. 1990) (noting in dicta that a defendant who receives Jencks Act material only after his trial has begun, and is thus first apprised of the facts upon which his motion to dismiss the indictment is based, may be in a position to argue good cause for his failure to have moved for dismissal prior to trial); *United States v. Chavez*, 902 F.2d 259 (4th Cir. 1990) (concluding trial court abused its discretion in denying defendant's request to file for suppression hearing out of time where request was made almost two weeks prior to trial and one day after defense counsel received grand-jury transcript that revealed answer to inquiry that defendant had unsuccessfully made at preliminary hearing); *United States v. Roberts*, 2009 WL 2960409 (E.D. Tenn. Sept. 9, 2009) (recognizing good cause when discovery materials not previously available to the defendants are uncovered). *Cf. United States v. Cameron*, 729 F.Supp.2d 418, 419–21 (D.Me. 2010) (finding cause when newly appointed counsel uncovered a potentially serious and dispositive Fourth Amendment violation that "only beg[an] to receive legal attention" after the deadline has passed"); *United States v. Slay*, 673 F.Supp. 336, 342, (E.D. Mo. 1987) (good cause shown when a subsequent Supreme Court decision after trial but before sentencing for the first time provided a basis for challenging intangible rights theory of indictment).

recognize that it is contained within the concept of "good cause." Accordingly, the Advisory Committee added the language that limits the requirement that defenses, objections, and claims "must" be raised before trial to those in which "the basis for the motion is then reasonably available . . . ." This standard is intended to be similar to that of the Jury Selection and Service Act, which requires claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence." 28 U.S.C. § 1867(a) & (b).

The addition of this language means that if a party raises an issue governed by Rule 12(b)(3) at any time after the trial has begun, the first step in the analysis should be to determine whether the basis for raising the issue was "reasonably available" before trial to the party who wishes to raise it (and the second step, discussed below, would be to determine whether it would have been possible for the court to resolve the issue at that time, before trial). For example, Rule 12(b)(3)(A) requires that a defect in the prosecution ordinarily be raised before trial. If, however, in a particular case the information necessary to raise such a defect first becomes "available" during the trial, the defendant's failure to raise the issue earlier would not be considered untimely under the Rule. Similarly, Rule 12(b)(3)(C) requires suppression motions to be made before trial, but the proposal would provide that the rule is applicable only if the basis for a motion to suppress was "reasonably available" before trial.

5. The Capable-of-Determination-Without-Trial Requirement

The Advisory Committee was also concerned that parties not be encouraged to raise (or punished for not raising) claims that depend on factual development at trial. Presently (b)(2) accomplishes this by the negative implication that issues that depend on a trial "of the general issue" may not be raised prior to trial. The Advisory Committee's proposal shifts this requirement to the introductory language of (b)(3), which provides that only those issues which can be determined "without a trial on the merits" "must be raised by motion before trial," and if not so raised are subject to cause and prejudice analysis (or "prejudice only" for failure to state an offense and double jeopardy). Recognizing that the Rule's language "determine without a trial of the general issue" has a well-settled meaning, specifically that trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the motion,[38] the Advisory Committee

[38]*E.g., Serfass v. United States*, 420 U.S. 377, 389 (1975) (citing *United States v. Covington*, 395 U.S. 57, 60 (1969)); *United States v. Sisson*, 399 U.S. 267, 302 & n. 56 (1970) (plurality opinion) ("We think a defense to a pre-induction suit based on conscientious objections that require factual determinations is so intertwined with the general issue that it must be tried with the general issue.

substituted the modern phrase "trial on the merits" for the more archaic phrase "trial of the general issue" now found in (b)(2). No change in meaning is intended.

6. Reorganization

At the January 2011 meeting, Professor Joseph Kimble, our style consultant, urged the Advisory Committee to use the proposed amendment to solve an organizational problem in the current rule. At present, the organization of the subdivisions separates the provisions requiring certain motions to be made before trial and the deadline for those motions (which are now in subdivisions (b) and (c)) from the provision governing the consequences of failure to file a timely motion (which is found in subdivision (e)). Professor Kimble noted that subdivision (d) (Ruling on a Motion) interrupts the logical sequence and makes it more difficult to find the critical provisions on the consequences of failure to file in a timely fashion.

The Advisory Committee accepted Professor Kimble's suggestion that it relocate the provision governing the "Consequences of Not Making a Timely Motion" to subdivision (c), so that it would address both the deadline for pretrial motions and the consequences for failure to meet this deadline. The Advisory Committee agreed that this was the logical placement of the provisions, and it concluded that there were also advantages to the reorganization. In general, the Advisory Committee thought that it was important not to renumber (reletter) the provisions of Rule 12. In this case, however, the provisions now found in Rule 12(e) are being significantly changed to eliminate the word "waiver" and add a new provision concerning failure-to-state-an-offense and double jeopardy claims. Researchers will be able easily to determine whether a case was decided under the older version of the rule if the court applies Rule 12(e) rather than Rule 12(c)(2). The proposed amendment avoids the need to renumber the later subdivisions of the rule any future confusion by reserving subdivision (e).

7. Conforming Amendment to Rule 34

. . . A defense is thus 'capable of determination' if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense. Rule 12(b)(4) allows the District Court in its discretion to postpone determination of the motion to trial, and permits factual hearings prior to trial if necessary to resolve issues of fact peculiar to the motion.").

If the Advisory Committee's proposal is approved, it will revive the need for the conforming amendment to Rule 34 (included below) that was approved by the Advisory Committee.

APPENDIX

Because the proposed amendment to Rule 12 has a lengthy history, and has already been twice presented to the Standing Committee, we set forth in this Appendix more fully the legal research we undertook during the course of our deliberations. Both the Advisory Committee's current proposal, and the earlier versions reviewed by the Standing Committee in January 2011, and also in June 2009, are discussed to permit comparison and facilitate review.

The 2009 proposal

The Advisory Committee's original proposal, presented to the Standing Committee in June 2009, was narrowly drafted to respond to the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002). *Cotton* held that an indictment's failure to state an offense does not deprive the court of its jurisdiction. In 2006, in the wake of *Cotton*, the Department of Justice asked the Advisory Committee to consider amending Rule 12(b)(3)(B) to require defendants to raise *before trial* any objection that the indictment failed to state an offense by eliminating the provision that required review of such a claim even when raised for the first time after conviction. The proposed amendment to Rule 12(b) made two related changes. First, it amended Rule 12(b)(3)(B) to add failure to state an offense to the list of requests, defenses, and objections that must be raised prior to trial. Second, it provided for the consequence of failure to raise the objection as required by the amended rule. Under Rule 12(e), claims not raised in timely fashion under (b)(3)(B) are "waived," but for "good cause, the court may grant relief from the waiver." The Advisory Committee deemed that standard too strict for failure to state an offense, and proposed amending Rule 12(e) to allow such claims to be considered, even if not raised prior to trial, if the failure to state an offense "has prejudiced a substantial right of the defendant."

The Standing Committee remanded the proposed amendment to the Advisory Committee for further study on two points: (1) the concepts of "waiver" (the term used in Rule 12(e)) and "forfeiture" (the term used in the Supreme Court's decision in *Cotton*); and (2) how Rule 12 interacted with Rule 52.

The January 2011 proposal

Responding to the Standing Committee's concerns, the Advisory Committee redrafted the proposed amendment to Rule 12, this time attempting to clarify exactly which sorts of claims must be raised, and when a claim was considered "waived" under the rule.

To address the confusion in the courts over whether Rule 52(b) plain error review applied and when, the proposed amendment (1) expressly designated plain error review under Rule 52(b) as the standard for obtaining relief for three specific claims (failure to state an offense, double jeopardy, and statute of limitations) under a new subsection entitled "forfeiture," and (2) left in place the "good cause" standard already applied to all other untimely claims, changing the language to "cause and prejudice" to reflect the Supreme Court's interpretation of the "good cause" standard, and moving this into a separate subsection entitled "waiver."

At its January 2011 meeting, the Standing Committee expressed general approval of the Advisory Committee's approach of specifying the types of motions falling within the various categories of Rule 12(b)(3). But the proposal was remanded once again to allow the Advisory Committee to consider several concerns. First, some members expressed concern that the Rule continued to employ the term "waiver" to mean something other than deliberate and knowing relinquishment. Second, some members were concerned that requiring a defendant to show plain error under Rule 52 could be even more difficult than showing "cause and prejudice." If so, the proposed amendment would not create a more generous review standard for three favored claims. Third, concern was expressed about the inclusion of the defense of "outrageous government conduct." And finally, the Reporters were also urged to consider some reorganization.

A. SUPREME COURT PRECEDENT ON THE REVIEW OF LATE-RAISED ERROR

1. Consideration of error "waived" under Rule 12: The Supreme Court's standard.

Rule 12(e), subtitled "Waiver of a Defense, Objection, or Request," presently provides: "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."

The Court has addressed this provision limiting the review of claims not raised in accordance with Rule 12(b) in two cases: *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963), and *Davis v. United States*, 411 U.S. 233 (1973). Because these cases are critical to some of the Advisory Committee's proposed changes to Rule 12, and because there is so much disagreement about the meaning of Rule 12(e), it is useful to set out in some detail the Court's discussion of this aspect of Rule 12 in each case.

In *Shotwell*, the defendants' direct appeal was remanded to the trial court for fact finding.[39] While on remand in the trial court, the defendants challenged jury selection for the first time. The district court, and then the court of appeals, found that consideration of the claim was barred by Rule 12 because the defendants had failed to show a reason that would excuse a delay of four years after a conviction before raising their jury claims, and also found no prejudice from any error.[40] In the Supreme Court, the defendants argued that it was improper for the courts below to have considered

[39]During the pendency of the petition for certiorari the Supreme Court granted the motion of the Solicitor General to remand the case to the District Court for further proceedings on the suppression issue. The District Court again denied suppression and also denied motions for a new trial and overruled challenges to the original grand and petit jury arrays, which had been brought for the first time during the remand. 371 U.S. 341, 344–45.

[40]The court of appeals described the rulings below as follows (287 F.2d 667, 673):

> In denying the motions, which ruling defendants now say was erroneous, the district court held that defendants "failed to establish any sufficient grounds which (would) justify the granting of relief from the waiver." However, exhibiting an extraordinary desire to cover all points, he then found that the jurors. . . possessed the necessary legal qualifications [,] . . .that no one was excluded because of race, color, economic status, political conviction, geographical location, religious beliefs or social status, and [the use of volunteers was not unconstitutional]. Inasmuch as defendants have not shown that these findings are without support in the record or that they were actually prejudiced by the method by which the jurors were selected, we hold that their motions were properly denied.

prejudice as well as cause under Rule 12. The Supreme Court rejected this argument.[41] The Court stated:

> . . . In denying the motions the District Court found that the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial. The same method of selecting jurors in the district had been followed by the clerk and the jury commissioner for years. Inquiry as to the system employed could have been made at any time. . . .
>
> Finally, *both courts below* have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the juries. Nor do petitioners point to any resulting prejudice. In *Ballard* it was said that 'reversible error does not depend on a showing of prejudice in an individual case.' However, where, as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), *it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule."*
>
> We need express no opinion on the propriety of the practices attacked. It is enough to say that we find no error in the two lower courts' holding that the objection has been lost.

371 U.S. at 364 (emphasis added; footnote and citations omitted).

In *Davis*, a decade later, the Supreme Court took on the task of defining the conditions under which a court may review the merits of a claim raised in an application for relief under 28 U.S.C. § 2255, when that claim should have been raised in the district court before trial under Rule 12. The Court explained:

> *Shotwell* held that a claim of unconstitutional grand jury composition raised four years after conviction, but while the appeal proceedings were still alive, was governed by Rule 12(b)(2). Both the reasons for the Rule and the normal rules of statutory construction clearly indicate

[41]As Justice Brennan later wrote, the Court in *Shotwell* "construed the cause exception to Rule12(b)(2) as encompassing an inquiry into prejudice." *United States v. Frady*, 456 U.S. 152, 185 (1982) (Brennan, J., dissenting).

> that no more lenient standard of waiver should apply to a claim raised three years after conviction simply because the claim is asserted by way of collateral attack rather than in the criminal proceeding itself.
>
> The waiver provisions of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.
>
> Rule 12(b)(2) promulgated by this Court and, pursuant to 18 U.S.C. § 3771, 'adopted' by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived. . . . But Congress did not deal with the question of waiver in the federal collateral relief statutes . . . . We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, *either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires.* We therefore hold that the waiver standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review.

411 U.S. at 241–42 (emphasis added).

The Court has never questioned the interpretations announced in *Shotwell* and *Davis,* even though it has mentioned Rule 12 in several cases. Later decisions have reiterated both key points

about the standard for reviewing error "waived" under Rule 12: First, the standard is "cause and prejudice,"[42] and second, that standard applies on direct appeal as well as in the district court.[43]

2. **Olano** *and the development of plain error review under Rule 52(b) for unraised errors; confusion about the meaning of "waiver" under Rule 52.*

The Supreme Court has used the term "waiver" to refer to both deliberate relinquishment and what is commonly considered forfeiture.[44] But in 1993, in the course of interpreting Rule 52(b), the

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[42]*See Murray v. Carrier*, 477 U.S. 478, 494 (1986) ("the former Rule 12(b)(2) . . . as interpreted in [*Shotwell* and *Davis*] treated prejudice as a component of the inquiry into whether there was cause for noncompliance with that rule"); *United States v. Frady*, 456 U.S. 152, 185 (Brennan, J., dissenting) (stating that the Court in *Shotwell* "construed the cause exception to Rule12(b)(2) as encompassing an inquiry into prejudice.").

[43]Consider *Wainwright v. Sykes*, 433 U.S. 72, 84 (1986), where the Court described its decision in *Davis* this way (emphasis added):

> We noted that the Rule "promulgated by this Court and, pursuant to 18 U.S.C. § 3771, 'adopted' by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived," . . . and held that this standard contained in the Rule, rather than the *Fay v. Noia* concept of waiver, should pertain in federal habeas *as on direct review*. Referring to previous constructions of Rule 12(b)(2), we concluded that review of the claim should be barred on habeas, *as on direct appeal*, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.

[44]For example, in *Peretz v. United States*, 501 U.S. 923, 936 (1991), the Court stated:

> The most basic rights of criminal defendants are similarly subject to waiver. See, *e.g.*, *United States v. Gagnon*, 470 U.S. 522, 528, 105 S. Ct. 1482, 1485, 84 L.Ed.2d 486 (1985) (absence of objection constitutes waiver of right to be present at all stages of criminal trial); *Levine v. United States*, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L.Ed.2d 989 (1960) (failure to object to closing of courtroom is waiver of right to public trial); *Segurola v. United States*, 275 U.S. 106, 111, 48 S. Ct. 77, 79, 72 L.Ed. 186 (1927) (failure to object constitutes waiver of Fourth Amendment right against unlawful search and seizure); *United States v. Figueroa*, 818 F.2d 1020, 1025 (CA1 1987) (failure to object results in forfeiture of claim of unlawful

Court in *Olano* addressed the differences between the concepts of "waiver" and "forfeiture," and announced that plain error review applies only to error "forfeited," and not to error that is "waived." The Court stated:

> The first limitation on appellate authority under Rule 52(b) is that there indeed be an "error." Deviation from a legal rule is "error" unless the rule has been waived. For example, . . . [b]ecause the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that right, his conviction without a trial is not "error."
>
> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst,* 304 U.S. 458 (1938); see, *e.g., Freytag v. Commissioner,* 501 U.S. 868, 894, n. 2 (1991) (SCALIA, J., concurring in part and concurring in judgment) (distinguishing between "waiver" and "forfeiture"); . . . Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. . . . Mere forfeiture, as opposed to waiver, does not extinguish an "error" under Rule 52(b). Although in theory it could be argued that "[i]f the question was not presented to the trial court no error was committed by the trial court, hence there is nothing to review," . . . this is not the theory that Rule 52(b) adopts. If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then

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postarrest delay); *United States v. Bascaro,* 742 F.2d 1335, 1365 (CA11 1984) (absence of objection is waiver of double jeopardy defense), *cert. denied sub nom. Hobson v. United States,* 472 U.S. 1017, 105 S. Ct. 3476, 87 L.Ed.2d 613 (1985); *United States v. Coleman,* 707 F.2d 374, 376 (CA9) (failure to object constitutes waiver of Fifth Amendment claim), *cert. denied,* 464 U.S. 854, 104 S. Ct. 171, 78 L.Ed.2d 154 (1983). *See generally Yakus v. U.S.,* 321 U.S. 414, 444, 64 S. Ct. 660, 677, 88 L.Ed. 834 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right"). Just as the Constitution affords no protection to a defendant who waives these fundamental rights, so it gives no assistance to a defendant who fails to demand the presence of an Article III judge at the selection of his jury.

> there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection.

Olano, 507 U.S. 725, 733–34 (1993) (citations to law reviews and treatise omitted).

This paradigm meaning for the term "waiver"—as intentional relinquishment—is different than the meaning assigned to the very same term in Rule 12 by the Court in *Shotwell* and *Davis*.[45] Although the Court never mentioned Rule 12 in *Olano* or in *any* of the cases involving plain error that have followed *Olano*,[46] courts of appeals have become divided over the relationship between Rule 12 and Rule 52, particularly for claims that are raised for the first time on appeal.[47]

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[45]Even in *Olano* itself, the Court seemed to recognize that not all waivers will fit this paradigm. As the Tenth Circuit noted in United States v. Burke, 633 F.3d 984, 991 (10th Cir. 2011):

> [I]n *Gonzalez v. United States*, 553 U.S. 242, 128 S. Ct. 1765, 170 L.Ed.2d 616 (2008), the Court recognized defendants could waive certain rights (i.e., what arguments to pursue, what evidentiary objections to raise, and what stipulations to make regarding the admission of evidence) without doing so knowingly and voluntarily. *Id.* at 248–49, 128 S. Ct. 1765. Even *Olano* itself stated, "[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." 507 U.S. at 733, 113 S. Ct. 1770.

[46]*United States v. Marcus*, 130 S. Ct. 2159 (2010); *Puckett v. United States*, 129 S. Ct. 1423 (2009); *United States v. Dominguez Benitez*, 542 U.S. 74 (2004); *Nguyen v. United States*, 539 U.S. 69 (2003); *United States v. Cotton*, 535 U.S. 625 (2002); *United States v. Vonn*, 535 U.S. 55 (2002); *Jones v. United States*, 527 U.S. 373 (1999); *Johnson v. United States*, 520 U.S. 461 (1997).

[47]Although *Olano* appears to have aggravated the disparity in approaches in the courts of appeals, the differential treatment was evident even prior to *Olano*. Many courts of appeals applied Rule 12's "good cause" exception to claims raised for the first time on appeal and thus "waived" under the terms of the Rule, demanding both cause and prejudice be shown before considering an untimely claim. *E.g., United States v. Coppola*, 526 F.2d 764, 773 (10th Cir. 1975) (refusing to grant an exception to waiver of claim of unauthorized prosecutor on appeal when defendant failed to demonstrate good cause for non-compliance with Rule 12(b), and "In neither his opening brief nor

B. COURT OF APPEALS INTERPRETATIONS TODAY: WHICH STANDARD APPLIES?

Courts of appeals[48] evaluating claims raised for the first time on appeal[49] that should have

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in his reply brief, [did] appellant indicate how he may have been prejudiced by the special attorney's appearance before the grand jury"). Other approaches were used as well, sometimes in the same circuit. *Compare United States v. Simone*, 931 F.2d 1186, 1192 (7th Cir. 1991) (grant relief from waiver only if cause is shown, and, in addition, the defendant establishes plain error) *with United States v. Gio*, 7 F.3d 1279, 1284-85 (7th Cir. 1993) (use plain error review if cause can not be established) and *with United States v. Griffin*, 765 F.2d 677, 682 (7th Cir. 1985) (find claim waived and that plain error did not apply, reasoning that *Frady* "bars Griffin from arguing that the plain error standard of Fed. R. Crim. P. 52(b) should govern the question of whether he waived his right to challenge his allegedly multiplicitous indictment").

[48]Although Rule 52 is regularly applied by trial courts, particularly when a claim is raised in a motion for new trial, trial courts generally require "good cause," applying some version of the Rule 12 exception, regardless of whether the claim is raised prior to trial but after the deadline for pretrial motions, during trial, or in a post-conviction motion for new trial.

[49]The diverging approaches appear most pronounced when courts of appeals review claims raised for the first time on appeal. Before and after *Olano*, courts of appeals have generally reviewed *district court decisions* to grant or deny relief from waiver using the abuse of discretion standard. *See e.g*, *United States v. Sobin*, 56 F.3d 1423, 1427 (D.C. Cir. 1995) (upholding denial of untimely suppression motion filed day of trial); *United States v. Madeoy*, 912 F.2d 1486, 1491 (D.C. Cir. 1990) ("Because we find that the appellants have shown neither cause for the untimeliness of their motion, nor actual prejudice from its denial, we conclude that the district court did not abuse its discretion in refusing to relieve them from their waiver of the right to challenge their indictment"); *United States v. Rodriguez-Lozada*, 558 F.3d 29, 37–38 (1st Cir.) (not abuse of discretion to deny suppression motion as untimely when filed during trial), *cert. denied sub nom. Rivera-Garcia v. United States*, 130 S. Ct. 283 (2009); *United States v. Gomez-Benabe*, 985 F.2d 607, 611 (1st Cir. 1993) (no abuse of discretion to reject as waived late motion to suppress); *United States v. Mendoza-Acevedo*, 950 F.2d 1, 3 (1st Cir. 1991) (suppression not raised until the fifth day of trial was waived when record shows no reason for the delay that would have permitted the court to grant relief from the waiver, noting relief under Rule 12(f) should be granted only upon showing of cause and prejudice); *United States v. Kopp*, 562 F.3d 141, 143 (2d Cir.) (no abuse of discretion to deny

been filed before trial under Rule 12 have disagreed about how to review such claims. Part of the difficulty is reconciling the command in *Olano* that Rule 52 applies unless there is true "waiver"by

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untimely motion to suppress when defendant has failed to show cause and prejudice), *cert. denied*, 130 S. Ct. 529 (2009); *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995) (no abuse of discretion for trial court to deny motion to dismiss based on violation of constitutional speedy trial rights brought after conviction when no cause demonstrated); *United States v. Nunez-Rios*, 622 F.2d 1093, 1098–99 (2d Cir. 1980) (denying defense of outrageous governmental conduct affirmed, this "should normally be raised prior to trial, so that the trial court can conduct a hearing with respect to any disputed issues of fact. . . [b]y failing to raise this issue prior to trial, [defendant] waived the right to assert it on appeal); *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 744-45 (3d Cir. 1979) (affirming district court's denial of late filed motion to strike, when no cause shown for delay); *United States v. Ferguson*, 778 F.2d 1017, 1019-20 (4th Cir. 1985) (no abuse of discretion in denying severance motion raised after closing arguments based on new theory when no cause or prejudice shown); *United States v. Payne*, 341 F.3d 393, 402-03 (5th Cir. 2003) (no abuse of discretion to refuse relief from waiver of duplicity objection); *United States v. Hirschhorn*, 649 F.2d 360, 364 (5th Cir. 1981) (denial of suppression motion filed two days before trial as waived not abuse of discretion when no prejudice shown); *United States v. Blair*, 214 F.3d 690, 699–701 (6th Cir. 2000) (district court properly denied late constitutional challenge to grand jury composition); *United States v. Trobee*, 551 F.3d 835, 838 (8th Cir.) (denial of tardy suppression motion not abuse of discretion), *cert. denied*, 130 S. Ct. 279 (2009); *United States v. Bloate*, 534 F.3d 893, 901 (8th Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1345 (2008) (denial of motion as untimely was not abuse of discretion when no cause shown); *United States v. Moore*, 98 F.3d 347, 351 (8th Cir. 1996) (denial of late suppression motion not abuse of discretion); *United States v. Tekle*, 329 F.3d 1108, 1112 (9th Cir. 2003); *United States v. Vasquez*, 2011 WL 1533495, at *3 (10th Cir. April 25, 2011) (no abuse of discretion to find late suppression claim waived); *United States v. Salom*, 349 Fed.Appx. 409, 411 (11th Cir.) (district court did not abuse its discretion by denying motion as untimely, defendant had not shown cause), *cert. denied*, 130 S. Ct. 2130 (2009).

For cases finding that a district court had abused its discretion, see *United States v. Crowley*, 236 F.3d 104, 110 (2d Cir. 2000) (error for district court to grant relief from waiver of challenge to specificity of indictment when no cause shown); *United States v. Chavez*, 902 F.2d 259 (4th Cir. 1990) (error for court to reject cause); *United States v. Salahuddin*, 509 F.3d 858 (7th Cir. 2007) (same).

intentional relinquishment, with the command in Rule 12 that says claims are "waived" whenever they are raised late. Four basic approaches have emerged.

1. ***Consider the claim if the defendant can meet the Rule 12 exception for "good cause"***

The courts of appeals for eight circuits—D.C.,[50] Second,[51] Third, [52] Fourth,[53] Sixth,[54]

[50]*See United States v. Hemphill*, 514 F.3d 1350, 1365 (D.C. Cir. 2008) (challenge to flawed ground in indictment was waived absent showing of cause, citing *Weathers*); *United States v. Burroughs*, 161 Fed. Appx. 13, 14 (D.C. Cir. 2005) (venue claim raised for first time on appeal waived when defendant failed to show "good cause" for his failure to raise objection on time); *United States v. Mathis*, 216 F.3d 18 (D.C. Cir. 2000) (duplicity challenge to indictment waived, citing *Weathers*); *United States v. Weathers*, 186 F.3d 948, 955 (D.C. Cir. 1999) (multiplicity challenge to indictment waived absent showing of cause and prejudice, noting "We cannot conclude that the Court intended *Olano*, a case which mentioned neither Rule 12 nor *Davis*, to overrule *Davis* by redefining sub silentio the meaning of the word "waiver" in Rule 12"). For a case finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Hewlett*, 395 F.3d 458, 460–461 (D.C. Cir. 2005) (suppression issue not raised was waived); *United States v. Gaviria*, 116 F.3d 1498, 1517 n. 22 (D.C. Cir. 1997) (venue challenge waived).

[51]*See United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003) (rejecting plain error review and stating, "we will find complete waiver of a suppression argument that was made in an untimely fashion before the district court unless there is a showing of cause").

[52]*See United States v. Rose*, 538 F.3d 175, 177–83 (3d Cir. 2008) (suppression issues raised for the first time on appeal are waived absent good cause under Rule 12, concluding, after lengthy analysis, "Though each of Rule 52(b) and Rule 12 appears applicable when read alone, when considered together we believe Rule 12's waiver provision must prevail."); *United States v. Pitt*, 193 F.3d 751, 759–61 (3d Cir. 1999) (failure to raise before trial waived claim of outrageous governmental conduct, where defendant made no showing of cause or prejudice).

[53] *See United States v. Richardson*, 276 Fed. Appx. 320, 323 (4th Cir. 2008) (per curiam) ("Because Richardson failed to raise the issue of suppression based on invalid search prior to or during trial, and he does not allege cause for his failure to do so, we find he has waived his right to raise the issue on appeal"); *United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004) (failure to object to venue before trial waives claim); *United States v. Colton*, 231 F.3d 890, 909 (4th Cir. 2000) (failure to object to a count on grounds of multiplicity prior to trial waives objection, unless party can demonstrate cause for the failure to object and actual prejudice resulting from the defect). For a case finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Whorley*, 550 F.3d 326, 337 (4th Cir. 2008) (suppression argument waived), *cert. denied*, 130 S. Ct. 1052 (2010).

Ninth,[55] Tenth,[56] and Eleventh[57]—have stated that they will not consider a claim first raised on

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[54]*See United States v. Auston*, 355 Fed. Appx. 919, 922–24 (6th Cir. 2009) (new basis for venue challenge raised for the first time on appeal waived, no cause shown), *cert. denied*, 130 S. Ct. 1558 (2010); *United States v. Collier*, 246 Fed. Appx. 321, 334–36 (6th Cir. 2007) (rejecting plain error review finding suppression challenge not raised below waived, "record reflects no attempt on Defendant's part to demonstrate good cause before the district court, or even to assert these challenges during trial. Nor does Defendant's *brief on appeal* address or explain his Rule 12(e) waiver. Accordingly, Defendant's "omission below to make a facial showing of the 'good cause' required" by Rule 12(e) precludes our review"). For a case finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Deitz*, 577 F.3d 672 (6th Cir. 2009) (severance objection waived), *cert. denied*, 130 S. Ct. 1720 (2010); *United States v. Brown*, 498 F.3d 523, 528 (6th Cir. 2007) (delayed indictment claim waived); *United States v. Neumann*, 887 F.2d 880, 885–86 (8th Cir. 1989) (en banc) (suppression issue waived); *United States v. Abboud*, 438 F.3d 554, 567–68 (6th Cir. 2006) (suppression argument waived); *United States v. Hamilton*, 263 F.3d 645, 655 (6th Cir. 2001) (*Miranda* claim waived).

[55]*See United States v. Anderson*, 472 F.3d 662, 668–669 (9th Cir. 2006) (granting relief from waiver of challenge based on dual criminality and speciality, remanding issue to district court); *United States v. Technic Services*, 314 F.3d 1031, 1039 (9th Cir. 2002) (duplicity challenge waived, noting defendant do not argue that they had cause), *overruled on other grounds, United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010); *United States v. Wright*, 215 F.3d 1020, 1026–27 (9th Cir. 2000) (defendant "waived any dispute about the legality of his arrest and placed the issue beyond this court's ability to review for plain error" and has "advanced no cause for failing to first raise his illegal arrest claim to the district court in a pre-trial suppression motion"). For cases finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Mausali*, 590 F.3d 1077, 1081 (9th Cir.) (severance motion waived), *cert. denied*, 131 S. Ct. 342 (2010); *United States v. Kahlon*, 38 F.3d 467, 469 (9th Cir. 1994) (failure to raise grand jury defects before trial results in waiver); *United States v. Klinger*, 128 F.3d 705, 708 (9th Cir. 1997) (duplicity and multiplicity challenges to the indictments waived).

[56]*United States v. Burke*, 633 F.3d 984, 988–89 (10th Cir. 2011) (suppression argument waived, noting defendant made no effort to demonstrate cause, nor does impediment to timely filing appear in record, rejecting plain error review), *cert. denied*, 2011 U.S. LEXIS 2907 (U.S. April 18, 2011); *United States v. Schneider*, 594 F.3d 1219, 1228 n.9 (10th Cir. 2010) (duplicitous indictment not raised until appeal, waived, unless good cause can be shown); *United States v. Haber*, 251 F.3d 881,

appeal that should have been raised before trial under Rule 12 unless the defendant can meet the Rule 12 exception for "good cause;" they do not apply plain error review.[58]

888-89 (10th Cir. 2001) (duplicity argument waived, no cause shown). For cases finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Rodriguez-Chavez*, 291 Fed. Appx. 915, 917 n.1 (10th Cir. 2008) (argument that indictment was ambiguous was waived); *United States v. Dirden*, 38 F.3d 1131, 1139 n. 10 (10th Cir.1994) (suppression issue waived).

[57]*United States v. Suescun*, 237 F.3d 1284, 1286–87 (11th Cir. 2001) (challenge to authority of prosecutor was required to be presented prior to trial under Rule 12 and defendant has not "asked us to grant relief from the waiver"). For cases finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Nix*, 438 F.3d 1284, 1288 (11th Cir. 2006) (suppression motion waived); *United States v. Dabbs*, 134 F.3d 1071, 1078 (11th Cir. 1998) (venue objection waived).

[58]The Fifth Circuit also has decisions following this approach. *See United States v. St. Martin*, 119 Fed. Appx. 645, 649–650 (5th Cir. 2005) (joinder and severance objections waived, and need not be addressed, when defendant does not provide any excuse for her failure to raise these objections before trial); United States v. Mann, 161 F.3d 840, 862 (5th Cir. 1998) (appellants failed to show cause, severance argument waived). More decisions from the Fifth Circuit appear to take a different approach. *See* note 62 *infra*.

The Seventh Circuit, too, has many decisions following the majority approach. *United States v. Quintanilla*, 218 F.3d 674, 678-79 (7th Cir. 2000) ("Although it is the appellant's burden to establish 'cause' for his failure to raise the no-knock issue in a motion to suppress, Quintanilla's brief fails to even suggest a reason for the failure. . . . [he] has failed to establish any possible prejudice from the inclusion of authorization for a no-knock entry in the warrant. We are convinced that Quintanilla has failed to establish cause for his failure to raise" the argument); *United States v. Evans*, 131 F.3d 1192, 1193 (7th Cir. 1997) ("Evans has not tried to establish 'cause' for neglecting this subject earlier"); *United States v. Dimitrova*, 266 Fed. Appx. 486, 487 (7th Cir. 2008) (noting the defendant offered no cause or explanation for her failure to raise the suppression issue before trial, did not offer a "good cause" explanation sufficient under Rule 12(e) and *Johnson* in her postrial motion, "nor has she done so on appeal"). Another approach in the Seventh Circuit is discussed at note 63 *infra*.

2. Require the defendant to meet the Rule 12 exception for "good cause," then if cause is established, review the late claim for plain error under Rule 52(b).

Several decisions from the Seventh Circuit require the appellant raising a claim that should have been raised before trial first to meet the Rule 12 exception for "good cause" and then establish

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Decisions from the Fifth and Seventh Circuits also find late claims waived without mentioning cause: *United States v. Cano*, 519 F.3d 512, 515 (5th Cir. 2008) (suppression arguments not raised are waived); *United States v. Whitfield*, 590 F.3d 325, 359 (5th Cir. 2009) (failure to make motion alleging defect in the indictment before trial "generally constitutes waiver"' error in indictment was waived), *cert. denied*, 131 S. Ct. 136 (2010); *United States v. Creech*, 408 F.3d 264 (5th Cir. 2005) (duplicity objection waived); *United States v. Chavez-Valencia*, 116 F.3d 127, 130–31 (5th Cir. 1997) (suppression claim waived, rejecting plain error review); *United States v. Pineda-Buenaventura*, 622 F.3d 761, 777 (7th Cir. 2010) (defendant waived issue on appeal of whether co-tenants had authority to actually give consent, since defendant did not object to magistrate judge's recommendation finding that they had authority, not discussing plain error).

whether there was plain error under Rule 52(b).[59] In other words both cause and plain error are required.

3. Apply plain error under Rule 52(b) instead of Rule 12.

A number of cases from the circuits above have applied plain error under Rule 52(b) to late claims that should have been raised prior to trial under Rule 12, either failing to mention Rule 12,[60]

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[59]*E.g.*, *United States v. King*, 627 F.3d 641, 647 (7th Cir. 2010) ("If a party raises new arguments for suppression on appeal, Court of Appeals reviews for plain error if the defendant can show good cause for failing to make those arguments in the district court. . . . King has not established good cause for his failure to present the illegal entry argument previously. And even if he passed that threshold, King has not shown error, much less plain error, in the district judge's decision . . ."); *United States v. Figueroa*, 622 F.3d 739, 742 (7th Cir. 2010) ("If a party filed a motion to suppress in the district court but raises new arguments for suppression on appeal . . . we review for plain error if the defendant can show good cause for failing to make those arguments in the district court."); *United States v. Brodie*, 507 F.3d 527, 530–31 (7th Cir. 2007); *United States v. Hargrove*, 508 F.3d 445, 450 (7th Cir. 2007) ("Hargrove has given us no explanation for his failure to seek suppression of this identification evidence before trial as required by Rule 12. . . . [He] has not made the good cause showing required by Rule 12(e) for the waiver. We need not move on to the question of whether he was prejudiced to the degree required in plain error review."); *United States v. Murdock* 491 F.3d 694, 698 (7th Cir. 2007) ("before we will review a forfeited suppression argument for plain error, the defendant must first show good cause for failing to make that argument in the district court"); *United States v. Johnson*, 415 F.3d 728, 730-31 (7th Cir. 2005) ("Before we even reach the question of plain error, however, we must consider the antecedent question implicit in the language of Rule 12(e) that we just quoted—namely, whether Johnson has shown good cause for his failure to make a timely motion to suppress on the *Miranda* ground.").

[60]*United States v. Moore*, 104 F.3d 377, 382 (D.C. Cir. 1997) ("Where, as here, a defendant fails to move for severance of a charge at the trial level, we will review only for 'plain error' not mentioning Rule 12); *United States v. Rumley*, 588 F.3d 202, 205 (4th Cir. 2009) (noting that "because Rumley did not challenge the constitutionality of the search in the district court, we review only for plain error"); *United States v. Stevens*, 487 F.3d 232, 242 (5th Cir. 2007) ("Because Raul Stevens raises his Miranda-based argument for the suppression of his statement of consent for the first time on appeal, we review for plain error."), *cert. denied*, 552 U.S. 936 (2007); *United States v. Deitz*, 577

or suggesting that even without showing cause under Rule 12, an untimely claim should be remedied if it amounts to plain error.[61] This latter approach appears to be the predominant view in the Fifth Circuit.[62]

F.3d 672 (6th Cir. 2009) (applying plain error), *cert. denied*, 130 S. Ct. 1720 (2010); *United States v. Sanders*, 315 Fed. Appx. 819 (11th Cir. 2009); *United States v. Galdos*, 308 Fed. Appx. 346, 357 (11th Cir. 2009) ("Because Galdos did not move for a severance of the charges in the district court and raises the severance issue for the first time on appeal, we review this issue only for plain error."); *United States v. Lewis*, 492 F.3d 1219, 1222 (11th Cir. 2007) (en banc) ("We now hold, consistent with *Olano*, that a waiver is the intentional relinquishment of a known right, whereas the simple failure to assert a right, without any affirmative steps to voluntary waive the claim, is a forfeiture to be reviewed under the plain error standard embodied in Rule 52(b). Lewis took no affirmative steps to waive his right against double jeopardy; he simply failed to assert his right. Accordingly, Lewis forfeited his right to a double jeopardy defense, and his claim is entitled to plain error review").

[61]*United States v. Brown*, 16 F.3d 423, 427 (D.C. Cir. 1994) (stating that if the defendant waived misjoinder issue under Rule 12(f), we will not reverse a conviction, even if Rule 8 would not have permitted joinder, unless there is plain error resulting in actual prejudice to the defendant, denying relief); *United States v. Lopez-Medina*, 461 F.3d 724, 738–39 (6th Cir. 2006) (finding suppression argument raised for the first time on appeal waived and that defendant has shown no good cause, but reviewing for plain error, noting question in circuit as to whether plain error should apply in addition to Rule 12, and finding no plain error); *United States v. Buchanon*, 72 F.3d 1217, 1227 (6th Cir. 1995) (a suppression argument forfeited under Rule 12(f) could be reviewed for plain error under Rule 52(b)); *United States v. Jones*, 530 F.3d 1292, 1298 (10th Cir. 2008) (where defendant failed to raise the misjoinder claim prior to trial, the court of appeals, with the agreement of both defendant and the government, reviewed for plain error); *United States v. Milian-Rodriguez*, 828 F.2d 679, 683–84 (11th Cir. 1987) (concluding that the defendant's failure to raise timely (without good cause) a suppression argument was a waiver under Rule 12(f), but then went on to review the argument for plain error); *United States v. Dewitt*, 946 F.2d 1497, 1502 (10th Cir. 1991) (holding that suppression issue was waived under Rule 12, but then noting that the Court did "not find plain error in the district court's admission of the evidence").

[62]*United States v. Scroggins*, 599 F.3d 433 (5th Cir.) (noting that the Fifth Circuit follows the view that "a defendant who fails to make a timely suppression motion cannot raise that claim for the first

4. Determine if district court would have abused its discretion had it been raised.

Several recent decisions of the Seventh Circuit require the appellate court to ask whether it *would have been* within the trial court's discretion to have denied a claim as untimely if the claim *had been* raised in the trial court.[63]

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time on appeal," but that "[n]onetheless, our cases identifying such waiver have often proceeded to evaluate the issues under a plain error standard for good measure"), *cert. denied,*131 S. Ct. 158 (2010); *United States v. Baker*, 538 F.3d 324, 329 (5th Cir. 2008) ("The *Pope* decision considered at some length reasons supporting its conclusion that arguments not urged in a motion to suppress may not be considered on appeal, [but] also conducted a plain-error analysis and concluded there was no plain error as did our court in *United States v. Maldonado.* We follow the same course today.") (footnotes omitted); *United States v. Whittington*, 269 Fed. Appx. 388, 401 (5th Cir. 2008) (unraised severance motion waived, but in the alternative will be reviewed for plain error); *United States v. Pope*, 467 F.3d 912, 917–20 (5th Cir. 2006) (suppression argument waived, but no plain error either).

[63]*See United States v. Acox*, 595 F.3d 729, 731-32 (7th Cir. 2010) (stating that the cause standard is for the district court alone to apply and requiring the appellate court to ask, in the absence of a district-court decision on good cause, "if a motion for relief had been made and denied, [whether] the district court would have abused its discretion in concluding that the defense lacked good cause"); *United States v. Bright*, 578 F.3d 547, 550-51 (7th Cir. 2009) ("Rule 12 mandates that Bright must have filed a suppression motion before his trial or risk losing it, and because he did not, it cannot be said that the district court committed any error, let alone plain error, when it followed the federal rules as written."); *United States v. Kirkland*, 567 F.3d 316, 322 (7th Cir. 2009) ("Considering that Kirkland gives no explanation for his failure to raise these arguments in his initial motion, it would have been within the district court's discretion to refuse to consider them in the first instance"), *cert. denied,* 130 S. Ct. 1120 (2010).

Other decisions of the Seventh Circuit, gathered in note 59 *supra*, appear to recognize the appellate court's authority to assess the presence of cause under Rule 12, and insist on such a showing as an antecedent to plain error review.

Finally, the First[64] and the Eighth[65] Circuits have expressly declined to decide the issue.

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[64]*United States v. Guerrero*, 524 F.3d 5, 11-12 (1st Cir. 2008) ("Assuming that we may review the claim for plain error despite the Rule 12(e) waiver, *see United States v. Perez-Gonzalez*, 445 F.3d 39, 44 (1st Cir. 2006) (noting that this remains an open question in this circuit), it is clear from the record that no Miranda violation occurred . . ."); *United States v. Colon-Munoz*, 192 F.3d 210, 218 (1st Cir. 1999) (participation of interim United States Attorney in grand jury waived when not raised until after verdict, declining to resolve whether Rule 12 waiver precludes plain error review, noting error harmless as a matter of law under *Mechanik*). But see United States v. Calderon, 578 F.3d 78, 99 (1st Cir.) (motion to sever never raised before trial was waived, defendant failed to identify any cause, much less good cause), *cert. denied sub nom Pomales-Pizarro v. United States*, 130 S. Ct. 437 (2009); *United States v. Pimentel*, 539 F.3d 26, 31 (1st Cir. 2008) (lack of specificity in indictment waived); *United States v. Page*, 521 F.3d 101, 110 (1st Cir. 2008) (severance motion waived when raised for the first time on appeal and defendant "has presented no additional argumentation as to how the denial of severance might have caused him actual prejudice"); *United States v. Negron*, 23 Fed. Appx. 10, 11 (1st Cir. 2001) ("Appellant's submissions wholly fail to show cause for his failure to raise [challenge that he was not indicted by a vote of at least 12 grand jurors] before his trial"); *United States v. Hansen*, 434 F.3d 92, 101–04 (1st Cir. 2006) ("[W]here a defendant has failed altogether to file a motion to suppress below, and as such, we will not consider Hansen's suppression arguments on appeal."); *United States v. Lopez-lopez*, 282 F.3d 1 (1st Cir. 2002) (defendant has not shown cause for relief from his waiver of late suppression motion so his argument is waived); *United States v. Batista*, 239 F.3d 16, 19 (1st Cir. 2001) (stating that relief from waiver under Rule 12 is proper "only where there is a showing of cause and prejudice"); *United States v. Rodriguez-Marrero*, 390 F.3d 1, 11–12 (1st Cir. 2004) (challenge to the specificity of the indictment was waived where it was not raised prior to trial); *United States v. Valerio*, 48 F.3d 58, 63 (1st Cir. 1995) ("Baez never objected to Count II for duplicity, or any other grounds, in the district court. He accordingly has waived his argument.").

[65]*See United States v. Eagle*, 498 F.3d 885, 892 (8th Cir. 2007) ("We have not yet decided whether the failure to raise a suppression matter in a timely pretrial motion precludes plain error review"); *United States v. Frazier*, 280 F.3d 835, 845 (8th Cir. 2002) (declining to decide "interesting question" of whether a court of appeals is barred altogether from reviewing an issue that has been "waived" under Rule 12(f)).

But see *United States v. Oslund*, 453 F.3d 1048 (8th Cir. 2006) (finding claim of pre-charge

The Advisory Committee's proposal adopted the majority approach, specifying that for all but two specified claims, a late claim—whether raised in the district court or the court of appeals—may only be considered if the party shows cause and prejudice. Plain error analysis under Rule 52, the Advisory Committee decided, is irrelevant. The reasons for adopting this approach are spelled out in detail in Section C of the accompanying report. The proposed language, then, omits any reference to the confusing term "waiver" and simply dictates the circumstances of the failure to raise on time and the circumstances under which a court may consider the claim:

delay waived); *United States v. Cordova*, 157 F.3d 587, 597 (8th Cir. 1998) (venue objection waived).

Rule 12. Pleadings and Pretrial Motions *

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(b) Pretrial Motions.

(1) ***In General.*** 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.~~***Motion That May Be Made at Any Time.*** A motion that the 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 motion before trial if the basis for the motion is then reasonably available and the

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

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) double jeopardy;

(v) the statute of limitations;

(vi) selective or vindictive prosecution; and

(vii) 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~~ 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 a 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.

(2) *Consequences of an Untimely Motion under Rule 12(b)(3).* If a party does not meet the deadline – or any extension the court provides – for making a Rule 12(b)(3) motion, the motion is untimely. In such a case, Rule 52 does not apply, but a court may consider the defense, objection, or request when:

(A) the party shows cause and prejudice; or

(B) if the defense or objection is failure to state an offense or double jeopardy, the party shows prejudice only.

(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.~~

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Committee Note

Rule 12(b)(2). The amendment deletes the provision providing that "any defense**,** objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer

requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

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 "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)(2). Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue" that appeared in existing (now deleted) (b)(2). 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.

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 two paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made. New paragraph (c)(2) governs review of untimely claims, which were 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)(2).

The standard for review of untimely claims under new subdivision 12(c)(2) 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)(2)(A), which requires that the party seeking relief show "cause and prejudice" for failure to raise a claim by the deadline. Although former Rule 12(e) referred to "good cause," no change in meaning is intended. The Supreme Court and lower federal courts 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). Each concept – "cause" and "prejudice" – is well-developed in case law applying Rule 12. The amended rule reflects the judicial construction of Rule 12(e).

Subdivision (c)(2)(B) provides a different standard for two specific claims: failure of the charging document to state an offense and violations of double jeopardy. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power of the state to bring a defendant to trial or to impose punishment, should be available without a showing of "cause." Accordingly, paragraph (c)(2)(B) provides that the court can consider these claims if the party "shows prejudice only." Unlike plain error review under Rule 52(b), the new standard under Rule (12)(c)(2)(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. 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 have been relocated from (e) to (c)(2).

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. ~~if:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

*** * * * ***

Advisory Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

AS SUBMITTED TO THE STANDING COMMITTEE JANUARY 2010

Rule 12. Pleadings and Pretrial Motions *

* * * * *

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

(3) ***Motions That Must Be Made Before Trial.*** The following defenses, objections, and requests must be raised by 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) double jeopardy;

(v) the statute of limitations;

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(vii) outrageous government conduct; and

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(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. 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.

(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) ~~**Waiver of a Defense, Objection, or Request.**~~

Consequence of Not Making a Motion Before Trial as Required.

(1) ***Waiver.*** A party waives any Rule 12(b)(3) defense, objection, or request – other than failure to state an offense , double jeopardy, or the statute of limitations – not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. ~~For good cause~~ Upon a showing of cause and prejudice, the court may grant relief from the waiver. Otherwise, a party may not raise the waived claim.

(2) ***Forfeiture.*** A party forfeits any claim based on the failure to state an offense, double jeopardy, or the statute of limitations, if the claim was not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. A forfeited claim is not waived. Rule 52(b) governs relief for forfeited claims.

Committee Note

Rule 12(b)(2). The amendment deletes the provision providing that "any defense**,** objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

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 "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 the failure to raise a claim a party could not have raised on time is not deemed to be "waiver" or "forfeiture" under the Rule. Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue" that appeared in existing (now deleted) (b)(2). 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.

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(e). Rule 12(e) has also been amended to clarify when a court may grant relief for untimely claims that should have been raised prior to trial under Rule 12(b)(3). Rule 12(e) has been subdivided into two sections, each specifying a different standard of review for untimely claims of error.

Subdivision (e)(1) carries over the "waiver" standard of the existing rule, applying it to all untimely claims except for those that allege a violation of double jeopardy or the statute of limitations or that the charge fails to state an offense. The rule retains the language that provides a party "waives" all other challenges by not raising them on time as required by Rule 12(b)(3), as well as the language that relief is available only if the defendant makes a certain showing, previously described as "good cause." "Good cause" for securing relief for an untimely claim "waived" under Rule 12 has been interpreted by the Supreme Court as well as most lower courts to require two showings: (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). Each concept – "cause" and "prejudice" – is well-developed in case law applying Rule 12. To clarify this standard, with no change in meaning intended, the words "for good cause" in the existing rule have been replaced by "upon a showing of cause and prejudice."

Subdivision (e)(2) provides a different standard for three specific claims, those that allege a violation of double jeopardy, a violation of the statute of limitations, or that the charge fails to state an offense. The Committee concluded that the "cause" showing required for excusing waiver of other sorts of claims is inappropriate for these claims. The new subdivision provides that a court may

grant relief for such a claim whenever the error amounts to plain error under Rule 52(b). This new standard is also consistent with the Court's holding in *Cotton,* that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton,* 535 U.S. at 631.

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. ~~if:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

*** * * * ***

Advisory Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

RULE 12 PROPOSAL SUBMITTED TO STANDING COMMITTEE JUNE 2009

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

* * * * *

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information, including 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 suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

* * * * *

(e) Waiver of a Defense, Objection, or Request.

(1) Generally. 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.

(2) Relief from Waiver. ~~For good cause,~~ The court may grant relief from the waiver:

(A) for good cause; or

(B) when a failure to state an offense in the indictment or information has prejudiced a substantial right of the defendant.

* * * * *

Committee Note

Rule 12(b)(3)(B) has 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 "jurisdictional," fatal whenever raised, and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned this 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"). The Court in *Cotton* held that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

The amendment requires the failure to state an offense to be raised before trial, like any other deficiency in the charge. Under the amended rule, a defendant who fails to object before trial that the charge does not state an offense now "waives" that objection under Rule 12(e). However, Rule 12(e) has also been amended so that even when the objection is untimely, a court may grant relief whenever a failure to state an offense has prejudiced a substantial right of the defendant, such as when the faulty charge has denied the defendant an adequate opportunity to prepare a defense.

The amendment is not intended to affect existing law concerning when relief may be granted for other untimely challenges "waived" under Rule 12(e).

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment ~~if: (1) the indictment or information does not charge an offense; or (2)~~ the court does not have jurisdiction of the charged offense.

*** * * * ***

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

* * * * *

(c) Place of Initial Appearance; Transfer to Another District.

* * * * *

(4) ***Procedure for Persons Extradited to the United States.*** If the defendant is surrendered to the United States in accordance with a request for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.

(d) Procedure in a Felony Case.

(1) ***Advice.*** If the defendant is charged with a felony, the judge must inform the defendant of the following:

* * * * *

(D) any right to a preliminary hearing; ~~and~~

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

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and

(F) if the defendant is held in custody and is not a United States citizen, that an attorney for the government or a federal law enforcement officer will:

(i) notify a consular officer from the defendant's country of nationality that the defendant has been arrested if the defendant so requests; or

(ii) make any other consular notification required by treaty or other international agreement.

* * * * *

Committee Note

Subdivision (c)(4). The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. The earlier stages of the extradition process have already fulfilled some of the functions of the initial appearance. During foreign extradition proceedings, the extradited person, assisted by counsel, is afforded an opportunity to review the charging document, U.S. arrest warrant, and supporting evidence. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person's transportation to hold an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending.

Subdivision (d)(1)(F). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

PUBLIC COMMENTS CONCERNING RULE 5

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed Rule 5(c)(4) be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

Rule 12. Pleadings and Pretrial Motions *

* * * * *

(b) Pretrial Motions.

(1) ***In General.*** 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.~~***Motion That May Be Made at Any Time.*** A motion that the 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 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:

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

(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) double jeopardy;

(v) the statute of limitations;

(vi) selective or vindictive prosecution; and

(vii) 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~~ 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 a 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.

(2) *Consequences of an Untimely Motion under Rule 12(b)(3).* If a party does not meet the deadline – or any extension the court provides – for making a Rule 12(b)(3) motion, the motion is untimely. In such a case, Rule 52 does not apply, but a court may consider the defense, objection, or request when:

(A) the party shows cause and prejudice; or

(B) if the defense or objection is failure to state an offense or double jeopardy, the party shows prejudice only.

(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)(2). The amendment deletes the provision providing that "any defense**,** objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

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 "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)(2). Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue" that appeared in existing (now deleted) (b)(2). 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.

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 two paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made. New paragraph (c)(2) governs review of untimely claims, which were 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)(2).

The standard for review of untimely claims under new subdivision 12(c)(2) 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)(2)(A), which requires that the party seeking relief show "cause and prejudice" for failure to raise a claim by the deadline. Although former Rule 12(e) referred to "good cause," no change in meaning is intended. The Supreme Court and lower federal courts 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). Each concept – "cause" and "prejudice" – is well-developed in case law applying Rule 12. The amended rule reflects the judicial construction of Rule 12(e).

Subdivision (c)(2)(B) provides a different standard for two specific claims: failure of the charging document to state an offense and violations of double jeopardy. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power of the state to bring a defendant to trial or to impose punishment, should be available without a showing of "cause." Accordingly, paragraph (c)(2)(B)

provides that the court can consider these claims if the party "shows prejudice only." Unlike plain error review under Rule 52(b), the new standard under Rule (12)(c)(2)(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. 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 have been relocated from (e) to (c)(2).

Rule 15. Depositions

* * * * *

(c) Defendant's Presence.

(1) ***Defendant in Custody*****.** Except as authorized by Rule 15(c)(3), the ~~The~~ officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) ***Defendant Not in Custody*****.** Except as authorized by Rule 15(c)(3), a ~~A~~ defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) ***Taking Depositions Outside the United States Without the Defendant's Presence.*** The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

* * * * *

Committee Note

Subdivision (c)(3). This amendment provides a mechanism for taking depositions in cases in which important witnesses — government and defense witnesses both — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

The Committee recognized that authorizing the taking of a deposition under new Rule15(c)(3) would not determine whether the resulting deposition will be admissible, in part or in whole, at trial. As is true of any other deposition, questions of admissibility of the evidence taken by means of these depositions are left to resolution by the courts, on a case by case basis, applying the Federal Rules of Evidence and the Constitution.

Recognizing that important witness confrontation principles and vital law enforcement and other public interests are involved in these instances, the amended Rule authorizes a deposition outside a defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court. New Rule 15(c)(3) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness

outside the defendant's presence. The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — as to the elements that must be shown

This amendment does not supersede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. ~~if:~~

~~(1) the indictment or information does not charge an offense;~~

~~or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

*** * * * ***

Advisory Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

Rule 37. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Federal Rule of Appellate Procedure 4(b)(3) lists three motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the judgment of conviction is entered and the last such motion is ruled upon. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Federal Rule of Appellate Procedure 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appellate jurisdiction. Rule 37 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court

states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Federal Rule of Appellate Procedure 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

PUBLIC COMMENTS CONCERNING RULE 37

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL "is pleased with" the proposed rule, but suggests amendments to the committee note to provide additional guidance to practitioners.

10-CR-002. Federal Magistrate Judges Association. FMJA "endorses" the proposed rule.

Rule 58. Petty Offenses and Other Misdemeanors

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(b) Pretrial Procedure.

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(2) ***Initial Appearance*****.** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(F) the right to a jury trial before either a magistrate judge or a district judge – unless the charge is a petty offense; ~~and~~

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release; and

(H) if the defendant is held in custody and is not a United States citizen, that an attorney for the government or a federal law enforcement officer will:

(i) notify a consular officer from the defendant's country of nationality that the defendant has been arrested if the defendant so requests; or

(ii) make any other consular notification required by treaty or other international agreement.

* * * * *

COMMITTEE NOTE

Subdivision (b)(2)(H). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

PUBLIC COMMENTS CONCERNING RULE 58

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed rule be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

TAB 7-E

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 11-12, 2011, Portland Oregon

I. ATTENDANCE AND PRELIMINARY MATTERS

The Advisory Committee on Criminal Rules of the Judicial Conference of the United States met in Portland, Oregon, on April 11-12, 2011. The following members participated:

Judge Richard C. Tallman, Chair
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Judge Morrison C. England, Jr.
Chief Justice David E. Gilbertson
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Thomas P. McNamara, Esquire
Judge Donald W. Molloy
Judge Timothy R. Rice
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter

The Hon. Lanny A. Breuer, Assistant Attorney General, Criminal Divison, Department of Justice (ex officio), participated in the meeting by telephone. One member, Judge James B. Zagel, was unable to attend.

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, and liaison member, Judge Reena Raggi.

Supporting the committee were:

Peter G. McCabe, Committee Secretary
Andrea Kuperman, Chief Counsel, Rules Committee Support Office
James Ishida, Attorney, Administrative Office
Jeffrey Barr, Attorney, Administrative Office
Holly Sellers, Supreme Court Fellow, Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center
Charlene Koski, law clerk to Judge Tallman

Also participating from the Department of Justice were Jonathan J. Wroblewski, Director

of the Office of Policy and Legislation, Kathleen Felton, Deputy Chief of the Appellate Section, and Andrew Goldsmith**,** National Criminal Discovery Coordinator.

A. Chair's Remarks, Introductions, and Administrative Announcements

Judge Tallman welcomed everyone, particularly the committee's newest member, Chief Justice David E. Gilbertson of the Supreme Court of South Dakota**,** who is replacing Justice Edmunds**.** Judge Tallman also welcomed a distinguished visitor, Judge Emmet G. Sullivan of the United States District Court for the District of Columbia.

The committee noted that this was the last meeting for the chair, Judge Tallman. Judge Rosenthal conveyed the great thanks of the Standing Committee for the outstanding work of Judge Tallman and all that he has done.

The committee also noted that this was the last meeting for Mr. McNamara. Judge Tallman lauded Mr. McNamara as a wonderful representative of the Federal Public Defenders. The committee agreed that both Judge Tallman and Mr. McNamara had made superb contributions to the committee's work.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the September 2010 meeting.

The committee approved the minutes unanimously by voice vote.

C. Status of Criminal Rules; Report of the Rules Committee Support Office

Ms. Kuperman reported that the Supreme Court recently approved the committee's proposed amendments (see below) that will take effect on December 1, 2011, unless Congress were to act to the contrary. In addition, in fall 2010, the committee's proposed amendments to Rules 5, 58, and 37 were published for public comment. The public comment period ended in February 2011.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved By the Judicial Conference for Transmittal to the Supreme Court

Ms. Kuperman reported that the following proposed amendments had been approved by the Judicial Conference for transmittal to the Supreme Court, and now have been approved by the Supreme Court for transmittal to Congress:

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.

5. Rule 6. The Grand Jury. Proposed amendment authorizing grand jury return to be taken by video teleconference.

6. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

7. Rule 32. Sentencing and Judgment. Proposed technical and conforming amendment concerning information in presentence report.

8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

9. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1 and return of warrant and inventory by reliable electronic means, and proposed technical and conforming amendment deleting obsolescent references to calendar days.

10. Rule 43. Defendant's Presence. Proposed amendment authorizing defendant to participate in misdemeanor proceedings by video teleconference.

11. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

B. Proposed Amendment Approved by the Standing Committee for Publication in August 2011

Ms. Kuperman further reported that the following amendment had been approved by the Standing Committee for publication:

1. Rule 11. Advice re Immigration Consequences of Guilty Plea; Advice re Sex Offender Registration and Notification Consequences of Guilty Plea.

Prof. Beale reported that the Standing Committee approved this proposal for publication at its January 2011 meeting. The amendment will be published for comment in August 2011.

She added that the committee had discussed the idea that, in addition to the rule amendment, related changes might be made to the section of the judges' benchbook addressing the plea colloquy, perhaps touching on more issues than the rule amendment does. The committee had before it a draft letter to Judge Rothstein of the FJC requesting the changes in the benchbook. The committee that oversees the benchbook, chaired by Judge Irma Gonzalez, will make the final determination on such changes.

A member questioned whether it is a good idea to ask the defendant whether he has discussed the issue of immigration consequences with his attorney. This could lead into a morass. Another member responded that discussing this with your attorney is at the heart of *Padilla v.. Kentucky*, 130 S. Ct. 1473 (2010). That is the whole point, that the judge should not accept your plea if you have not discussed this with your attorney.

A member argued that the Rule 11 issue relates to advice from the court to the defendant about collateral consequences, which has nothing to do with what the defendant has discussed with his attorney. Even if the defendant has had discussions with his attorney, if he still doesn't understand, then the court cannot accept his plea. In *Padilla*, the issue was incorrect advice given defendant by his attorney, not a failure to have the conversation.

A member added that if the defendant says yes, I talked to my attorney about this, all that means is that the topic has come up. It does not mean that defendant got good advice, or full advice, or the right advice. Is the judge in any position to do anything about that? The judge cannot give the defendant any advice at all.

Judge Tallman emphasized that the committee is not writing a script for the plea colloquy here. The committee is merely trying to identify issues that need to be considered at the plea. Every judge will ask about this in the judge's own way.

Judge Tallman called for a vote on whether to include the language in the letter regarding the immigration consequences of a guilty plea.

The committee voted unanimously by voice vote to approve this language.

A member stated that the remaining issue, the language in the letter relating to sex offenses, is more complicated. It could be simplified by not getting into issues of civil commitment. Another member disagreed and argued that that language should be included, because these civil commitment issues are arising more often and are proving to be quite challenging for defense counsel.

Prof. Beale noted that under the statute addressed in *United States v. Comstock*, 560 U.S. ___ (2010), any defendant leaving the custody of the Bureau of Prisons can be subject to civil commitment, no matter what the offense for which the defendant was imprisoned, if the government can show that the defendant has committed a sex offense previously. Also, if someone pleads guilty to a federal sex offense, they are subject to both federal and state civil commitment and sex offender registration laws.

A member stated that with all of this added to the benchbook, the plea allocutions are going to be too lengthy. If it's not in the rule, the committee should not add it to the benchbook. A member agreed that every judge can decide for himself, but said it's a good idea to flag issues.

Mr. Wroblewski reported that in the Department of Justice manual, which discusses this topic, the coverage is limited to the consequences that flow directly from the guilty plea. Otherwise, you could go on forever. There are a whole host of possible indirect consequences.

Judge Tallman called for a vote on whether to include the language in the letter regarding the collateral consequences of a guilty plea to a sex offense.

The committee voted unanimously by voice vote to approve this language.

The chair subsequently transmitted the final letter to the benchbook committee.

C. Proposed Amendments Approved by the Standing Committee for Publication in August 2010

Ms. Kuperman reported that the following amendments had been published for public comment in August 2010.

1. Rule 5. Initial Appearance. Proposed amendment providing that initial appearance for extradited defendants shall take place in the district in which defendant was charged, and that non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

Prof. Beale reported that the comments received on the proposed amendment were generally very positive.

There were comments suggesting that the rule should state that the initial appearance must take place without unnecessary delay. But a different part of the rule already says that, and the draft Committee Note mentions it, so there is no need for any change.

Some comments suggested that the rule should also require certain advice and warnings from the court to the defendant. This is something the government has long opposed. The language of the current rule amendment was carefully negotiated. It is not the court's responsibility to give the diplomatic notification. Perhaps, Prof. Beale suggested, language could be added to the draft Committee Note addressing this issue.

Judge Tallman stated that he does not think the committee needs to further tinker with the draft Committee Note.

The committee voted unanimously by voice vote to approve the amendment, with no change in the draft Committee Note, for transmission to the Judicial Conference.

2. Rule 58. Initial Appearance. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

Prof. Beale reported that Rule 58 contains a provision parallel to the provision in Rule 5 that is to be amended. Accordingly, this is a conforming amendment to Rule 58.

The committee voted unanimously by voice vote to approve the amendment for transmission to the Judicial Conference.

3. Rule 37. Indicative Rulings. Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant relief because appeal has been docketed.

Prof. Beale reported that this amendment dovetails with similar provisions that have recently been adopted in the Civil and Appellate Rules governing indicative rulings. Among the comments received, the Federal Magistrate Judges Association has endorsed this. The National Association of Criminal Defense Lawyers approves of the rule, but has suggested changes to the Committee Note to help guide practitioners about the kinds of cases in which this procedure could be employed. Prof. Beale expressed doubt that the committee should expand the Note to specify more details. The Standing Committee prefers shorter Notes. Even if the committee gave more examples, that would not exhaust all the situations in which the rule might be employed. Listing more examples starts down a slippery slope.

She added that the draft Committee Note contains the words "if not exclusively," suggesting there might be no other proper uses of the procedure. The committee could delete those three words, but the Standing Committee added those words after much negotiation, because the Department of Justice had concerns. Those words reflect a considered policy judgment by the Standing Committee.

Judge Rosenthal added that this same language is now in the Committee Note accompanying the Appellate Rule. If the language is not here, and it remains there, that will create questions.

The committee voted unanimously by voice vote to approve the amendment, with no change in the draft Committee Note, for transmission to the Judicial Conference.

III. CONTINUING AGENDA ITEMS

A. Rule 12 (Pleadings and Pretrial Motions)

Judge Tallman noted that the committee's proposals to amend Rule 12 had been remanded back to the committee, once again, by the Standing Committee at its meeting in January. Judge England, the chair of the Rule 12 subcommittee, reported that the committee's effort to amend Rule 12 began in 2006 as a surgical attempt to simply require that a claim that the indictment failed to state an offense must be raised before trial. It turned out, however, that that change raised other, difficult issues surrounding the standard to be applied when such a claim was not timely brought before trial. The subcommittee has met many times to take up these issues, including issues specifically raised by the Standing Committee.

Judge England added that the subcommittee believes it is important that the reasons for the committee's latest round of modifications to its Rule 12 proposal are fully explained to the Standing Committee. The subcommittee believes that in the past there may have been a disconnect between what the committee recommended and the way the Standing Committee perceived it.

Prof. Beale explained that at the urging of the Standing Committee in 2010, the committee had reworked the proposal to address the relationship between Rule 12 and plain error review. The proposal the committee sent to the Standing Committee for its January 2011 meeting distinguished between those claims "waived" absent a showing of cause, as the current language of Rule 12 provides, and those claims "forfeited" and subject to plain error, the approach applied by the Supreme Court in *United States v. Cotton*, 535 U.S. 625 (2002). That proposal was again remanded by the Standing Committee, which expressed concerns about the confusion from the use of the terms "waiver" and "forfeiture" in the rule. The proposal now before the committee eliminates the terms "waiver" and "forfeiture" altogether.

But even without use of these terms, there still remains the continuing issue of distinguishing between the treatment of most untimely claims and the treatment given a smaller special group of untimely claims, e.g., the indictment's failure to state an offense and double jeopardy. The current proposal attempts to avoid confusing terms like "waiver" and "forfeiture" and instead clarify as much as possible the standard for raising an untimely claim. Thus the current proposal has some very different language from the proposal considered by the Standing Committee at its June 2011 meeting.

There is also the question of filing the claim late in the district court, as distinguished from raising the claim for the first time in the court of appeals. In *United States v. Vonn*, 535 U.S. 55

(2002), the Supreme Court held, with regard to the harmless error provisions of Rule 11, that because Rule 11 did not specifically state that Rule 52 did not apply to claims analyzed under Rule 11, Rule 52 did apply. For that reason the current proposal states explicitly, "Rule 52 does not apply." If the amended Rule 12 does not specify that the Rule 52 "plain error" standard does not apply, then *Vonn* would appear to dictate that the Rule 52 standard will apply.

Prof. King noted that the committee's new proposed language makes it clear that the two standards – i.e., the standard applied to late claims of an indictment's failure to state an offense or of double jeopardy, and the standard applied to all other late claims – are exactly the same except for "cause." That is all that stands between them. "Cause" must be shown to raise the latter claims late, but need not be shown to raise the former claims late.

A participant observed that the committee's Rule 12 amendment process started with the purpose of eliminating from the rule, in the light of the Supreme Court's ruling in *Cotton*, the exception permitting a claim of the indictment's failure to state an offense to be raised at any time. But now, the proposed Rule 12 amendment has gone way beyond that. Under the current rules, all untimely motions can be heard under Rule 12(e) for good cause. Now, instead, the committee is considering a new review standard that would apply in both the district courts and the courts of appeals. It is not clear that this is the correct standard on appellate review in the court of appeals. It is good that the committee's new proposal no longer uses the terms "waiver" and "forfeiture," since use of those terms would create a morass. But the new proposal still threatens to mess with appellate review standards. The committee seems to believe that it's not enough for the Supreme Court to tell the courts of appeals what the standard of review on appeal is, the committee also has to tell them in a rule. The courts of appeals may follow the Supreme Court, not the rule.

Prof. Beale disagreed, stating that the committee had researched the question and the current proposal for considering these untimely claims only after a showing of cause and prejudice states the current standard for review applied by most courts of appeals. A member agreed that this is the same standard. The only thing that is new under the current proposal is that it adds to the list of claims that must be raised before trial a claim that an indictment fails to state an offense. Also, the committee is trying to help the courts by making the existing standard clearer for everyone to understand.

Prof. King added that there is disagreement, not just confusion, about this question in the courts. The courts of appeals do not agree on what the correct standard should be. So the committee is trying to clarify this. If the committee wishes to make clear to a court of appeals that wants to review such questions for "plain error" that it should not do so, the best way to achieve that is to say expressly, "Rule 52 does not apply."

A participant stated that to a district judge, the reference to Rule 52 means nothing. To the extent that the committee's Rule 12 proposal is directed at district judges, any reference to Rule 52 muddies the waters. A member agreed that removing any reference to Rule 52 from the amendment will make the standard clear for district judges, and allow the courts of appeals to do whatever they normally do.

A member reported that the defense bar is opposed to any change at all to Rule 12, but if there must be an amendment, the defense bar wants a statement that Rule 52 will not apply. Otherwise the amendment will be even more unfair to defendants.

Prof. Beale reiterated that it would be very helpful, in light of *Vonn, supra*, to be explicit about whether or not Rule 52 applies. If the rule does not mention Rule 52, then courts will continue to struggle with the question whether Rule 52 should apply.

A member stated that the debate about the review standard in the courts of appeals is an exercise in futility. The committee should just clarify the standard for considering untimely claims in the district courts, and leave the court of appeals alone, making no mention of Rule 52. The committee can always return to the issue of the appellate standard in two or three years, if that is needed. Judge Tallman expressed hesitation about the committee having to revisit this yet again since this is our third effort at settling the language.

A member suggested that the committee publish the proposal with "Rule 52 does not apply" in brackets as an alternative. Judge Tallman noted that the rules committees typically use bracketed language as a method of flagging an issue in order to seek input on something the committee believes may be controversial or has had trouble resolving.

Prof. Beale reiterated that the committee originally wanted to just fix the *Cotton* problem, and the committee's original proposal only addressed the failure-to-state-an-offense claim in *Cotton*. It was the Standing Committee that asked the committee to do more, stating that there was confusion among the courts of appeals on these issues generally, which the committee could dispel by revising Rule 12.

Judge Rosenthal advised that in sending its proposal to the Standing Committee, the committee should be clearer in explaining the arguments raised and the reasons for the committee's decisions. Also, the committee should send the Standing Committee a clear signal about severability, whether the committee believes the committee's Rule 12 amendment should still go forward if the issue of the appellate review standard is severed. The committee should explain the debate on this question to the Standing Committee, and solicit comment on how the appellate review standard can best be conveyed.

Prof. King noted that, in fact, the Rule 12 proposal started as a response to cases in which the defendant's claim was raised for the first time on appeal. Judge Rosenthal acknowledged that, but reminded the committee of the need to step back from the history that brought the committee to this point, and look at the committee's proposal instead from the viewpoint of someone reading it for the first time.

Judge Tallman called for a vote on proceeding with a Rule 12 amendment which includes the language, "In such a case, Rule 52 does not apply."

The committee voted 8-3 in favor of proceeding with consideration of the proposed amendment containing this reference to Rule 52.

Prof. Beale reported that the category of "outrageous government conduct" had been deleted from the list of defects contained in the Rule 12 amendment. The Seventh Circuit has ruled that such a defect does not exist. If the committee includes it, it will look as though the committee concluded that nevertheless this defect does exist. The amendment's list of defects is non-exhaustive, so excluding it does not mean or imply that it does not exist. This is an easy call to avoid taking an unnecessary position on a controversial question.

In addition, claims based on the statute of limitations have been removed from the list of favored untimely claims that are to receive a more generous standard of review. Under the current proposal, there are only two such claims, not three as before: claims that the indictment fails to state an offense, and double jeopardy claims. Removing statute of limitations claims from the list of favored claims would preserve the current case law.

Judge Tallman called for a vote on the Rule 12 amendment before the committee.

The committee voted 8-3 to approve for publication the proposed amendment to Rule 12, and a conforming amendment to Rule 34.

Prof. Beale reported that the committee had failed to delete two references in the draft Committee Note to statute of limitations claims. Now that statute of limitations claims have been deleted from the amendment's list of favored claims, these Note references are obsolete.

The committee voted 8-3 to revise the draft Committee Note to delete these references to statute of limitations claims.

Judge Tallman asked whether the committee wanted to take a position on the severability of the question of including the reference to the application of Rule 52.

A member stated that the committee should make it clear that this issue is severable. If the Standing Committee wants to delete the reference to Rule 52, the remainder of the Rule 12 amendment stands and should be approved. The member added that if the reference is ultimately deleted, and the appellate standard of review is left to case law development in the appellate courts, then the Committee Note should not state a position on the question.

Judge Tallman noted the consensus of the committee that if the Standing Committee wants to delete the reference to Rule 52, the committee favors proceeding to publish the amendment without the Rule 52 language.

B. Rule 16 (Discovery and Inspection)

Judge Tallman reported that the Rule 16 subcommittee, which he chairs, has been unable to agree on any acceptable amendment to Rule 16. He had circulated a discussion draft of a proposed amendment in order to stimulate a full committee discussion. The Department of Justice, at Judge Tallman's request, also prepared language along the lines the Department had previously mentioned it would not oppose, merely incorporating or codifying the principles of the Supreme Court rulings in *Brady* and *Giglio*. The Department made clear that it is not advocating that this language be adopted, and that it was prepared solely at Judge Tallman's request.

Mr. Breuer reported that the Department has taken unprecedented steps to ensure that federal prosecutors meet their disclosure obligations. The Department has appointed Andrew Goldsmith as its first national criminal discovery coordinator. They have amended the U.S. Attorneys' Manual to address this issue. They have adopted a groundbreaking and transparent policy on criminal discovery, going beyond the basic Supreme Court requirements. They have directed each U.S. Attorney to develop granular discovery policies suiting the needs of that particular district. All federal prosecutors are now required to take annual discovery training.

The Department is also training thousands of law enforcement personnel in discovery practices, including personnel of the FBI, DEA, ATF, Marshals Service, and Bureau of Prisons. When that is done, they will train personnel from IRS and other agencies outside the Department of Justice. Then they will train district attorneys and local law enforcement.

The Department has also emphasized the use of software to manage discovery electronically. They have published a bluebook dealing with discovery requirements, written by senior prosecutors who have dealt with discovery matters for many years.

When, on rare occasions, the Department does not meet its discovery obligations, it's not for lack of a rule, but because of the demands on prosecutors and the lack of resources. The Department's comprehensive approach is what is needed to improve its performance. A rule change will not address anything. There will still be mistakes no matter what the rule says.

Mr. Goldsmith reported that he has traveled all over the nation addressing this issue. He now has a Deputy Coordinator helping him, another senior prosecutor. When he spoke to this committee in Chicago in April 2010, one participant lauded the performance of Attorney General Holder in this area, but expressed concern about what will happen when Attorney General Holder leaves. Mr. Goldsmith said that the Department has tried in a serious way to change the culture of the Department in this respect, so that compliance with disclosure obligations will be ongoing and will not depend on the efforts of a particular Attorney General.

Some have objected that the Department has been great at training prosecutors, but the prosecutors only know what the agents tell them. So now the Department is also training the agents, getting everyone on the same page with respect to disclosure obligations. If it is perceived as just a situation of prosecutors telling agents what to do, the agents won't listen. But now, with all this training, the agents are buying in. The Department is training 26,000 agents on a national basis, telling them, "When in doubt, disclose." Disclosure is the default position.

The Department has also trained federal prosecutors from around the nation, actually going out there and speaking with them. It's not just a situation of local prosecutors getting faceless memos from Washington about discovery. Meetings are also underway about training state and local prosecutors. Also, the Department has been interacting with Federal Public Defenders about the idea of coming up with a protocol for exchange of electronic information.

Mr. Wroblewski explained that the rule language the Department drafted at Judge Tallman's request recognizes that the disclosure obligations are not just those of the attorney for the government, but the entire prosecution team. The language refers to *Brady*, *Giglio* and their "progeny," because there is a lot of case law dealing with nuances of *Brady* and *Giglio*.

Judge Tallman wondered whether there are any current rules that cite cases in the text of the rule, as this proposal would. Judge Rosenthal responded no. The Standing Committee even worries about citing cases in Committee Notes because case law changes.

Judge Tallman stated that to the extent the committee wants to make a modest change in Rule 16, one way to do that would be to incorporate the two Supreme Court rulings. That would be a significant step. The question before the committee now is whether to go forward with any rule change at all. The Federal Judicial Center survey shows an even split among judges on the issue, with the Department of Justice opposing any rule amendment and the defense bar in favor of a rule amendment. Consequently, the chance that the committee can come up with a Rule 16 proposal that has any chance of success is slim.

Judge Tallman stated that Ms. Brill also had produced a draft of a Rule 16 amendment. Ms. Brill reported that she worked on the draft with several Federal Public Defenders and private defense lawyers around the country. Their draft attempts to be more descriptive than merely citing *Brady*, *Giglio*, and their progeny. Their idea, like the Department of Justice's approach, was just to codify the current law, but they did try to flesh out what that means. They stated that if their proposal is shown to go beyond current law, they will change their proposal. They are not trying to slip in a clandestine expansion of existing law.

Ms. Brill argued that the need for such a rule amendment is there. There have been instances of prosecutors not understanding discovery obligations after the Department started all its changes and training, and not just with complex electronic discovery, but with traditional kinds of materials not being disclosed. Further, there really is common ground to support such a modest proposal. The FJC survey reveals that 51% of judges favor a rule change, even though a majority of those judges are happy with prosecutors' performance of discovery obligations. This is compelling. The judges who oppose a rule change may be motivated by security issues, which she expressed willingness to accommodate by providing exceptions to disclosure.

A member responded that Ms. Brill's proposal does not even mention witness security. And it does not even mention the Jencks Act, which is a huge problem here. If prosecutors are determined to break the law governing disclosure obligations, then they will, rule or no rule.

A member stated that the member has received messages from Federal Public Defenders saying that they are still seeing disclosure problems out there. It is great that the Department of Justice is taking these steps, but why are they so afraid of a rule? With a rule, there are teeth there. The biggest problems are with agents. The prosecutor will give the defense at the last minute some statement he says he didn't know his agent had.

Mr. Wroblewski said that the Department does not deny that it faces challenges in complying with existing discovery obligations. There are complex electronic repositories of information, and a lot of federal and state actors. But changing the rule does not help with any of that. If the goal is to increase the amount of material that is actually disclosed, then it's not about the rule. Merely codifying the existing law in a rule would not affect that. A member agreed that the Department has problems with limited budgets and expanding technology.

Members lauded the admirable job done by the Department in this area, but asked, how do you institutionalize these policies and practices without a rule change, without black letter law requiring them? A member expressed doubt that some future administration's Department of Justice is going to place much emphasis on this. The committee needs to provide real guidance in a rule. With a rule, the particular policies of each future Attorney General may matter less.

Mr. Wroblewski responded that the Department needs to put all the information about discovery in one place, and that's what they are doing now. Errors typically are not about a bad decision the prosecutor made about disclosure of a particular document – and, in any event, no rule change will help with that. The typical situation is that the prosecutor finds out about the information late, so the prosecutor turns it over late. Rule changes won't help with that either. The Department does not believe that a rule is the best way to ensure compliance with discovery obligations. And the proposed rule amendments do not address victims' rights and witness security.

Mr. Goldsmith responded that he has worked for years at the Department, and he rejects the notion that if the Republicans win the White House in 2012, all his work on criminal discovery will go up in flames. He would be beyond shocked if that happened. That's not how the Department works. Making the Department's policies clear and well-disseminated is far more important than a rule change; it gives prosecutors meaningful guidance, which a rule amendment would not do. A member agreed that a new administration is not going to remove these procedures from the U.S. Attorneys' manual.

A member expressed skepticism about the value of trying to capture moving, changing case law in a rule. That would be very difficult, and perhaps not very useful.

A member stated that the timing issues only come up with impeachment materials. Core *Brady* materials must be turned over immediately. Mr. Wroblewski agreed. He predicted that the committee could come to some agreement fairly quickly on just core *Brady* materials. It is the timing of disclosure of impeachment materials that is the most complex issue.

A member stated that whatever rule is adopted, any rule amendment will create additional satellite litigation. In a large district like the Southern District of New York, games playing is simply what lawyers do. Litigation already takes forever, and any rule amendment will add another layer of satellite litigation. Another member agreed, arguing that prosecutors are not intentionally violating the *Brady* principle. No rule would have changed what happened in the Sen. Ted Stevens case. If a prosecutor is going to ignore 47 years of Supreme Court case law, they'll ignore a rule. Budget limitations may be a factor when the prosecution falls short.

Judge Tallman added that he worries that the Department won't get the money it needs for the steps it wants to take to meet its disclosure obligations in the electronic discovery area.

A participant pointed to Fed. R. Evid. 901, which is unique in that it provides a non-exhaustive checklist of possible methods to authenticate evidence and satisfy the requirements of Fed. R. Evid. 901. That rule comes closest to merging the concept of a checklist with a Department of Justice manual, and gives some rule teeth to it. There are no teeth to a mere checklist or manual, no penalty if you fail to comply.

A participant expressed skepticism about the committee's ability to create a rule to give rule-effect to the principles of *Brady* and *Giglio*. It is a false premise that the current administration is somehow the first to discover *Brady* obligations. Another false premise is that half of all judges want a rule amendment. Studies are useful but do not provide conclusive information. 50% of judges indicated some approval of a rule, but also 60% said they had seen no *Brady* violations in the last five years. A rule amendment may be a solution without a problem, since there have really been only a handful of highly publicized violations.

People keep saying that we need a rule, with teeth. But there already is a "rule," it's *Brady* and *Giglio*. There are hundreds of cases about sanctions for violations of *Brady* or *Giglio*. That's already out there, and sanctions are teeth. What some people are really looking for are consequences beyond what *Brady* and *Giglio* already provide. A rule will just create a lot of satellite litigation for those who will game the system.

Judge Tallman noted this discussion underscores the complete lack of consensus about what the committee should do. He tried, in his discussion draft of a proposed amendment, to break out what would be exculpatory material and what would be impeachment material. The feedback he got was that any rule language, even closely based on existing case law, would create more litigation over the precise meaning of the language. He stated that he does not know of any way to draft around that. He is concerned about the time courts would have to devote to such satellite litigation, and the expense that would impose on defense counsel and the Department of Justice. The result would be to transform criminal litigation into civil discovery practice.

In addition, the Jencks Act is almost an insurmountable obstacle. Judge Tallman stated that his attempt to work around the Jencks Act would have provided that prosecutors need not disclose witness statements until later, as the Act provides, but would nevertheless require earlier disclosure of summaries of the witness statements. But DOJ objected that preparing these summaries is going

to take time. And then there will be a new wave of satellite litigation over the content and accuracy of the summaries. His draft also contained "trump" language that would permit the government to withhold disclosure of dangerous information upon the filing of an unreviewable statement of the need to do so. That provision, too, would invite satellite litigation.

Judge Tallman reiterated that he is not now advocating adoption of his discussion draft, which many have opposed. But he noted no consensus draft has emerged. He suggested that the committee could vote to abandon, at least for now, its consideration of any Rule 16 amendment.

A member argued that the committee could issue a proposed amendment for public comment, and see what develops. Judge Tallman reminded the committee that the Standing Committee would need to approve such publication. In 2007, the Standing Committee refused to publish a proposed Rule 16 amendment after hearing impassioned objections from the Department of Justice, which had made changes to the U.S. Attorneys' manual on this issue. The Standing Committee instead remanded the issue back to this committee. The issue then was reopened in light of the Sen. Ted Stevens case after the chair received a letter from Judge Emmett Sullivan requesting reconsideration. If the committee decides to take no action now, the committee can still revisit the subject down the road. The Department has done a lot more this time than the last time. For that reason, it may be even tougher to win Standing Committee approval for publication, given that the Department's position opposing any rule amendment has not changed.

A member stated that, speaking for the defense side, the defense bar is interested only in putting forth a proposal that would have the support of – or at least that would not be actively opposed by – the Department of Justice. That is why representatives of the defense bar attempted to draft a proposal that found common ground, hoping that the Department would not oppose a mere codification of the existing case law.

Judge Tallman called for a vote on whether to make any change at all in Rule 16. A yes vote would favor proceeding to consider some change. A no vote would oppose making any change in Rule 16.

The committee voted 6-5 against any amendment to Rule 16.

Judge Tallman stated that in light of the committee's vote, the committee would table any further work on amending Rule 16. The committee will not go forward with any rule change. But that does not mean that the committee will abandon its initiatives that do not involve a rule change, such as working with the Federal Judicial Center to include this issue as a checklist in the judges' benchbook, asking the FJC to compile a "best practices" guide for criminal discovery, and expanding judicial education efforts. He emphasized that the issue of improving criminal discovery by amending rule 16 – which the committee has looked at for forty years – will not go away.

Judge Rosenthal observed that there can be beneficial effects and improvements as a result of the rulemaking process, even if there is no rule change. This is the best example of that she has ever seen. Because of the committee's process, the Department of Justice and others have

undertaken major policy changes and extensive education initiatives that they would not otherwise have done, or at least would not have done so quickly.

Judge Tallman promised that the issue of non-rule initiatives on criminal discovery will be pursued with the FJC. He pointed to the materials in the current agenda book listing specific points the committee might recommend that the FJC include in the judges' benchbook, and in a best-practices manual, on this issue.

Ms. Hooper reported that the FJC will probably conduct nationwide interviews with judges about best practices. As for the benchbook, there is a judges' committee, chaired by Judge Irma Gonzalez, that oversees changes in the benchbook. Judge Tallman stated that he would follow up by letter with that committee and be sure that this issue gets on that committee's agenda. Subsequent to the meeting the chair transmitted the committee's proposals to the FJC.

A participant suggested that it is imperative that the FJC conduct annual education of judges – not just new judges, but all judges – about criminal discovery. Judge Tallman stated that he has already discussed this with Judge Rothstein of the FJC and she is very supportive.

A participant suggested that any transmittal to the FJC make clear that the committee is looking for a list of best practices, not some kind of exhaustive checklist that encourages judges to turn their brains off. Judges must stay aware of a wide variety of unforseen problems that can arise. Judges must understand the difference between what the law mandates, and the actual practices favored across the courts. Judges should not conclude that once they go through the checklist, they don't have to think about *Brady* any further.

A member asked if this material goes in a benchbook, what does a judge do with it? Meet with the lawyers and tell them to do what's in the benchbook? If they don't, what should be the consequence? Judge Tallman responded that this issue does require more active judicial involvement in criminal discovery. A member agreed that the civil model of the Fed. R. Civ. P. 16 and 26 conferences might be useful. Mr. Wroblewski emphasized that the timing is important. If such a conference is held just before trial, a lot of this makes sense. But at the start of a case, a lot of this material will not yet have been disclosed.

Prof. King stated that a big point of contention will be whether such a criminal discovery conference has to happen before a guilty plea. Judge Tallman responded that the Supreme Court already has decided that is not constitutionally required. Prof. King agreed as to impeachment material, but noted that the Court's decision in *Ruiz* did not directly address known information establishing factual innocence.

A participant stated that sometimes guilty pleas are negotiated precisely to resolve the case quickly and spare the government additional investigation costs. The committee should not require the government to prepare every case for trial when the defendant is ready to plead guilty. A member agreed, but suggested that prosecutors be required to disclose material that the prosecutor actually knows about, without imposing any further duty on the prosecutor to investigate. Mr.

Wroblewski stated that usually the defendant is ready to plead right away, and warned that requiring the government to put off plea negotiations pending a *Brady* investigation would be a big change in practice. A member observed that sometimes defendants want to plead right away to avert any further government investigation, because defendants are afraid of what more the government will discover. Another member added that if defendants are going to re-plead after receiving *Brady* disclosures, that will wreak havoc in a busy district.

A participant objected that nevertheless this material has to be produced. A defendant cannot plead guilty, for example, without knowing of a recanting witness' statement. Prof. King noted that she'd read that some states consider it unethical for a prosecutor to sign a plea agreement in which the defendant waives the right to known exculpatory information. This is seen as the prosecutor gaining a waiver of the prosecutor's own misconduct.

A participant noted that the FJC will survey judges to ask what best practices judges are actually using. They are not going to find many judges requiring *Brady* disclosures before guilty pleas.

A member stated that the current draft checklist contains too many adverbs, too many quantitative words and intensifiers. These kinds of words plant the seeds of future disputes and should be removed from the checklist. Prof. King responded that most of that language was lifted from the U.S. Attorneys' manual. Judge Tallman agreed that the checklist is not a rule, and does not need to be so precise and didactic. The actual wording lies in the jurisdiction of the Benchbook Committee chaired by Judge Gonzalez.

A member stated that some of the objections to codifying disclosure obligations in a rule have to do with the dicey proposition of correctly characterizing the current case law, which is a moving target. It might be better to create in a rule an early conference to discuss the timing of disclosure of certain items, and then a pre-trial conference to discuss what has been disclosed. This could be placed in Rule 17.1 (pre-trial conference). The committee could graft ideas from Civil Rule 16 about such conferences into Rule 17.1. A whole variety of issues could be worked out at such a conference. This approach would not impose black-letter requirements on the government and, flexibly administered, it would not bog down the processing of routine cases.

Judge Tallman asked what judges' current practices are. Two members responded that they conduct a very general conference early on, and following that conference, issue an order setting schedules and deadlines. Another member reported that only one judge in the member's district does this, the other judges are "old-school" and do not. Another member reported that every judge in the member's district holds a conference almost immediately. There are several conferences, usually, in the average case, with a pre-trial conference usually two weeks before trial. Another member reported that in the member's district, three of the seven judges set a trial date in a vacuum, without any conference, which creates chaos every time.

A participant expressed skepticism about the notion of trying to create a formula for a Rule 17.1 conference. This cannot simply copy civil procedures, with Fed. R. Civ. P. 16 and 26 conferences. There are usually many more than two conferences in a criminal case.

A member objected to forcing mandatory conferences on judges. Another member agreed, but stated that the proposal was not mandatory and would maintain judicial discretion. The proposal is merely an attempt to set forth best practices with some kind of formality.

Judge Tallman stated that the committee had already voted not to amend the rules now to address *Brady*, and instead to pursue best practices and education through the FJC and others. Accordingly, he stated, he was concerned that this Rule 17.1 proposal is meant to address the same subject indirectly and is thus inconsistent with the committee's vote. And in any event, what would this Rule 17.1 proposal accomplish that the FJC best practices approach could not?

Judge Rosenthal added that there is a real concern in the civil area that judges and lawyers are not adequately using Civil Rule 16. Until the committee identifies some concrete problem that an amendment to Rule 17.1 would seek to solve, the committee is going to face opposition from district judges, who do not want mandatory practices imposed on them.

Judge Tallman stated that he will refer the Rule 17.1 proposal to the criminal discovery subcommittee. But, in light of the vote, amending Rule 16 is off the table for now.

C. Rule 15 (Depositions)

Judge Keenan, chair of the Rule 15 subcommittee, reported that years ago the Department of Justice pointed out to the committee that in terrorist or certain international criminal cases, there is some need for foreign depositions outside the physical presence of the defendant. Suppose a witness in a foreign country refuses to, or is unable to, come to the U.S. to testify. For whatever reason, the defendant cannot get to the foreign country to be present at a deposition of that witness. The committee drafted a proposed Rule 15 amendment to address this problem. The amendment would authorize the deposition outside the presence of the defendant – with the defendant participating by video technology – only under very limited circumstances. The court must first make case-specific findings on a whole list of requirements.

The Standing Committee and Judicial Conference approved this proposal, but the Supreme Court sent it back, apparently on Confrontation Clause grounds. The committee has been informally advised that the Court was concerned that the rule did not clarify that compliance with the procedures for gathering the evidence did not resolve the ultimate admissibility of such a deposition at trial. The committee has added language to the Committee Note further explaining that the rule amendment only addresses the taking of the deposition, and the later admissibility of such evidence at trial is determined by the Federal Rules of Evidence and the Constitution.

Judge Tallman explained that the committee had considered this issue before, and a sentence at the end of the current Committee Note addresses this. Now the committee has elevated that discussion to an entire paragraph at the beginning of the Committee Note to clarify the point.

Judge Rosenthal cautioned that the informal advice given about the Supreme Court's view of this amendment was just advice. There are no guarantees that the Court will accept what the committee has done. Judge Tallman agreed.

Prof. King pointed out that, nevertheless, the second-to-last paragraph of the Committee Note is about the admissibility of the evidence. She suggested that that paragraph be deleted. A member suggested deleting everything in that paragraph except the first sentence, and moving that first sentence to be the concluding sentence of the preceding paragraph.

The member also suggested, in the second paragraph of the Committee Note, inserting the language, "*As is true of every other deposition*, questions of admissibility of the evidence . . . ." This would make clear that the committee is not creating some new creature governed by new standards – the standards are the same as for any other deposition.

Judge Rosenthal suggested that it would be useful to run this Committee Note language, as revised, by the chair and reporter of the Advisory Committee on Evidence Rules.

Judge Tallman called for a vote on the above revisions to the draft Committee Note.

The committee unanimously by voice vote approved the above revisions to the Committee Note.

Judge Tallman called for a vote on final approval of the rule amendment and Committee Note, to be sent to the Judicial Conference.

The committee by voice vote, with a single dissenting vote, approved the amendment for transmission to the Judicial Conference.

IV. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER ADVISORY COMMITTEES

A. Status Report on Legislation and Other Matters Affecting the Federal Rules of Criminal Procedure

Ms. Kuperman reported that nothing is happening on the legislative front right now that would affect the Criminal Rules.

She stated that the Standing Committee is in the process of revising the procedures under which the rules committees operate. One change from the current procedures will be to recognize that there is now a rules web-site, and to specify what items must be posted there. The revised procedures will be presented to the Standing Committee at its June 2011 meeting.

Judge Rosenthal noted that the current procedures are not very readable, and are being restyled. Also, it is useful to think about what it means to be a sunshine committee in an electronic age, and what must be posted on-line. Mr. McCabe added that these procedures have not been changed since 1983.

B. Rule 45(c) and the "Three Days Added" Rule

Prof. Beale reported that Rule 45(c) on computation of time is parallel to the time-computation provisions in the other federal rules, and is modeled on Fed. R. Civ. P. 6(d). An academic published an article noting that a styling change to these provisions had produced an unintended consequence. The party who made service may benefit from the extra three days, which were intended only to benefit the party receiving service.

But in the Criminal Rules, only one provision, Rule 12.1(b)(2), could even conceivably be affected by this, and even then only in limited circumstances. The Civil Rules, by contrast, contain a number of affected provisions. For that reason it would be best for the committee to let the Advisory Committee on Civil Rules take the lead on this.

Judge Rosenthal agreed. If the committee doesn't like what the Civil Rules committee is doing, let them know. This is part of a potential larger project to remove from all the rules the vestigial remnants of the paper age. If the default filing method is electronic, not paper, then adjustments are needed. But doing that is tricky, where there are still a lot of paper filers such as pro se litigants. There is also a question whether to make such changes piecemeal, thereby pestering the bar with many small changes dribbling out over time, or instead to do it all at once in a large future project.

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman reminded members that the next meeting of the committee would be held on October 31-November 1, 2011, in St. Louis. After discussion, Judge Tallman stated that the spring 2012 meeting of the committee would be held on April 23-24, 2012, in San Francisco.

TAB 8-A-B

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

MEMORANDUM

DATE: **April 8, 2011**

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

FROM: **Honorable Sidney A. Fitzwater, Chair, Advisory Committee on Federal Rules of Evidence Procedure**

RE: **Report of the Evidence Rules Advisory Committee**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 1, 2011 in Philadelphia at The University of Pennsylvania Law School.

The Committee seeks approval of one proposal for release for public comment: an amendment to Evidence Rule 803(10)—the hearsay exception for absence of public record or entry—that is intended to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*.

A complete discussion of this proposal can be found in the draft minutes of the Spring 2011 meeting, attached as an appendix to this Report.

II. Action Item

Proposed Amendment to Evidence Rule 803(10)

In June 2009 the Supreme Court decided *Melendez-Diaz v. Massachusetts*. The Court held that certificates reporting the results of forensic tests conducted by analysts are "testimonial" within the meaning of the Confrontation Clause, as construed in *Crawford v. Washington.* Consequently, admitting such certificates in lieu of in-court testimony violates the accused's right of confrontation. The Committee has concluded that, in a criminal case, *Melendez-Diaz* also precludes the admission under Rule 803(10) of certificates offered to prove the *absence* of a public record. Like the certificates at issue in *Melendez-Diaz*, certificates proving the *absence* of public records are prepared with the sole motivation that they be used at trial as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting a certificate of the absence of a public record under Rule 803(10), where the certificate is prepared for use in court, violates the accused's right of confrontation.

The Committee at its Fall 2010 meeting discussed the possibility of amending Rule 803(10) to correct this constitutional infirmity, and it voted unanimously to consider a proposed amendment at the Spring meeting. The Reporter suggested adding a "notice-and-demand" procedure to the Rule that would require production of the person who prepared the certificate only if, after receiving notice from the government of intent to introduce a certificate, the defendant made a timely pretrial demand for production of the witness. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure. The Committee directed the Reporter to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that added procedural details such as providing for continuances. After consulting with the DOJ, the Reporter prepared proposed amendments to Rule 803(10).

At its Spring meeting, the Committee voted unanimously to refer a proposed amendment to Rule 803(10), and the Committee Note, to the Standing Committee, with the recommendation that the amendment be released for public comment. The proposed Rule and Committee Note are set out in an appendix to this report. As amended, Rule 803(10) would permit a prosecutor who intends to offer a certification to provide written notice of that intent at least 14 days before trial. If the defendant does not object in writing within 7 days of receiving the notice, the prosecutor would be permitted to introduce a certification that a diligent search failed to disclose a public record or statement rather than produce a witness to so testify. The amended Rule would allow the court to set a different time for the notice or the objection.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 803(10) be approved for release for public comment.

III. Information Items

A. Possible Amendment to Rule 801(d)(1)(B)

At its Spring meeting, the Committee considered a proposed amendment to Rule 801(d)(1)(B) initially suggested by Judge Bullock when he was a member of the Standing Committee. Judge Bullock proposed that Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility—specifically those that rebut a charge of recent fabrication or improper motive—are also admissible substantively under the hearsay exemption. But other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of bad memory—are not admissible under the hearsay exemption but only for rehabilitation. The justification for amending the Rule is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

The Committee voted to consider at its Fall 2011 meeting a proposed amendment to Rule 801(d)(1)(B). The Committee requested that the Department of Justice representative and the Public Defender representative solicit the views of interested parties. The Committee directed the Reporter to research the practices in the states with similar rules. And one committee member will solicit the views of state supreme court justices.

B. Decision Not to Continue Considering Possible Amendments of Rules 803(6)-(8)

The restyling project revealed an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. These exceptions set out admissibility requirements and provide that a record meeting the requirements is admissible, despite the fact that it is hearsay, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The Rules do not specify which party has the burden of showing trustworthiness or untrustworthiness.

The Committee did not submit proposed amendments to these Rules as part of restyling because research into the case law indicated that the changes would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. When the Standing Committee approved the Restyled Rules, however, several members suggested that the Evidence Advisory Committee consider making minor substantive changes that would clarify who has the burden.

At its Fall meeting, the Committee, while dubious about the need for amendments, directed the Reporter to consult representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether amendments should be proposed. The American College, the Litigation Section, and the Department of Justice favor amending the Rules to clarify that the opponent has the burden of showing untrustworthiness. They believe amending the Rules will provide a useful clarification.

At the Spring meeting, however, the Committee voted not to propose amendments to Rules 803(6)-(8). Members stated that any problems in applying the Rules are the result of a few outlier cases, that amending the Rules could create new problems for courts and litigants, and that the Rules clearly place the burden of establishing untrustworthiness on the party who opposes admitting the evidence.

C. Decision Not to Continue Considering Possible Amendment of Rule 806

In response to a directive from the Committee to identify rules that have been the subject of conflicting interpretations in the courts, the Reporter identified Rule 806, the Rule that allows impeachment of hearsay declarants.

At the Spring meeting, the Committee considered possible changes to the Rule and voted unanimously not to proceed with any. It concluded that difficulties in amending the Rule, coupled with concerns that changing the Rule could undermine a good policy of barring extrinsic evidence to impeach hearsay declarants, warranted a decision not to proceed further.

D. *Crawford* Developments

The Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*. The Reporter has provided the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to allow the Committee to keep current on developments in the law of confrontation because such developments might affect the constitutionality of hearsay exceptions contained in the Evidence Rules. Apart from Rule 803(10), nothing in the developing case law appears to require amending the Evidence Rules at this time. The Supreme Court is currently considering the case of *Bullcoming v. New Mexico*, in which it will address whether lab results can be introduced by a witness other than the person who conducted the test. The Court's decision in *Bullcoming* could affect the application of Rule 703. The Committee will continue monitoring developments in this area.

E. Privilege Project

Several years ago, the Committee voted to undertake a project to publish a pamphlet that describes the federal common law of evidentiary privileges. The project is only intended as a restatement of the federal common law, not a proposed codification of the law of privileges or a set

of proposals for consideration by the Congress. This project is considered a valuable service to the bench and bar because it will set out in text and commentary the privileges that exist under federal common law.

At its Spring meeting, the Committee considered materials on the attorney-client privilege and the psychotherapist-patient privilege. It determined that the project should cover the basic privileges: attorney-client; interspousal; psychotherapist; clergy; journalist; informant; deliberative process; and other governmental privileges. The Committee also concluded that there should be a separate section on waiver.

F. Restyling Symposium

The Committee is sponsoring a Symposium on the Restyled Rules of Evidence in conjunction with its Fall meeting. The symposium and the meeting will take place at William and Mary Law School on Friday, October 28, 2011. The proceedings of the Symposium will be published in the *William and Mary Law Review*. Standing Committee members who are not already participating as panelists are invited to attend. Members of the William and Mary Law School community have also been invited, as has been a representative from the National Center for State Courts.

IV. Minutes of the Spring 2011 Meeting

The Reporter's draft of the minutes of the Committee's Spring 2011 meeting is attached to this report as an appendix. These minutes have not yet been approved by the Committee.

Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2011

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(10)

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) if the prosecutor in a criminal case intends to offer a certification, the prosecutor provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 1, 2011

Philadelphia, Pennsylvania

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 1, 2011 in Philadelphia, Pennsylvania.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee")
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Hon. Paul S. Diamond, Liaison from the Civil Rules Committee
Hon. Judith H. Wizmur, Liaison from the Bankruptcy Rules Committee
James N. Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office

I. Opening Business

Introductory Matters

Judge Fitzwater, the Chair of the Committee, welcomed the members.

Dean Fitts of Penn Law School welcomed the Committee and stated that he was honored to have the Committee meeting at the Law School.

The minutes of the Fall 2010 Committee meeting were approved.

Judge Fitzwater noted with regret that it was the last meeting for two valued members of the Committee — Judge Joan Ericksen and Judge Joseph Anderson. He expressed the Committee's thanks and gratitude for all their fine work, and observed that they would receive a formal tribute at the next Committee meeting.

The Reporter noted for the record that this would be the first Evidence Rules Committee meeting without the stellar assistance of John Rabiej, who has taken an important position at the Sedona Conference. The Reporter stated that John's presence would be sorely missed at this meeting and in the future.

Restyling: Supreme Court Review

The Restyled Rules of Evidence were approved by the Judicial Conference in the Fall of 2010 and were sent to the Supreme Court. The Court notified Judge Rosenthal that it was considering four changes to the Restyled Rules. After a dialog with Judge Rosenthal and the Chair and Reporter of the Evidence Rules Committee, the Supreme Court withdrew its suggestions for change to two of the Rules ---- Rule 405(b) (the suggestion being to drop the word "relevant" from the rule), and Rule 801(a) (the suggestion being to specify that the intent requirement applies only to conduct and not to written or verbal assertions).

Judge Rosenthal, the Chair and the Reporter agreed with the changes suggested by the Court with respect to two rules: Rules 408 and 804(b)(4). Both changes restored language from the existing rule. Those changes, shown in blackline form, are as follows:

Rule 408:

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: **(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration ~~in order to compromise~~ in compromising or attempting to compromise the claim; and

Rule 804(b)(4):

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.	**(4)** ***Statement of Personal or Family History.*** A statement about: **(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or **(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

In sum, the proposed changes restored "in compromising or attempting to compromise a claim" to Rule 408 and "adoption" to Rule 804(b)(4). In response to these suggestions, Judge Rosenthal contacted Judge Sentelle, the Chair of the Executive Committee of the Judicial Conference, and asked for approval of the changes proposed by the Supreme Court. The Executive Committee approved the changes on an expedited basis. The changes were then presented to the Court as a recommendation of the Judicial Conference.

At the Advisory Committee meeting, the Committee discussed the two changes proposed by the Supreme Court. Committee members noted that the Court had obviously reviewed the Restyled Rules with significant care and detail. Committee members expressed pride in the fact that out of the hundreds of changes made in the restyling, the Supreme Court found only two small revisions to be advisable. After discussion of those proposed changes, the Committee voted unanimously to ratify the changes to Rules 408 and Rule 804(b)(4)

The Committee expressed its gratitude to Judge Rosenthal and to Andrea Kuperman, Chief of the Rules Committee Support Office for their outstanding work under considerable time pressure in effectuating the changes raised by the Supreme Court. The Chair thanked the Reporter for his quick responses on the legal questions raised by the Supreme Court proposals.

Restyling Project: Legal Writing Award

Judge Rosenthal informed the Committee that the Restyled Rules have been awarded a legal writing award from the Center for Plain Language. The award will be given at an award ceremony at the National Press Club. Judge Hinkle, who chaired the Evidence Rules Committee during the restyling project, will accept the award on behalf of the Standing Committee and the Evidence Rules Committee.

II. Proposed Amendment to Rule 803(10)

In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that certificates reporting the results of forensic tests conducted by analysts were "testimonial" and therefore the admission of such certificates (in lieu of testimony) violated the accused's right to confrontation. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

At the last meeting, the Reporter prepared a memorandum for the Committee on the effect of *Melendez-Diaz* on the constitutionality, as applied, of the hearsay exceptions that cover records in the Federal Rules of Evidence. The memorandum made the following tentative conclusions:

1) Records fitting within the business records exception are unlikely to be testimonial, and addressing any uncertainty about the constitutional admissibility of business records in certain unusual cases should await more case law development.

2) Records admissible under the public records exception are unlikely to be testimonial, because to be admissible under that exception the record cannot be prepared with the primary motivation of use in a criminal prosecution.

3) Authenticating business and public records by certificate under various provisions in Rule 902 is unlikely to raise constitutional concerns, because the Court in *Melendez-Diaz* found an exception to testimoniality for certificates that did nothing but authenticate a document. That exception has already been invoked by lower federal courts to uphold Rule 902 authentications against confrontation challenges.

4) *Melendez-Diaz* appears to bar the admission of certificates offered to prove the absence of a public record under Rule 803(10). Like the certificates at issue in *Melendez-Diaz,* a certificate proving up the absence of a public record is ordinarily prepared with the sole motivation that it will be used at trial — as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting a certificate of absence of public record under Rule 803(10), where the certificate is prepared for use in court, violates the accused's right to confrontation after *Melendez-Diaz.*

In light of the above, the Committee at its Fall 2010 meeting discussed the possibility of an amendment to Rule 803(10) that would correct the constitutional problem raised by *Melendez-Diaz.* The possible fix suggested in the Reporter's memo was to add a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if after receiving notice from the government of intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure, and the Reporter's draft added the language from that state version to the existing Rule 803(10).

The Committee unanimously resolved to consider a proposed amendment to Rule 803(10) at the Spring meeting. The Reporter was directed to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that add procedural details such as providing for continuances.

After consulting with the DOJ, the Reporter prepared a proposed amendment to Rule 803(10) that provided as follows:

(10) Absence of a Public Record. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) if the prosecutor in a criminal case intends to offer a certification, the prosecutor provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court, for good cause, sets a different time for the notice or the objection.

In drafting this proposed amendment, the Reporter relied on the following considerations:

1. The basic Texas rule, approved by the Supreme Court in *Melendez-Diaz*, serves as a good template for a notice-and-demand provision.

2. The rule should contain specific time periods.

3. The time for demand should be measured from the date of receipt of notice, rather than the number of days before trial.

4. A good cause provision should be added.

5. The amendment need not address such details as continuance, waiver, and testimony by an expert.

6. The amendment should not provide that if the defendant makes a proper demand, the government must produce the person who prepared the certificate.

In discussion on the proposal, the Committee agreed with all the above principles but for one. A number of members argued against a good cause provision on two grounds: 1) it would undermine the predictability of the rule, as a prosecutor could never be sure that even if a timely demand is not made, the court might still find good cause and then the government would have to produce the witness; 2) good cause would be applied in the context of the confrontation rights found in *Melendez-Diaz* and it is unclear how that might work in practice; and 3) the Court in *Melendez-Diaz* approved a notice-and-demand statute that did not contain a good cause requirement.

One member suggested that a good cause requirement was necessary because of unforeseen circumstances such as phones being out, computers crashing, and the like. But other members responded in two ways: 1) all the defendant has to do is make a demand within seven days of receiving the notice — there is no requirement of a substantial production or significant effort that would be forestalled by an emergency event; and 2) if the defendant truly has a justification for failing to timely comply, a court is likely to grant relief even without good cause language in the Rule.

The Committee then considered whether, if good cause language were cut from the proposal, the rule should still provide that the court could set a different time for the notice and demand.

Members generally agreed that it would be useful to retain such a provision. It was noted that many of the Civil and Criminal Rules provide specifically that a court can set a different time than the period provided by a particular rule. Moreover, courts may want to provide time periods at the outset of a case to require the government to provide notice before the time required by the rule.

Finally, the Committee considered whether the procedural fix of a notice-and-demand statute should be placed somewhere other than Rule 803(10). One member pointed out that certain excited utterances might be testimonial — though this is far less likely after the Supreme Court's decision in *Michigan v. Bryant* — or that other hearsay exceptions might encompass testimonial hearsay. But other members responded that it was only Rule 803(10) that authorizes admission of hearsay that will almost always be testimonial — because certificates of the absence of public record are almost always prepared with the primary motivation that they would be used in a criminal prosecution. It would make no sense to impose notice and demand provisions on other hearsay exceptions that rarely if ever embrace testimonial hearsay. The effect of a notice and demand provision is to require the government to produce a witness in lieu of a hearsay statement, and that effect is not justified unless the hearsay is testimonial.

After significant discussion, the Committee unanimously approved the following amendment to the text of Rule 803(10), to be transmitted to the Standing Committee with the recommendation that it be approved for public comment:

> **(10) Absence of a Public Record.** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:
>
> (A) the testimony or certification is admitted to prove that
>
> (~~A~~ i) the record or statement does not exist; or
>
> (~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and
>
> (B) if the prosecutor in a criminal case intends to offer a certification, the prosecutor provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

The Committee unanimously approved a Committee Note to accompany the proposed amendment to Rule 803(10). That Note provides as follows:

Committee Note

> Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and an opportunity to demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

The proposed amendment and Committee Note, in proper format, are attached as an appendix to Judge Fitzwater's report to the Standing Committee.

III. Possible Amendments to Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Those exceptions in current form set forth admissibility requirements and then provide that a record meeting those requirements is admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness.

The restyling sought to clarify the ambiguity by providing that a record fitting the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information, etc., indicate a lack of trustworthiness. But the Committee did not submit this proposal as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Thus the proposal would have changed the law in at least one court, and so was substantive under the restyling protocol.

When the Standing Committee approved the Restyled Rules, several members suggested that the Evidence Rules Committee consider making the minor substantive change that would clarify what is implicit in Rules 803(6)-(8) — that the opponent has the burden of showing untrustworthiness. Those members believed that allocating the burden to the opponent made sense for a number of reasons, including: 1) the Rules' reference to a "lack of trustworthiness" suggests strongly that the burden is on the opponent, as it is the opponent who would want to prove the lack of trustworthiness; 2) almost all the case law imposes the burden on the opponent; and 3) if the other admissibility requirements are met, the qualifying record is entitled to a presumption of trustworthiness, and adding an additional requirement of proving trustworthiness would unduly limit these records-based exceptions.

At the Fall 2010 meeting, the Advisory Committee was dubious about the need for an amendment that would clarify the burden of proof as to trustworthiness. Some members suggested that the determination of trustworthiness might be a process and a court may decide that a record is untrustworthy even if the opponent does not provide any evidence or argument on that subject. Others noted that almost all courts impose the burden on the opponent and so there was really no serious problem worth addressing. Ultimately the Committee directed the Reporter to check with representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether it would be helpful to propose an amendment that would clarify that the burden of showing untrustworthiness is on the opponent. The Committee determined that it would revisit the question of a possible amendment at the Spring meeting.

The Reporter sought input from the American College, the Litigation Section, and the Department of Justice. All came out in favor of an amendment to clarify that the opponent has the burden of showing untrustworthiness of business and public records. Those organizations thought the amendment would provide a useful clarification and would assist courts and litigants in structuring arguments and admissibility determinations for business and public records.

But at the Spring meeting, Committee members were opposed to any amendment to the trustworthiness language of Rules 803(6)-(8). Members stated that any problem in the application in the rule was caused by a few wayward cases; that an amendment could simply invite parties to raise trustworthiness arguments that would not otherwise be raised; that courts need flexibility to deal with trustworthiness arguments; that parties understand that the burden of proving untrustworthiness is on the opponent; and that the restyling did nothing to change that basic understanding.

The Committee noted for the record that the burden of proving untrustworthiness is on the opponent and that this is clear enough in the existing language of the rule, so that clarification is unnecessary.

A motion was made against publishing an amendment to the trustworthiness clauses of Rules 803(6)-(8). Eight members voted in favor of the motion. One member abstained.

IV. Possible Amendment to Rule 801(d)(1)(B)

At the Spring meeting the Committee considered a proposed amendment that had been tabled a number of years earlier when the Committee was involved in Rule 502 and then restyling. The proposal — made by Judge Bullock, then a member of the Standing Committee — was to amend Evidence Rule 801(d)(1)(B). That is the hearsay exemption for certain prior consistent statements. Judge Bullock proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exception whenever they would be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper motive — are also admissible substantively under the hearsay exemption. But other rehabilitative statements — such as those which explain a prior inconsistency or rebut a charge of bad memory — are not admissible under the hearsay exception but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, as Judge Bullock noted, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case.

The Committee unanimously agreed with Judge Bullock's argument that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow and makes no practical difference. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements. Parties might seek to use the exemption as a means to bolster the credibility of their witnesses. The Committee was cognizant of the Supreme Court's concern in *Tome v. United States*, 513 U.S. 150 (1995): that under an expansive treatment of prior consistent statements "the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones."

One member agreed with the point that the current rule was problematic in treating some rehabilitative prior consistent statements differently from others, but suggested that the proper result is that *none* of them should be admissible substantively — i.e., the Committee should propose deleting Rule 801(d)(1)(B). But this suggestion was rejected by other Committee members, who found no good reason for upsetting the current practice in this way. The Department of Justice member was also opposed to any proposal to limit the current substantive admissibility of prior consistent statements.

Both the Department of Justice representative and the Public Defender representative noted that they had not yet had the opportunity to vet the proposed amendment with their interested parties. Committee members also noted that it might be useful to determine how the practice has gone under the states that already have a rule that is similar to the possible amendment.

Accordingly, after extensive discussion, the Committee resolved to further consider the proposal to amend Rule 801(d)(1)(B) at the next meeting. The working language for the proposed amendment is as follows:

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

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

* * *

(B) is consistent with the declarant's testimony and ~~is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying~~ rehabilitates the declarant's credibility as a witness;

The Committee requested the Department of Justice representative and the Public Defender representative to solicit the views of their interested parties. The Reporter was directed to research the practice in the states with similar rules. And Justice Appel offered to solicit the views of other state supreme court justices.

V. Proposed Amendment to Rule 806

In 2001, the Evidence Rules Committee directed the Reporter to review all the Evidence Rules and report on which rules were the subject of a conflict in interpretation in the courts. The goal of the project was to allow the Committee to consider whether to propose an amendment to any such rule in order to rectify the conflict. One rule subject to such a conflict was and is Rule 806 — the rule allowing impeachment of hearsay declarants. The Reporter prepared a memorandum discussing the conflict and providing language for a possible amendment. But by the time the Committee considered the conflict regarding Rule 806, it had become involved in developing Rule 502, and then restyling, and so consideration of a possible amendment was tabled.

At the Spring meeting, the Committee considered the possibility of two separate changes to Rule 806. One change addressed the conflict in the case law over whether a hearsay declarant may be impeached by extrinsic evidence of bad acts bearing on character for truthfulness. If the declarant were to testify as a witness, he could be questioned about pertinent bad acts, but Rule 608(b) would prohibit extrinsic evidence of those acts. Rule 806 is designed to allow an opponent to impeach a hearsay declarant in the same way that he could be impeached on the stand. But the problem is that a hearsay declarant ordinarily cannot be asked about bad acts — so the only way to raise the act would be through extrinsic evidence. Rule 806 currently does not provide for an exception to Rule 608(b), but at least one court has read such an exception into the Rule, in order to allow the opponent a means of attacking the credibility of a hearsay declarant through bad acts. The rationale of that court is that the goal of Rule 806 is to allow the opponent to impeach the declarant as fully as if he were on the stand. Other courts, however, read the rule literally and refuse to add an extrinsic evidence exception that is not in the text.

The possible amendment to the Rule — considered by the Committee at the Spring meeting — would have provided that "the court may admit extrinsic evidence of the declarant's conduct when offered to attack or support the declarant's character for truthfulness."

Committee members discussed the proposal and unanimously determined that the amendment should not proceed. Members noted that it is impossible to treat impeachment with bad acts exactly the same when the person to be impeached is a hearsay declarant. That is because extrinsic evidence would have to be admitted, where it would be barred if the declarant were to testify. Given that impossibility of exactly equal treatment, the Committee considered whether it was good policy to allow extrinsic evidence of bad acts to impeach a hearsay declarant. It concluded that the policy of barring extrinsic evidence was a good one, as it prevented minitrials on collateral bad acts — minitrials that would require discovery by the parties. Because impeachment of witnesses and impeachment of hearsay declarants can never be exactly the same, the Committee saw no need to open up the costs of admitting extrinsic evidence to impeach hearsay declarants.

The other possible amendment to Rule 806 would deal with a narrow issue. Under the rule, a criminal defendant in a multi-defendant trial could end up being impeached with a prior conviction even if he never took the stand. This could occur when his hearsay statement is admitted against himself and his co-defendants (e.g., as a co-conspirator statement), and the co-defendants seek to attack the declarant's credibility. Some have argued that Rule 806 should be amended to prohibit the impeachment of an accused whose hearsay statements are admitted in a multiple defendant trial where the declarant-defendant does not testify. But the Committee determined that the solution to the problem of impeaching an accused who does not testify does not lie in the rules of evidence but rather in the law of severance. The Committee also noted that there was no easy answer to whether such impeachment should be permitted — while the declarant/defendant's rights are obviously at stake, so are the rights of the impeaching party to challenge the credibility of a hearsay declarant. The Committee unanimously determined that the proper resolution to these problems should be left to the trial judge considering the circumstances of the particular case, with the possible remedy of severance.

The Committee unanimously determined that there was no sentiment to move forward with any amendment to Rule 806.

VI. *Crawford* Developments

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Committee reviewed the memo and the Reporter noted that — with the exception of Rule 803(10), discussed supra — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The digest contained an extensive discussion of the Supreme Court's recent decision in *Michigan v. Bryant,* which considered whether a hearsay statement admitted as an excited utterance was testimonial. The Court's decision in *Bryant* makes it very unlikely that a statement admitted under Rule 803(2) — the Federal Rules hearsay exception for excited utterances — will be found testimonial. The Reporter observed that the Supreme Court is currently considering the case of *Bullcoming v. New Mexico,* in which it will address whether lab

results can be introduced by a witness other than the person who conducted the test. The Court's decision in *Bullcoming* may have an effect on the application of Rule 703. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Privilege Project

Several years ago the Committee voted to undertake a project to publish a pamphlet that would describe the federal common law on evidentiary privileges. The Committee determined that it would not be advisable to propose an actual codification of all the evidentiary privileges to Congress. But it concluded that it could perform a valuable service to the bench and bar by setting forth in text and commentary the privileges that exist under federal common law. Professor Broun had prepared drafts of a number of privileges, but the project was put on hold given the time and resources required for Rule 502 and the restyling project.

At the Spring meeting, Professor Broun submitted materials on the attorney-client privilege and the psychotherapist-patient privilege. Committee members praised his work and predicted that the final product, when published, would be extremely useful to the bench and bar. The Committee resolved unanimously that the privilege project should be continued.

Professor Broun stated that the goal of the project was to provide a textual "restatement" of the federal law of privilege, with an explanatory section setting forth the case law. Professor Broun sought guidance on which privileges should be addressed as the project goes forward. After discussion, the Committee determined that the project should cover the basic privileges: attorney-client; interspousal; psychotherapist; clergy; journalist; informant; deliberative process; and other governmental privileges. In addition, the Committee agreed with Professor Broun's suggestion that there should be a separate section on waiver — analogous to the separate rule on waiver proposed by the original Advisory Committee.

Committee members stated for the record that the project was intended only as a restatement of the federal common law of privilege — a published product that would assist the bench and bar. Members emphasized that the Committee has no intent to propose codification of privileges or to intrude on Congress's role in enacting privilege rules.

At the suggestion of the Chair, Judge Rosenthal agreed to check on whether the American Law Institute might be working on any project involving privileges.

Professor Broun stated that at the next meeting he would provide materials on the attorney-client privilege and the interspousal privileges.

VIII. Restyling Symposium

The Chair reported to the Committee on plans being made for a Symposium on the Restyled Rules of Evidence, to take place on the morning before the scheduled Fall meeting of the Committee. The Symposium and the Committee meeting will take place at William and Mary Law School on Friday October 28, 2011.

The Chair explained that the Fall meeting will be an opportune moment for the Committee to take pride in the restyling effort, as the Restyled Rules are scheduled to go into effect on December 1, 2011 (if all goes well). The Chair and the Reporter have begun to put together two panels for the Symposium. One is a retrospective panel that will look at the process and protocol of restyling, problems encountered by the Committee, and how those problems were addressed in the Restyled Rules. The second panel will discuss how the Restyled Rules are likely to be received by the bench and bar; any questions about meaning that may exist; and what problems if any there might be in applying the Restyled Rules.

The proceedings of the Symposium will be published. Standing Committee members are enthusiastically invited to attend. Members of the William and Mary community will also be invited to attend.

The following people have agreed to make a presentation at the symposium — with subject matter of each presentation to be determined:

- Judge Robert Hinkle, Chair of the Committee during the restyling effort
- Professor Joe Kimble, style consultant
- Judge James Teilborg, Chair of the Style Subcommittee of the Standing Committee
- Judge Marilyn Huff, Member of the Style Subcommittee of the Standing Committee
- Professor Steve Saltzburg (Litigation Section representative on the restyling project).
- Judge Reena Raggi (Standing Committee member who provided very helpful comments on restyling)
- Judge Harris Hartz (former Standing Committee member who provided very helpful comments on restyling)
- Justice Andy Hurwitz, member of the Committee during restyling
- Judge Joan Ericksen, member of the Committee during restyling
- Professor Deborah Merritt, Ohio State (comment on Rule 1101)
- Professor Roger Park, Hastings (provided public comment)
- Judge S. Allan Alexander, Federal Magistrate Judges' Association
- Professor Katherine Schaffzin, Memphis (provided public comment)
- A representative from the National Center for State Courts.

The Chair invited Committee members to suggest any other individuals who should be invited to make a presentation, and to propose any other topics that might be covered by the panels.

IX. Next Meeting

The Fall 2011 meeting of the Committee is scheduled for Friday, October 28 in Williamsburg. It will take place after the Restyling Symposium.

Respectfully submitted,

Daniel J. Capra
Reporter

TAB 9-A-E

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

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

DATE: May 6, 2011

RE: Report of the Bankruptcy Rules Advisory Committee

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 7 and 8, 2011, in San Francisco, California. The initial portion of the meeting was held jointly with the Advisory Committee on Appellate Rules in order to discuss possible revisions of the bankruptcy appellate rules (Part VIII of the Bankruptcy Rules) and of Appellate Rule 6, which governs bankruptcy appeals in the courts of appeals.

Among the matters before the Committee were the proposed rule and form amendments and proposed new forms that were published for comment in August 2010. Thirty-seven comments were submitted in response to the publication. The Committee held a hearing in Washington, D.C., on February 4, 2011, at which six witnesses testified. Through a series of subcommittee conference calls and discussions at the San Francisco meeting, the Committee carefully considered the comments and testimony that were submitted. They are summarized below, along with the changes that the Committee recommends making to the published rules and forms in response to the comments received.

At its April meeting and at an earlier meeting in September 2010, the Committee took action on several matters that it now presents to the Standing Committee. The action items are grouped into three categories:

(a) matters published in August 2010 for which the Committee seeks approval for transmission to the Judicial Conference—amendments to Rules 3001(c), 7054, 7056, Official Form 10, and Official Form 25A; and new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2);

(b) matters for which the Committee seeks approval for transmission to the Judicial Conference without publication—amendments to Rules 1007(c), 2015(a), 3001(c), and Official Forms 1 and 9A - 9I; and

(c) matters for which the Committee seeks approval for publication in August 2011—amendments to Rules 1007(b), 3007(a), 5009(b), 9006, 9013, and 9014, and Official Forms 6C, 7, 22A, and 22C.

After discussing these action items, the report presents information about the Committee's ongoing work on revising the bankruptcy appellate rules and on the Forms Modernization Project.

II. Action Items

A. Items for Final Approval

1. Amendments and New Forms Published for Comment in August 2010. **The Advisory Committee recommends that the proposed amendments and new forms that are summarized below be approved and forwarded to the Judicial Conference. The Advisory Committee recommends that the amended forms and new forms be effective on December 1, 2011.** The texts of the amended rules and forms and the new forms are set out in Appendix A.

Action Item 1. Rule 3001(c) would be amended to provide, in new paragraph (3), requirements for the documentation of claims based on an open-end or revolving consumer credit agreement. Subdivision (c)(1) currently requires the attachment to a proof of claim of the writing, if any, on which a claim or an interest in property is based. That provision would be amended to create an exception for claims governed by paragraph (3) of the subdivision. New paragraph (3) would require for an open-end or revolving consumer credit claim that a statement be filed with the proof of claim that provides the following information to the extent applicable: name of the entity from whom the creditor purchased the account; name of the entity to whom the debt was owed at the time of the account holder's last transaction; date of the account holder's last transaction; date of the last payment on the account; and the charge-off date. This information may be needed by the debtor to associate the claim with a known account, since claims of this type—primarily for credit card debts—are frequently sold one or more times before being held by the claim filer, which may be an entity unknown to the debtor. The required information would also provide a basis for assessing the timeliness of the claim. In addition to this information, which must be routinely provided, a party in interest could obtain a copy of the writing on which an open-end or revolving consumer credit claim is based by requesting it in writing from the holder of the claim.

a. Testimony and comments

Four witnesses testified at the February 4, 2011 hearing on these proposed amendments, and 24 people submitted written comments on them. Individual summaries of the testimony and comments are set forth in Appendix A. The major topics they addressed are the following:

Whether there is a need for the amendments. A few representatives of consumer lenders or purchasers of credit card debt questioned the need for the proposed amendments. They noted the low incidence of objections to the claims they file and said that in many cases the debtor has scheduled the debts owed to them, thus acknowledging the validity of their claims.

Lawyers for consumer debtors and a bankruptcy judge supported the rule's requirement that credit card claimants provide specific information to support their claims. They stated that these claimants are ignoring the current requirement for attaching the writing on which the claim is based and that, having purchased the claims in bulk, the claimants generally have very little information about the claims they file. Two comments noted that the U.S. Trustee Program recently entered into a settlement with Capital One Bank for filing thousands of previously discharged claims.

Whether the amendments place an appropriate burden on consumer lenders and debt purchasers. One witness representing the American Bankers Association testified that the proposed amendment would place an unreasonable burden on consumer lenders and debt purchasers and would improperly shift the burden of proof to the creditor. This, he said, would adversely affect an industry that purchased $100 billion of charged-off debt last year. Several representatives of debt purchasing companies suggested that the rule should acknowledge that compliance with the requirements of Rule 3001(c)(3)(A) entitles the claim to prima facie validity without regard to whether the supporting writing is requested or provided.

Some consumer lawyers commented that the proposed amendment would not place a sufficient burden on credit card claimants. They objected to excepting these types of claims from the general requirement for attachment of the writing on which a claim is based. Some argued for a requirement that a debt buyer who files a claim produce a complete chain of title, and another urged that a full account transaction history be required. One comment stated that the rule should require more diligence, more documentation, and more care in the preparation of a proof of claim given the "sorry state of compliance with existing rules." A representative of the National Association of Consumer Bankruptcy Attorneys characterized the proposed amendment as "quite modest and, at best, barely adequate to deal with widespread problems."

Whether subdivision (c)(3)(A) requires disclosure of the appropriate items of information. Some witnesses and commentators questioned the value of some of the information required to be included in the statement accompanying the proof of claim or suggested other information that should be required. Some comments suggested that particular provisions were ambiguous.

Whether subdivision (c)(3)(B) requires too much or too little of holders of credit card claims. Much of the public comment was addressed to the requirement that the claimant provide the writing on which the claim is based if a party in interest makes a written request for this document. Comments and testimony by some representatives of consumer lenders and bulk claims purchasers argued that a threshold showing of need for the writing should be required of the requesting party, that the rule should clarify the specific writing that should be produced for credit card claims, or that the provision should be deleted.

Some of the consumer bankruptcy lawyers, on the other hand, commented that there was no reason to have this special rule for holders of credit card claims and that they should have to produce the writing without request like all other creditors filing proofs of claim. Others argued that the rule should provide a time limit for the production of the writing in response to a request and that the

Committee Note should state that the documentation that must be produced includes the chain of title, the contract upon which the claim is based, and a transaction record.

Some commentators on both sides of the issue said that requiring production of the writing will lead to litigation and delay.

Comments on previously approved amendments to Rule 3001(c). Some commentators representing bulk claims purchasers used this occasion to object to amendments to Rule 3001(c)(2) that were recently approved by the Supreme Court and transmitted to Congress. In particular they expressed displeasure with the requirement that interest, fees, expenses, and other charges included in a claim be itemized and with the authorization of sanctions for the failure to comply with the requirements of Rule 3001(c).

b. Committee consideration

Many of the issues raised in the testimony and written comments were ones that the Advisory Committee had previously considered. The Committee concluded that the proposed rule amendment will permit enforcement of an appropriate disclosure requirement on creditors seeking recovery from bankruptcy estates for claims based on open-end or revolving consumer credit agreements. Under the existing rule, all creditors are required to file the writing on which the claim is based. As reflected in comments from advocates for all affected parties, this requirement is generally not being complied with by credit card claimants. Rather than imposing a new requirement of document production on credit card claimants, the proposed amendments allow those creditors flexibility in providing information that will provide a basis for debtors and trustees to assess whether a claim is valid and enforceable. The proposed amendments for credit card claimants are less stringent than the requirements under existing Rule 3001(c), but they are designed to provide more information than is often provided under current practices. The Committee concluded that the comments and testimony did not provide any reason to revisit the basic decisions that it had previously reached.

The Committee did agree that a deadline for responding to a request for the underlying writing should be imposed. Specifying a time limit will enable the requesting party to determine when there has been a failure to comply if the request is met with silence. The Committee therefore voted to add a 30-day deadline for responding to a written request under proposed Rule 3001(c)(3)(B). The time would run from when the written request is sent. This time limit would be subject to enlargement or reduction by the court for cause under Rule 9006.

Because there is no deadline for making a request under proposed Rule 3001(c)(3)(B), the Committee discussed the point at which a properly filed proof of claim based on an open-end or revolving credit card agreement would be entitled to be treated under Rule 3001(f) as prima facie evidence of the validity and amount of the claim. If the applicability of subdivision (f) depended upon compliance with proposed subsection (c)(3)(B), it would be uncertain whether the claim was entitled to the benefit of prima facie validity until a written request was made—if and whenever that might occur—and the claimant did or did not provide a proper response. The Committee voted to add to the Committee Note a statement that a proof of claim based on an open-end or revolving credit card agreement that is filed and executed in accordance with Rule 3001(a), (b), (c)(1), (c)(2), (c)(3)(A), and (e) is entitled to the benefit of subdivision (f). Failure of a claimant to comply with proposed Rule (c)(3)(B) would not affect the applicability of subdivision (f), but would subject the claimant to possible sanctions.

Finally, the Committee agreed with one witness that proposed Rule 3001(c)(3) is not intended to apply to home equity lines of credit. Those types of loans, which are secured by a security interest in the debtor's real property, are covered by the pending home mortgage amendments and were not intended to be included within subdivision (c)(3). The Committee therefore added an exception for these types of loans to proposed Rule 3001(c)(3).

Action Item 2. Rule 7054 incorporates Fed. R. Civ. P. 54(a) - (c) for adversary proceedings, and in subdivision (b) it provides for the awarding of costs. The proposed amendment that was published for comment would amend (b) to provide more time—14 days rather than one day—for a party to respond to the prevailing party's bill of costs, and extend from five to seven days the time for seeking court review of the costs taxed by the clerk. The first change was proposed in order to provide a more reasonable period of time for a response, and the latter period was changed to conform to the 2009 time-computation amendments, which changed five-day periods in the rules to seven days. These changes are also intended to make the rule consistent with Civil Rule 54, which was previously amended to adopt the proposed time periods.

One comment was submitted on this proposed amendment. Norman H. Meyer, Jr., Clerk of the U.S. Bankruptcy Court for the District of New Mexico, suggested that both time periods in Rule 7054(b) be extended to 14 days. His district's local rule allows 14 days after entry of the judgment to move for the taxation of costs, 14 days after notice of the motion to object to the bill of costs, and 14 days after the taxation of costs to seek court review.

Because one of the goals of the proposed amendment is to make Rule 7054(b) consistent with the civil rule, the Committee voted unanimously to recommend approval of the amended rule as published.

Action Item 3. Rule 7056 makes Fed. R. Civ. P. 56 applicable in adversary proceedings. Under Rule 9014(c), Rule 7056 also applies in contested matters unless the court directs otherwise. The amendment was proposed in response to the civil rule's imposition of a new default deadline for filing a motion for summary judgment. Under the civil rule, the deadline for filing a motion for summary judgment is 30 days after the close of all discovery, unless a different time is set by local rule or court order. Because hearings in bankruptcy cases sometimes occur shortly after the close of discovery, the proposed amendment to Rule 7056 bases the default deadline on the scheduled hearing date, rather than on the close of discovery. The deadline for filing a summary judgment motion would be 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless a local rule or the court sets a different deadline.

No one submitted a comment on this amendment. The Committee voted unanimously to recommend approval of the proposed amendment to Rule 7056 as published.

Action Item 4. Official Form 10 (Proof of Claim) would be amended in several respects. As published, the proposed amendments included the following:

- a request for additional information about the interest rate for secured claims and a clarification that the information concerns the rate as of the filing of the petition;

- clarification that a summary of supporting documents may be submitted only as an addition to copies of the documents themselves and not as a substitute;

- additional emphasis of the need to redact attached documents to eliminate personal data identifiers;

- changes to the date and signature box to emphasize the duty of care that must be exercised in filing a proof of claim and to require disclosure of the capacity in which the filer is acting;

- the addition of a space for a uniform claim identifier; and

- various formatting and stylistic changes.

a. Comments

Six comments were submitted regarding the proposed Form 10 amendments, and an additional inquiry was informally made regarding that form.

Judge Paul Mannes (Bankr. D. Md.) pointed out that, as proposed to be amended, Form 10 would contain two places to indicate whether the proof of claim is being filed by a trustee or debtor, rather than by a creditor. He suggested that the first request for that information be deleted, and that the resulting space be used to allow the claimant to indicate that it did not receive notice of the filing of the bankruptcy case from the court.

Linda Spaight, of the Administrative Office's Bankruptcy Court Administrative Division, noted the continuation of an existing discrepancy between the form's instruction not to "send original documents, as attachments may be destroyed after scanning" and Rule 3001(c)'s requirement that the original or a duplicate of a writing on which a claim is based be attached. The National Association of Consumer Bankruptcy Attorneys commented that Form 10, either on its face or in the instructions, should state that attachments are required for open-end consumer credit claims and mortgage claims. It stated that not all claimants will be familiar with the rules requiring the attachment of those documents.

Two attorneys expressed support for the amendments, and another commentator questioned whether "email" was spelled properly.

Finally, Robby Robinson of the Bankruptcy Court Administrative Division, on behalf of the NextGen project, informally questioned why requests for email addresses were added to Form 10 and whether the provision of that information was intended to constitute consent to receive notices and service by email.

b. Committee consideration

The Committee considered these comments and voted unanimously to recommend approval of the amendments to Form 10, with the following changes to the published draft:

- the deletion of the debtor/trustee checkbox on page 1 of the form, without adding a replacement for the checkbox, leaving the identity of the person filing the claim for disclosure only in the signature box; and

- the addition of a statement to the Committee Note, explaining that the new requests for email addresses are intended only to facilitate communication with the claimant and that the provision of this information does not affect any requirements for serving or providing notice to the claimant.

The Committee also decided to include additional statements in box 7 of Form 10 reminding claimants of the need to attach the documentation required by Rule 3001(c) for claims secured by a security interest in the debtor's principal residence and claims based on an open-end or revolving consumer credit agreement. Because the latter documentation requirement will not take effect until December 1, 2012, the Committee voted to delay recommending these additions to box 7 until June 2012, when it will submit them to the Standing Committee for approval.

The Committee decided to respond to the discrepancy between Rule 3001(c) and Form 10—concerning whether original documents should be filed—by proposing a technical amendment to the rule, rather than amending the form. This change, which brings the rule into conformity with existing practice, is addressed in Part II.A.2 of this report.

Action Item 5. Official Form 10 (Attachment A) (Mortgage Proof of Claim Attachment) is new. It would implement the requirements of Rule 3001(c)(2) for a claim secured by a security interest in the debtor's principal residence. That rule amendment was recently approved by the Supreme Court and transmitted to Congress. Accompanying the proof of claim for a home mortgage, this attachment form would require a statement of the principal and interest due as of the petition date; a statement of prepetition fees, expenses, and charges; and a statement of the amount necessary to cure a default as of the petition date.

Two witnesses testified at the February 4, 2011 hearing about this and the other two proposed mortgage claims, and thirteen written comments were submitted. Summaries of the testimony and comments are included in Appendix A.

The Committee thoroughly discussed the testimony and comments that were submitted on the proposed mortgage forms. Members agreed that the major issue raised at the hearing and in the comments was whether a mortgage lender should be required to provide a complete account history as an attachment to its proof of claim. The Committee had considered this issue prior to recommending the proposed forms for publication, and the decision not to require this information was based largely on the desire to require the disclosure of information about the basis for a mortgage claim without imposing an undue burden on the mortgagee or overwhelming the debtor with too much detail. The Committee recognized that some of the comments and testimony, particularly those of Bankruptcy Judges Marvin Isgur (S.D. Tex.) and Elizabeth Magner (E.D La.), called into question whether the proper balance had been struck.

The Committee discussed various options for giving further consideration to whether a full loan history should be required. In the end, the Committee concluded that it was important that the proposed rules and forms requiring greater disclosure of information about mortgage claims not be delayed and that they remain on track to take effect in December 2011. Amending the attachment form to require a loan history would require republication and thus a year's delay in the effective date of the form. The Committee did not support allowing the rules to go into effect without all of the implementing forms.

The Committee did not, however, want to dismiss completely the possibility of requiring a loan history. Testimony and comments supporting such a requirement persuasively explained the value that this information might provide, in particular by showing how the lender applied prepetition payments it had received from the debtor. But the Committee noted that only a small number of persons had been heard from, and none of the comments were submitted by mortgage lenders or servicers. Some members of the Committee expressed concern about whether it would be feasible for creditors of all sizes to comply with a loan-history requirement and whether the costs of implementing automation systems to provide this information were justified by the value of the information to parties and the courts.

The Committee concluded that gathering information about people's experience with the proposed rules and forms after they go into effect could be helpful in deciding later whether to require a loan history. The Committee discussed several means of gathering this information, including holding a mini-conference of mortgage lenders and servicers, chapter 13 trustees, consumer debtors' attorneys, and judges; asking the Federal Judicial Center to undertake a survey or study; or having the reporter publish a request for information. Ultimately, the Committee voted to give further consideration in the future to requiring attachment of a complete loan history to a proof of claim filed for a claim secured by a security interest in the debtor's principal residence. A decision by the Committee will be informed by information obtained after a period of experience with the currently proposed attachment form.

Following that decision, the Committee voted unanimously to approve Form 10 (Attachment A), with the changes noted below made to the published draft. These changes are responsive to comments that were submitted and Committee members' suggestions:

- Change the instruction at the top of Part 2 to read, "Itemize the fees, expenses, and charges due on the claim as of the petition date." This will clarify that the intended disclosure is of amounts remaining due as of the petition date, not all amounts that have been incurred as of that date.

- After the item in the Part 2 list labeled "Escrow shortage or deficiency," change the parenthetical to read, "(Do not include amounts that are part of any installment payment listed in Part 3.)." This will prevent duplication with the escrow portion of missed installment payments listed in Part 3.

- In Part 3, add a new line reading "Subtract amounts for which debtor is entitled to a refund."

- Add a new item in Part 3 reading "3. Calculation of cure amount."

- For ease of completion and reading, add numbers to the left and right columns of Part 2.

Action Item 6. Official Form 10 (Supplement 1) (Notice of Mortgage Payment Change) is new. Designed to implement Rule 3002.1(b), this form would be used by the holder of a home mortgage claim to provide notice of any escrow account payment adjustment, interest payment change, or other mortgage payment change while a chapter 13 case is pending.

Only two comments on the mortgage forms addressed Supplement 1 specifically. A chapter 13 trustee expressed support for the proposed form. He stated that notices of payment change are not always provided during the chapter 13 case. Without that information, disbursements may be made that result in the debtor incurring late charges. He stated that the debtor needs complete information about the mortgage in order to emerge from bankruptcy with a fresh start.

Judge Marvin Isgur expressed concern about the form's provision for the reporting of escrow changes. He said that Supplement 1 should not instruct the mortgagee to attach an escrow account statement "prepared according to applicable nonbankruptcy law." He believed that the instruction provided for an analysis of an escrow shortage according to the federal Real Estate Settlement Procedures Act. That analysis, he said, might improperly allow the mortgagee to collect the escrow shortage as part of an ongoing adjusted mortgage payment, as well as under the plan as part of the cure payment.

The Committee had previously decided that the forms should not dictate the method of determining escrow arrearages, an issue on which courts disagree. In response to Judge Isgur's comment, however, the Committee concluded that the instructions in Parts 1 and 2 of the Notice of Mortgage Payment Change form should be worded the same way that Part 3 of Attachment A is worded: "Attach . . . an escrow account statement prepared . . . in a form consistent with applicable nonbankruptcy law" (rather than "prepared according to applicable nonbankruptcy law"). That change was intended to clarify that nonbankruptcy law determines only the form of disclosure and not the method of calculating escrow balances.

With that change and another minor stylistic change made, the Committee voted unanimously to recommend the approval of Form 10 (Supplement 1).

Action Item 7. Official Form 10 (Supplement 2) (Notice of Postpetition Mortgage Fees, Expenses, and Charges), which is new, would implement Rule 3002.1(c). It would be used in a chapter 13 case by the holder of a home mortgage claim to provide notice of the date incurred and amount of any postpetition fees, expenses, and charges.

Several comments on the proposed mortgage forms expressed general support for requiring home mortgage claimants to provide more information about changes in amounts required to be paid during the life of the chapter 13 plan. Three comments addressed Supplement 2 specifically.

One consumer attorney expressed strong support for requiring home mortgage claimants to inform debtors of any charges assessed during bankruptcy. In one of her cases, the mortgagee paid property taxes without the debtor's knowledge, even though those taxes were being paid under the plan. She said that toward the end of the five-year plan, the lender sought to foreclose due to its payment of the taxes. According to her, it took over a year and six hearings to resolve the matter (efforts that she handled pro bono).

Another consumer attorney stated that the forms implementing Rule 3002.1 (Supplements 1 and 2) should not be limited to chapter 13 cases, but should also apply in chapter 7 asset cases and in chapter 11 individual cases.

The National Association of Consumer Bankruptcy Attorneys urged the Committee to add to the Committee Note accompanying Supplement 2 a statement that mortgage claimants are not authorized to charge additional fees for providing the information required by the form.

After considering these comments, the Committee voted unanimously to recommend approval of Form 10 (Supplement 2) with only two minor changes to the form as published: the addition of numbers to the left and right columns of Part 1 and (to correct an internal reference) the substitution of "Notice" for "Claim" in the declaration at the end of the form.

Action Item 8. Official Form 25A (Plan of Reorganization in Small Business Case Under Chapter 11) would be amended to change the effective-date provision to reflect the 2009 amendments that increased from 10 to 14 days the time periods for filing a notice of appeal and for the duration of the stay of a confirmation order. Under the amended provision, the effective date of the plan would generally be the first business day following the date that is 14 days after the entry of the order of confirmation.

No comments were submitted on this proposed amendment. The Committee voted unanimously to recommend that it be approved as published.

2. Amendments for Which Final Approval is Sought Without Publication. **The Advisory Committee recommends that the proposed amendments that are summarized below be approved and forwarded to the Judicial Conference. The Advisory Committee recommended that the amended forms be effective on December 1, 2011.** Because the proposed amendments are technical or conforming in nature, the Committee concluded that publication for comment is not required. The texts of the amended rules and forms are set out in Appendix A.

Action Item 9. Rule 1007(c) would be amended to eliminate a time period that is now inconsistent with Rule 1007(a)(2). Rule 1007(c) prescribes the time limits for filing various documents. Among its provisions is the following sentence: "In an involuntary case, the list in subdivision (a)(2), and the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days of the entry of the order for relief." Rule 1007(a)(2) was amended as of December 1, 2010, to reduce to seven days the time for an involuntary debtor to file the list of creditors. Unfortunately, during the process leading to the amendment of Rule 1007(a)(2), the redundant deadline in subdivision (c) was overlooked. Thus it remains at 14 days, despite the change to seven days in subdivision (a)(2).

Because there is no need to repeat the deadline, the Committee voted unanimously at its September 2010 meeting to delete from subdivision (c) the time limit for filing the list of creditors in an involuntary case. As amended, the sentence would parallel the prior sentence that imposes time limits for filing schedules, statements, and other documents in a voluntary case.

Action Item 10. Rule 2015(a) would be amended to correct a reference to 11 U.S.C. § 704 of the Bankruptcy Code. Prior to the 2005 Amendments to the Code, § 704 was not divided into subsections. Rule 2015(a) therefore correctly referred to § 704(8) in requiring the trustee or debtor in possession to file reports and summaries required by that provision. The 2005 Amendments, however, expanded § 704 and broke it into subsections. What was previously § 704(8) became § 704(a)(8).

In order to correct the now erroneous reference, the Committee voted unanimously at its September 2010 meeting to amend Rule 2015(a) to refer to § 704(a)(8).

Action Item 11. Rule 3001(c)(1) would be amended to delete the option of filing with a proof of claim the original of a writing on which a claim is based. As noted above, in response to the August 2010 publication of amendments to Rule 3001(c) and Form 10, Linda Spaight of the Administrative Office's Bankruptcy Court Administration Division submitted a comment pointing out a discrepancy between Rule 3001(c)(1) and paragraph 7 of the instructions for Form 10. The rule requires the attachment of "the original or duplicate" of a writing on which a claim is based, whereas the instructions direct the claimant not to "send original documents, as attachments may be destroyed after scanning."

The Committee concluded that the discrepancy pointed out by Ms. Spaight was created by earlier Committee action, and not by either the pending amendments to Rule 3001(c) or the proposed amendments to Form 10. Ms. Spaight's comment was therefore treated as a suggestion for an amendment to either Form 10 or Rule 3001(c). After discussion, the Committee concluded that the language of the form, rather than of the rule, reflects the current practice of filing copies, not originals, of documents supporting proofs of claim. It therefore voted unanimously to recommend the amendment of Rule 3001(c)(1) to replace "the original or a duplicate" with "a copy of the writing."

Action Item 12. Official Form 1 (Voluntary Petition) would be amended to include lines on the form for a foreign representative filing a chapter 15 petition to indicate the country of the debtor's center of main interests and countries in which related proceedings are pending. This amendment would implement the requirements of new Rule 1004.2 (Petition in Chapter 15 Cases), which is scheduled to go into effect on December 1, 2011.

The Committee voted unanimously at its September 2010 meeting to recommend approval of this conforming change to Form 1, with the same effective date as Rule 1004.2.

Action Item 13. Official Forms 9A - 9I (Notice of Meeting of Creditors & Deadlines) would be amended to conform to a rule amendment scheduled to take effect on December 1, 2011, and to make some minor stylistic changes.

Rule 2003(e) currently states that a meeting of creditors "may be adjourned . . . by announcement at the meeting of the adjourned date and time without further written notice." A pending amendment to Rule 2003(e) that has been approved by the Supreme Court and transmitted to Congress would require the presiding official at a meeting of creditors to file a statement specifying the date and time to which such a meeting is adjourned.

All of the versions of Form 9 (A - I) reflect the current wording of Rule 2003(e). On the back of each form, the explanation of "Meeting of Creditors" states that the "meeting may be continued and concluded at a later date without further notice." The Committee therefore voted unanimously at its September 2010 meeting to recommend that the explanation be revised to state that the "meeting may be continued and concluded at a later date specified in a notice filed with the court."

In addition, the amendment to the forms would correct a spelling and a punctuation error and call greater attention to the instruction to "See Reverse Side for Important Explanations."

B. Items for Publication in August 2011

The Advisory Committee recommends that the proposed amendments that are summarized below be published for public comment. The texts of the amended rules and official forms are set out in Appendix B.

Action Item 14. Rule 1007(b)(7) would be amended to relieve individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course. This amendment is proposed in response to a suggestion by Dana McWay, the Clerk of the Bankruptcy Court for the Eastern District of Missouri, which she submitted on behalf of the NextGen Clerk's Office Functional Requirements Group ("FRG").

The Bankruptcy Code provides that a discharge must be denied an individual debtor who does not complete a personal financial management course after filing the bankruptcy petition, but the Code does not address what document must be filed to attest to course completion or who must file it. In implementing the Code requirement, Rule 1007(b)(7) currently requires that the debtor file a "statement of completion of a course concerning personal financial management, prepared as prescribed by the appropriate Official Form." The form referred to is Official Form 23, and it requires the debtor to certify that he or she has completed an instructional course in personal financial management.

As part of its effort to plan for the Next Generation of Bankruptcy CM/ECF, the FRG recommends authorizing financial management course providers, who must be approved by the United States trustee or the bankruptcy administrator, to file course completion statements directly with the court. Ms. McWay indicated that this change is intended to reduce the number of cases closed without entry of a discharge, which currently occurs when debtors are unable to get the necessary certificate from the course provider or they fail to file Form 23. Many of these cases are reopened later, necessitating the payment of an additional fee, in order for the debtor to file the statement and the court to issue the discharge.

Under the FRG's proposal, approved personal financial management course providers would be given "limited user" logins/passwords for the CM/ECF filing system. The FRG envisions that, as a condition for being approved by the U.S. trustee or bankruptcy administrator, a provider would have to use computer software that allows for automatic filing with the court of a statement indicating that the debtor has completed the personal financial management course. A debtor would be required to provide certain information to the course provider (such as case name, case number, district in which case is pending). Then, upon the debtor's completion of the course, the statement would be automatically e-filed as either a text entry or a PDF; no human intervention would be required.

The Committee expressed support for the goal of reducing the number of individual cases that are dismissed—even though the debtor had completed the financial management

course—without the granting of a discharge and later reopened at a cost to the debtor and the court system. It concluded that, while it might not be appropriate for a Bankruptcy Rule to impose a requirement directly on providers of personal financial management courses, Rule 1007(b)(7) could be amended to facilitate the filing of statements by those providers. The Committee voted unanimously at its September 2010 meeting to seek publication of an amendment to Rule 1007(b)(7) that would eliminate the requirement that Form 23 be filed by individual debtors if a course provider notifies the court that the debtor has completed the course. A related amendment to Rule 5009(b) is discussed below.

Action Item 15. Rule 3007(a) would be amended to allow the use of a negative notice procedure for objections to claims and to clarify the method for serving claim objections. These proposed amendments are made in response to suggestions submitted to the Committee by Bankruptcy Judges Margaret D. McGarity (E.D. Wis.) and Michael E. Romero (D. Colo.) on behalf of the Bankruptcy Judges Advisory Group. The Committee considered these suggestions during its September 2010 and April 2011 meetings.

Judge McGarity suggested that the Committee amend Rule 3007(a) to dispense with the rule's apparent requirement that every objection to a claim be noticed for a hearing, a procedure currently not followed by a number of bankruptcy courts. She instead urged the Committee to amend Rule 3007(a) to allow the court to place the burden on a claimant to request a hearing after receiving notice of an objection.

Section 502(b) of the Code provides that if an objection to a claim is made, "the court, after notice and a hearing, shall determine the amount of such claim . . . and shall allow such claim," except to the extent that one of the specified grounds for disallowance applies. As used in the Code and rules, the phrase "after notice and a hearing," or similar wording, allows action to be taken without a hearing if notice is properly given and a hearing is not timely requested by a party in interest. *See* 11 U.S.C. § 102(1); Bankr. Rule 9001. The Code, therefore, does not mandate that a hearing actually be conducted on every objection to a claim. Rule 3007(a), however, by not using the phrase "after notice and a hearing" and by affirmatively requiring a hearing date to be noticed along with the objection, might be read to require that a hearing be calendared for all objections to claims.

The Committee concluded that a negative notice procedure should be permitted for objections to claims. The bases for some objections are straightforward and do not require a hearing for their resolution. The Committee therefore voted unanimously to propose an amendment to Rule 3007(a) that deletes the requirement for service of a "notice of the hearing" on the objection and that adds a reference to a possible "deadline for the claimant to request a hearing."

With respect to the manner of serving objections to claims, Judge Romero noted that there is confusion and disagreement among the courts about whether an objection must be served according to one of the methods specified for service of complaints in Rule 7004, which is made applicable to contested matters by Rule 9014(b), or whether it is sufficient to serve the objection by mail on the person designated on the proof of claim. The Committee concluded that the issue should be clarified and that, to the extent possible, claim objections should be served by first-class mail to the person designated on the proof of claim for receipt of notices, at the address there indicated.

The Committee concluded, however, that certain types of claimants should be served by an additional method. Because of the large number of claims filed by the federal government and the dispersed responsibility for litigating them, the Committee decided that service by mail as provided under Rule 7004(b)(4) and (5) to the appropriate U.S. Attorney's office, the Attorney General, and, where appropriate, a federal officer or agency should also be required for objections to federal claims.

Claims filed by insured depository institutions must also receive special treatment. Because Congress enacted Rule 7004(h), which specifies the method of serving such institutions in a contested matter or adversary proceeding, the Committee concluded that a claim objection must be served on an insured depository institution in the congressionally prescribed manner, as well as by mailing the objection to the person designated on the proof of claim.

Action Item 16. Rule 5009(b) would be amended to reflect the proposed amendment of Rule 1007(b)(7). As discussed above, Rule 1007(b)(7) would be amended to relieve an individual debtor of the obligation to file a statement of completion of a personal financial management course if the course provider notifies the court directly that the debtor has completed it. Rule 5009(b) currently requires the clerk to send a notice to an individual debtor who has not filed the statement within 45 days after the first date set for the meeting of creditors. The proposed amendment would require the clerk to send this notice only if the debtor is required to file the statement and has failed to do so within the 45-day period. If a course provider has already provided notification of the debtor's completion of the course, the debtor would not be required to file Form 23, and the clerk would not be required to send the notice under Rule 5009(b).

Action Item 17. Rule 9006(d) would be amended to draw attention to the fact that it prescribes default deadlines for the service of motions and written responses. A suggestion to the Committee submitted by Bankruptcy Judge Raymond Lyons (D.N.J.) urged the deletion of the provision for two reasons. First, he contended that the provision is superfluous because most districts have their own local rules governing motion practice that specify time periods for service of motions and responses. Second, he stated that the rule is "misplaced" because motion practice and contested matters are otherwise governed by Rules 9013 and 9014. Judge Lyons therefore suggested that Rule 9006(d) may be overlooked by parties filing and responding to motions.

At its September 2010 meeting, the Committee discussed this suggestion and concluded that the provision should not be deleted. Rule 9006 is based on Civil Rule 6, which also contains a subsection regarding the time for service of motions. Although many districts have their own local rules governing motion practice, some do not. For the latter districts, Rule 9006(d) provides timing rules for any motions not addressed elsewhere in the Bankruptcy Rules or imposed in an individual case.

Unlike the civil rule, however, Rule 9006 does not indicate in its title that it addresses time periods for motions. Nor is it followed by a rule that addresses the form of motions, as is the case with the civil rule. The Committee concluded that several rule amendments should be proposed to highlight the existence of Rule 9006(d). The first set of changes is to Rule 9006 itself. The Committee voted to amend the title of the rule to add a reference to the "time for motion papers."

This change, which is consistent with Civil Rule 6, should make it easier to find the provision governing motion practice.

The Committee also proposes that the coverage of subdivision (d) be expanded to address the timing of the service of any written response to a motion, not just opposing affidavits. Local motion practices vary widely, so the Committee concluded that the provision should be as inclusive as possible. The caption of subdivision (d) and its wording would be changed to reflect this expansion.

Action Item 18. Rule 9013, which addresses the form and service of motions, would be amended to provide a cross-reference to the time periods in Rule 9006(d). This amendment, like the ones to Rule 9006(d), is proposed to call greater attention to the default deadlines for motion practice. In addition, stylistic changes would be made to Rule 9013 to add greater clarity.

Action Item 19. Rule 9014, which addresses contested matters, would be similarly amended to add a cross-reference to the times under Rule 9006(d) for serving motions and responses.

Action Item 20. Official Form 6C (Schedule C – Property Claimed as Exempt) would be amended to reflect the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010). It would provide a new option permitting the debtor to state the value of the claimed exemption as the "full fair market value of the exempted property."

In *Schwab* the Court held that a debtor's claim of an exemption in the same amount as the value specified for the exempted property does not constitute a claim for the entire value of the property if the actual property value is more than the value specified. Rather, it is a claim of exemption limited to the specific value stated. Thus, if the debtor "accurately describes an asset subject to an exempt interest and . . . declares the 'value of [the] claimed exemption' as a dollar amount within the range the Code allows," the trustee has no duty to object to the exemption within the time limit specified by Rule 4003(b). 130 S. Ct. at 2662. On the facts of the case before it, the Court held that the debtor's Schedule C revealed a valid exemption claim, limited in amount, to which the trustee had no duty to object. As a result, the trustee was not barred from later contending that the property was worth more than the specific exemption amount claimed and seeking to sell the property to collect that excess value for the estate.

At the end of the majority opinion, the Court explained how a debtor can indicate the intent to exempt "the full market value of the asset or the asset itself" in a manner that puts the trustee on notice of the scope of the claimed exemption. The Court stated that the debtor can list as the exempt value of the asset on Schedule C "'full fair market value (FMV)' or '100% of FMV.'" Then, the Court explained, "[i]f the trustee fails to object, or if the trustee objects and the objection is overruled, the debtor will be entitled to exclude the full value of the asset." 130 S. Ct. at 2668.

In considering the impact of *Schwab* on Schedule C, the Committee noted that the current form does not indicate the right of a debtor to exercise the option described by the Supreme Court of exempting the full fair market value of an asset. Schedule C requires four pieces of information for each exemption claimed: description of property, law providing each exemption, value of claimed exemption, and current value of property without deducting exemption. Members of the Committee expressed concern that only knowledgeable debtors (or more likely, debtors represented

by knowledgeable lawyers) would understand that "value of claimed exemption" could be stated as something other than a specific dollar amount.

After discussing the matter at both the September 2010 and April 2011 meetings, the Committee voted to propose an amendment to Schedule C that would change the column for value of claimed exemption in the following manner. Two options for that column would be provided: one that says "Exemption limited to $_____" and the other that says "Full fair market value of the exempted property." The debtor would be instructed to "Check one box only for each claimed exemption." The columns would also be rearranged so that the current market value of the property would follow the description of the property. In *Schwab* the Court stated that the property's market value provides useful information but is not essential for determining the validity of a claimed exemption.

Action Item 21. Official Form 7 (Statement of Financial Affairs) would be amended to make the definition of "insider" consistent with the Bankruptcy Code's definition of the word. The phrase "any owner of 5 percent or more of the voting or equity securities of a corporate debtor" would be deleted, and "any persons in control of a corporate debtor" would be included.

This amendment is proposed in response to a suggestion submitted by attorney Aaron Cahn. He pointed out that Form 7 defines "insider" to include "any owner of 5 percent or more of the voting or equity securities of a corporate debtor." By contrast, the definition of "insider" in § 101(31) of the Code does not list such a person as being an insider of a corporate debtor. Section 101(31) includes an affiliate as an insider, but "affiliate" is defined in § 101(2) to mean, among other things, an "entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor." The Code definition of "insider" lists other relationships that make someone an insider, including a "person in control" of a corporate debtor, but Mr. Cahn stated that the statute contains no bright-line test that would invariably make a 5 percent shareholder an insider. He suggested therefore that Form 7 be amended to conform to the Code.

The Committee concluded that Mr. Cahn's suggestion was well taken. The language proposed to be deleted was added to the form's definition in 2000, but no explanation for this amendment appears in the Committee Note, Advisory Committee report to the Standing Committee, or the Advisory Committee minutes. The Committee recognized that the Code definition of "insider" is not exclusive since it says that the term "includes" the relationships that are listed. It found no basis, however, for concluding that § 101(31) provides authority to create the bright-line, 5 percent definition that currently appears in Form 7.

Action Item 22. Official Forms 22A (Chapter 7 Statement of Current Monthly Income and Means-Test Calculations) and 22C (Chapter 13 Statement of Current Monthly Income and Calculations of Commitment Period and Disposable Income) would be amended to make a minor adjustment to the deduction for telecommunication expenses. In addition Form 22C would be amended in response to the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010).

The telecommunications-deduction issue was raised in a comment by attorney William Neild on earlier amendments to Forms 22A and 22C. He proposed that Form 22A be revised to allow chapter 7 debtors to deduct from income any expenses incurred in the production of income. He

contended that deductions of this type are allowed by the IRS and thus are required to be deducted by § 707(b)(2)(A)(ii) of the Code.

The Committee disagreed with Mr. Neild's broad argument because § 707(b)(2)(A)(ii) only allows the deduction of "the debtor's actual monthly expenses for the *categories specified* as Other Necessary Expenses issued by the Internal Revenue Service" (emphasis added). The Committee concluded that Form 22A properly limits deductions for Other Necessary Expenses to the expense items specifically listed in the IRS Financial Analysis Handbook. This part of the means test does not permit the deduction of all expenses incurred in the production of income.

The Committee's comparison of Form 22A to the IRS list of Other Necessary Expenses did reveal one respect in which the allowed deductions on the form are narrower than the IRS categories. The deduction for telecommunication services allows for the monthly cost of pagers, call waiting, internet service, etc. "to the extent necessary for your health and welfare or that of your dependents." The IRS, on the other hand, includes as Other Necessary Expenses the cost of optional telephones, telephone services, and internet provider/email "if it meets the necessary expense test." For internet and email services, the explanation goes on to say, "generally for the production of income." It therefore appears that the IRS necessary expense test does not limit these types of expenses to ones necessary for the debtor's health and welfare but considers as well their necessity for the production of income.

The Committee therefore voted at the September 2010 meeting to propose an amendment to Forms 22A and 22C (which allows the same deduction) that would permit the deduction of telecommunication services, including business cell phone service, to the extent necessary for the production of income if not reimbursed by the debtor's employer.

Official Form 22C would be amended as well to reflect the *Hamilton v. Lanning* decision. That case concerned the calculation of a chapter 13 debtor's "projected disposable income," which under § 1325(b)(1) of the Bankruptcy Code the debtor's plan may be required to devote to payment of unsecured claims. The Supreme Court rejected a purely "mechanical" approach to the calculation that considers only the debtor's average monthly income for the six months before bankruptcy. The Court instead adopted a "forward-looking" approach that allows consideration of changes in the debtor's income and expenses that have occurred before confirmation or are virtually certain to occur afterward. Because Form 22C calculates disposable income for above-median-income debtors—following the Code definition of "disposable income"—based only on information about the debtor's pre-bankruptcy average income and current expenses, the Advisory Committee considered whether the form should be amended.

At the September 2010 meeting, the Committee approved adding a question to Form 22C in which above-median-income chapter 13 debtors would list any changes in the income and expenses reported on the form that have already occurred or are virtually certain to occur during the 12 months following the filing of the petition. The same time frame for reporting anticipated changes is set out in § 521(a)(1)(vi) of the Code and is included in Schedules I and J (Current Income and Current Expenditures of Individual Debtor(s)).

III. Information Items

The draft minutes of the April 7-8, 2011, Advisory Committee meeting are attached to this report as Appendix C.

A. Revision of the Bankruptcy Appellate Rules

The Advisory Committee is proceeding with its consideration of a comprehensive revision of the bankruptcy appellate rules (Part VIII of the Bankruptcy Rules). As previously reported, the goals of this project are the following:

- Make the bankruptcy appellate rules easier to read and understand by adopting the clearer and more accessible style of the Federal Rules of Appellate Procedure ("FRAP").
- Incorporate into the Part VIII rules useful FRAP provisions that currently are unavailable for bankruptcy appeals.
- Retain distinctive features of the Part VIII rules that address unique aspects of bankruptcy appeals or that have proven to be useful in that context.
- Clarify existing Part VIII rules that have caused uncertainty for courts or practitioners or that have produced differing judicial interpretations.
- Modernize the Part VIII rules to reflect technological changes—such as the electronic filing and storage of documents—while also allowing for future technological advancements.

At its April 2011 meeting, the Committee met jointly with the Advisory Committee on Appellate Rules to discuss issues presented by the intersection of the bankruptcy appellate rules and FRAP. The Appellate Rules Committee provided valuable input with respect to issues involving direct bankruptcy appeals to the court of appeals; the revision of the rules to take account of the courts' use of electronic filing technology; indicative rulings by the bankruptcy court; the handling of documents under seal; and the rulemaking authority for local rules of bankruptcy appellate panels. The Bankruptcy Rules Committee likewise provided input to the Appellate Rules Committee about its possible amendment of Appellate Rule 6, which governs bankruptcy appeals in the courts of appeals.

This summer a working group comprising several members of the Committee, its reporters, and one or two members of the Appellate Rules Committee will engage in a thorough review and editing of the current draft of revised Part VIII and accompanying committee notes. Half of the preliminary draft will be presented to the Committee at its fall meeting for its consideration and approval, and the other half will be presented at the spring 2012 meeting. The entire Part VIII revision, if approved by the Committee, will be submitted to the Standing Committee at its June 2012 meeting for approval of the revision's publication for comment in August 2012. Under that schedule, the presumptive effective date of the new bankruptcy appellate rules would be December 1, 2014.

B. Forms Modernization Project

The Committee's Forms Subcommittee continues its multi-year Forms Modernization Project, which was initiated to develop recommendations for making the bankruptcy forms more user-friendly and less error-prone and taking better advantage of modern information technology.

With help from the Federal Judicial Center, the Project is testing drafts of bankruptcy forms for individual debtors with career law clerks, law students, attorneys, lay people, and other groups. While the first forms are being tested, the Project is beginning work on the business forms and additional forms for individuals. The goal is to publish for comment in August 2012 a package of new forms for individual debtors.

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

* * * * *

(c) TIME LIMITS. In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within 14 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (g) of this rule. In an involuntary case, ~~the list in subdivision (a)(2), and~~ the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days ~~of~~ after the entry of the order for relief. * * * * *

* * * * *

COMMITTEE NOTE

In subdivision (c), the time limit for a debtor in an involuntary case to file the list required by subdivision (a)(2) is deleted as unnecessary. Subdivision (a)(2) provides that the list must be filed within seven days after the entry of the order for relief. The other change to subdivision (c) is stylistic.

Because this amendment is being made to conform to an amendment to Rule 1007(a)(2) that took effect on December 1, 2010, final approval is sought without publication.

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

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status

(a) TRUSTEE OR DEBTOR IN POSSESSION. A trustee or debtor in possession shall:

* * * * *

(3) file the reports and summaries required by § 704(a)(8) of the Code, which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited;

* * * * *

COMMITTEE NOTE

Subdivision (a)(3) is amended to correct the reference to § 704. The 2005 amendments to the Code expanded § 704 and created subsections within it. The provision that was previously § 704(8) became § 704(a)(8). The other change to (a)(3) is stylistic.

Final approval of this technical amendment is sought without publication.

Rule 3001. Proof of Claim[**]

* * * * *

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing*. Except for a claim governed by paragraph (3) of this subdivision, w~~W~~hen a claim, or an interest in property of the debtor securing the claim, is based on a writing, ~~the original or a duplicate~~ a copy of the writing shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

* * * * *

(3) *Claim Based on an Open-End or Revolving Consumer Credit Agreement.*

(A) When a claim is based on an open-end or revolving consumer credit agreement—except one for which a security interest is claimed in the debtor's real property—a statement shall be filed with the proof of claim, including all of the following information that applies to the account:

(i) the name of the entity from whom the creditor purchased the account;

[**] Incorporates amendments that are due to take effect on December 1, 2011, if Congress takes no action otherwise.

(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;

(iii) the date of an account holder's last transaction;

(iv) the date of the last payment on the account; and

(v) the date on which the account was charged to profit and loss.

(B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.

COMMITTEE NOTE

Subdivision (c) is amended in several respects. The former requirement in paragraph (1) to file an original or duplicate of a supporting document is amended to reflect the current practice of filing only copies. The proof of claim form instructs claimants not to file the original of a document because it may be destroyed by the clerk's office after scanning.

Subdivision (c) is further amended to add paragraph (3). Except with respect to claims secured by a security interest in the debtor's real property (such as a home equity line of credit), paragraph (3) specifies information that must be provided in support of a claim based on an open-end or revolving consumer credit agreement (such as an agreement underlying the issuance of a credit card). Because a claim of this type may have been sold one or more times prior to the debtor's bankruptcy, the

debtor may not recognize the name of the person filing the proof of claim. Disclosure of the information required by paragraph (3) will assist the debtor in associating the claim with a known account. It will also provide a basis for assessing the timeliness of the claim. The date, if any, on which the account was charged to profit and loss ("charge-off" date) under subparagraph (A)(v) should be determined in accordance with applicable standards for the classification and account management of consumer credit. A proof of claim executed and filed in accordance with subparagraph (A), as well as the applicable provisions of subdivisions (a), (b), (c)(2), and (e), constitutes prima facie evidence of the validity and amount of the claim under subdivision (f).

To the extent that paragraph (3) applies to a claim, paragraph (1) of subdivision (c) is not applicable. A party in interest, however, may obtain the writing on which an open-end or revolving consumer credit claim is based by requesting in writing that documentation from the holder of the claim. The holder of the claim must provide the documentation within 30 days after the request is sent. The court, for cause, may extend or reduce that time period under Rule 9006.

Changes Made After Publication

Subdivision (c)(1). The requirement for the attachment of a writing on which a claim is based was changed to require that a copy, rather than the original or a duplicate, of the writing be provided.

Subdivision (c)(3). An exception to subparagraph (A) was added for open-end or revolving consumer credit agreements that are secured by the debtor's real property.

A time limit of 30 days for responding to a written request under subparagraph (B) was added.

Committee Note. A statement was added to clarify that if a proof of claim complies with subdivision (c)(3)(A), as well as with subdivisions (a), (b), (c)(2), and (e), it constitutes prima facie evidence of the validity and amount of the claim under subdivision (f).

Other changes. Stylistic changes were also made to the rule.

10-BK-003. Philip S. Corwin (American Bankers Association, Independent Community Bankers of America, and the Financial Services Roundtable). The proposed amendments to Rule 3001(c) may be inconsistent with § 502(b) of the Code, which provides the exclusive grounds for disallowance of a claim. Proposed subdivision (c)(3) would place an unreasonable burden on consumer lenders and debt purchasers. The rule would shift the burden of proof to the creditor and would adversely affect an industry that purchased $100 billion of charged-off debt last year. He is not aware of any objective evidence that indicates a problem that needs addressing. Most credit card debts for which proofs of claim are filed have already been scheduled by the debtors, and the vast majority of chapter 7 consumer cases have no assets to distribute. Proposed Rule 3001(c)(3) as drafted is unclear. What do "as applicable" and "last transaction" mean? The rule should be clarified to indicate that it is not applicable to home equity lines of credit. The documentation requirements are inconsistent with Rule 3001(f), which presumes the validity of a creditor's claim. The proposed rule is also inconsistent with Federal Rules of Evidence 803(6), 803(15), and 807. The Judicial Conference should also reconsider the amendments to Rule 3001(c) that are scheduled to go into effect this year that require an itemization of interest and fees and authorize the imposition of sanctions.

10-BK-006. Raymond P. Bell, Jr. (Creditors Interchange Receivables Management LLC). The Committee is to be commended for its recent revision of Rule 3001. The reference in (c)(3) to consumer credit agreement should be changed to consumer credit bilateral agreement. Rather than requiring disclosure of the name of the entity from whom the creditor purchased the account, (c)(3)(i) should require disclosure of the name of the original creditor. Rule 3001(c)(3) should refer to "an originated open-end or revolving credit claim as defined under the Truth in Lending Act." Rather than requiring the name of the entity to which the debt was owed at the time of the last transaction, the rule should require the name of the original creditor. Subdivision (c)(3)(A)(iii) should require disclosure of the date of the last payment by the account holder, not the date of the last transaction. Items (iv) and (v) should be deleted, as should (c)(3)(B).

Brett Weiss (testimony on behalf of the National Association of Consumer Bankruptcy Attorneys). Virtually all credit card claims today are filed by debt buyers. They typically buy only specific electronic data; as a result there are large gaps in what a filing creditor knows about the claim. What they file in court is just hearsay, based on what they were told by the

creditor from whom they purchased the account. Significant errors result. The information required by (c)(3)(A)(i) and (ii)—creditor from whom account was purchased and creditor at time of account holder's last transaction—is important. A comment should be added to the Committee Note stating that if an account is purchased from a securitized trust, the full name of the trust must be provided. The rule should also require the creditor to provide a chain of title, showing the creditor's entitlement to file the POC. Subdivision (c)(3)(B) should state a time in which the creditor must respond to a request for the underlying writing and the penalty for failing to do so. Moreover, it is not clear why a credit card creditor, unlike all other creditors, should have to provide this documentation only upon request.

10-BK-010. Bankruptcy Judge William R. Sawyer (M.D. Ala.). The new rule and amended proof of claim form will add much clarity to current practice, which too often involves the filing of vague claims that are met by vague objections.

10-BK-012. Ellen Holland Keller. If a credit card debt has been sold more than once, the current creditor should be required to provide a complete chain of title back to the original creditor. Otherwise, duplicate claims may be filed. With that change, it would be acceptable to require the credit card claimant to produce the underlying writing only upon request.

10-BK-013. Daniel Greenbaum. While the proposed rules are a welcome improvement, they do not go far enough to protect consumer debtors. Stricter rules need to be imposed for all creditors, not just holders of credit card debt.

10-BK-014. B-Line, LLC (submitted by Linh K. Tran). The proposed amendments to Rule 3001(c) should not be approved. They violate due process and conflict with Rules 3001, 3007, 9010, 9014, the Part VII rules, and Fed. R. Civ. P. 26, 34, and 37. Because the sanction provision of Rule 3001(c) that is scheduled to go into effect in December 2011 is justified as being similar to Civil Rule 37, it must be that the Advisory Committee views every proof of claim as a complaint filed in an adversary proceeding. As a result, an attorney would have to sign the proof of claim. Moreover, by requiring information from only the claimant, the proposed rule impermissibly requires one-sided discovery and permits the imposition of one-sided sanctions. A party in interest that requests the writing underlying a credit card claim does not need to act in good faith or provide any reason for making the request, as Rule 9011 would not apply to the request since it is not filed in court. The rule also permits the imposition of sanctions on a claimant for the failure to disclose enumerated data fields, even if the data

do not exist or are not reasonably available. Because there is no requirement for the parties to confer in good faith, the rule will encourage litigation.

10-BK-016. David R. Badger. It is a major problem to obtain the original account application in order to determine whether the non-filing spouse is jointly liable or simply received a courtesy card. The credit card industry should not get a free pass on proof-of-claim documentation. The rules need to provide some balance in the system. Requiring account writings to be produced upon request is an improvement, but requiring a request will unnecessarily delay case administration and increase costs.

10-BK-017. Fred Welch. Requiring more information for a proof of claim will prevent debtors from having to pay more than they owe and creditors from receiving more than they are entitled to receive.

10-BK-018. Penny Souhrada. Often the attachment to a proof of claim filed by a debt buyer consists only of a redacted account number and an amount owed. Debt buyers should be required to provide the name of the original creditor and subsequent assignees, as well as the writing on which the claim is based. The rule needs to provide a deadline for responding and penalties for failure to respond to a request for the underlying writing.

10-BK-019. Christopher D. Lagow (Portfolio Recovery Associates, Inc.). PRA appreciates the Committee's revisions based on the earlier public comment. As drafted, however, the proposed amendments are likely to cause more confusion and litigation. Subdivision (c)(3)(A)(iii) should either be deleted or revised to define the meaning of "transaction." Subdivision (c)(3)(A)(iv) should be revised to provide for the possibility that no payment has ever been made. If a creditor complies with (c)(3), the claim should be entitled to prima facie validity. That would shift the burden of proof to the debtor on any claim objection. Subdivision (c)(3)(B) will likely lead to more litigation and will do little to enhance the debtor's recognition of accounts. There is no compelling evidence of a need for these changes, but if amendments are approved, they should address the concerns noted.

10-BK-20. Alane A. Becket. It will be impossible for many unsecured creditors to comply with proposed Rule 3001(c)(2)(A) [approved by the Supreme Court in April 2010] that requires an itemized statement of interest, fees, and charges. Credit card balances revolve, and interest compounds; thus it is not possible to break down a credit card balance into its component parts. Proposed Rule 3001(c)(3)(B) will subject unsecured creditors to arbitrary and harassing requests for documents with no

articulated or demonstrated need for the writing. The provision should at least require a requesting party to articulate a substantive need for the documents or dispute the underlying debt and subject the requesting party to sanctions if the request is not made in good faith.

10-BK-021. David Melcer. If the information required by subdivision (c)(3)(A) is filed with the claim, the claim should be entitled to a presumption of prima facie validity under Rule 3001(f) without the actual writing on which the claim is based. That result would be made clear by eliminating subdivision (c)(3)(B). The new proposal is an improvement over the withdrawn requirement for the last account statement, but there are ambiguities in the wording of (c)(3). For example, the meaning of "transaction" is not clear. It would be better to use "purchase" or "borrowing." There is no need for the required information when a debtor has scheduled the claim in question, thereby admitting the claim's validity.

10-BK-022. Matthew Bogosian. He supports proposed Rule 3001, but it should be made clear that it sets the minimum threshold in bankruptcy court and does not preempt states from creating more stringent debt-buyer standards for state-based actions.

10-BK-023. Wendell J. Sherk. Rule 3001 should require more diligence, more documentation, and more care in the preparation of a proof of claim, especially given the "sorry state of compliance with existing rules." The U.S. Trustee Program recently settled a case with Capital One Bank with a multi-million dollar refund to consumers and estates. That problem would probably have been caught sooner if Rule 3001 had been strengthened and strictly enforced. The proposed amendments largely eliminate the utility of Rule 3001, apparently as the result of "special pleading and lobbying." A proof of claim should require sufficient documentation to meet a prima facie burden of proof.

10-BK-024. Michael Bahner (Resurgent Capital Services L.P.). Proposed Rule 3001(c)(3)(B) does not clearly state what is required. The Committee should consider deleting it, but if it is retained, a threshold showing (such as a good faith dispute) should be required before the creditor has to produce the underlying writing. It is unclear which writing must be produced. It could be the credit application, the terms and conditions of the credit agreement, or evidence of a transaction. The time frame for responding is not stated. This provision creates more questions than it answers. A valuable compromise would be to acknowledge that compliance with Rule 3001(c)(3)(A) entitles the claimant to prima facie validity of the claim and to add a burden-shifting mechanism as a precondition to a (c)(3)(B) request.

10-BK-025. Richard I. Isacoff. A full account transaction history should be required. For credit cards and other revolving lines, once payments stop and the debt is sold, there is an industry practice of showing a payment that was never made to avoid a statute of limitations defense.

10-BK-027. National Association of Consumer Bankruptcy Attorneys (submitted by Henry J. Sommer). The importance of the proposed amendments cannot be overstated. As bad as the problems in the mortgage servicing industry have been, "they pale in comparison to the abuses that [NACBA] members have seen in the credit card and credit card debt buying arena." Claims are regularly filed without a showing of entitlement of the claimant to collect. For example, claims are filed even though the statute of limitations has run on the claim, the debtor has already settled with a prior debt buyer or collection agency, the claim arises from identity theft, or the debt was discharged in a prior bankruptcy. Others have seen these same problems. (He cites, among other things, the U.S. Trustee Program's settlement with Capital One for filing thousands of previously discharged claims, Consumers Union report on problems with debt buyers, and an FTC report). The proposed amendments to Rule 3001 are "quite modest and, at best, barely adequate to deal with the widespread problems." It is not clear why one group of creditors should be excused from the requirements applicable to all other creditors. Mere inconvenience to debt buyers is not a good reason. The rule does not specify how long a claimant has to respond to a request for a writing or what the consequences are for failing to comply. The committee note should make clear that the documentation required upon request includes the chain of title, the contract upon which the claim is based, and a transaction record. Requiring adequate documentation of claims protects other creditors as well as the debtor. Trustees also need the information to carry out their statutory duties.

10-BK-028. Travis L. Starr. These amendments should absolutely not be adopted. Credit card claimants should not be relieved of the obligation of filing the writing on which the claim is based. They should also have to file a transactional history. Unsecured creditors are required to prove what they are owed.

10-BK-029. D. Nathan Davis. Proofs of claim for credit card debts should have to identify the name of the creditor that appears on the credit card since many issuers use more than one trade name. Requiring the debt buyer to tell who the original creditor was will assist the debtor in recognizing the debt and will eliminate unnecessary challenges.

10-BK-031. Dee Compton. Adopt the NACBA position on Rule 3001.

10-BK-032. Ellen Carlson. Credit card creditors and assignees should be required, like other creditors, to provide a copy of the account-opening document or an explanation of why it is not available.

10-BK-036. Peter A. Ryan. The rules should require a debt buyer to provide a complete chain of title, and failure to provide the required documentation should constitute prima facie evidence of the invalidity of the claim. The burden should be on the creditor to prove that the debt is owed.

10-BK-037. Hartley Roush. The rule changes should be adopted as proposed.

Jane McLaughlin. Unsecured creditors in bankruptcy should have the same burden of proof that would be imposed on them in collection actions outside of bankruptcy.

Rule 7054. Judgments; Costs

* * * * *

(b) COSTS. The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on ~~one day's~~ 14 days' notice; on motion served within ~~five~~ seven days thereafter, the action of the clerk may be reviewed by the court.

COMMITTEE NOTE

Subdivision (b) is amended to provide more time for a party to respond to the prevailing party's bill of costs. The former rule's provision of one day's notice was unrealistically short. The change to 14 days

conforms to the change made to Civil Rule 54(d). Extension from five to seven days of the time for serving a motion for court review of the clerk's action implements changes in connection with the December 1, 2009, amendment to Rule 9006(a) and the manner by which time is computed under the rules. Throughout the rules, deadlines have been amended in the following manner:

- 5-day periods became 7-day periods
- 10-day periods became 14-day periods
- 15-day periods became 14-day periods
- 20-day periods became 21-day periods
- 25-day periods became 28-day periods

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

10-BK-026. Norman H. Meyer, Jr. (Clerk of the U.S. Bankruptcy Court for the District of New Mexico). Both time periods in Rule 7054(b) should be extended to 14 days. His district's local rule allows 14 days after entry of the judgment to move for the taxation of costs, 14 days after notice of the motion to object to the bill of costs, and 14 days after the taxation of costs to seek court review.

Rule 7056. Summary Judgment

Rule 56 F. R. Civ. P. applies in adversary proceedings~~.~~, except that any motion for summary judgment must be made at least 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless a different time is set by local rule or the court orders otherwise.

COMMITTEE NOTE

The only exception to complete adoption of Rule 56 F.R. Civ. P. involves the default deadline for filing a summary judgment motion. Rule 56(c)(1)(A) makes the default deadline 30 days after the close of all discovery. Because in bankruptcy cases hearings can occur shortly after the close of discovery, a default deadline based on the scheduled hearing date, rather than the close of discovery, is adopted. As with Rule 56(c)(1), the deadline can be altered either by local rule or court order.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted on this amendment.

B1 (Official Form 1) (12/11)

United States Bankruptcy Court **_____DISTRICT OF _____**	**Voluntary Petition**
Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN)/Complete EIN (if more than one, state all):	Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN)/Complete EIN (if more than one, state all):
Street Address of Debtor (No. and Street, City, and State): ZIP CODE	Street Address of Joint Debtor (No. and Street, City, and State): ZIP CODE
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address): ZIP CODE	Mailing Address of Joint Debtor (if different from street address): ZIP CODE
Location of Principal Assets of Business Debtor (if different from street address above): ZIP CODE	

Type of Debtor (Form of Organization) (Check **one** box.)	**Nature of Business** (Check **one** box.)	**Chapter of Bankruptcy Code Under Which the Petition is Filed** (Check **one** box.)
☐ Individual (includes Joint Debtors) *See Exhibit D on page 2 of this form.* ☐ Corporation (includes LLC and LLP) ☐ Partnership ☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)	☐ Health Care Business ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101(51B) ☐ Railroad ☐ Stockbroker ☐ Commodity Broker ☐ Clearing Bank ☐ Other	☐ Chapter 7 ☐ Chapter 9 ☐ Chapter 11 ☐ Chapter 12 ☐ Chapter 13 ☐ Chapter 15 Petition for Recognition of a Foreign Main Proceeding ☐ Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding

Chapter 15 Debtors	**Tax-Exempt Entity** (Check box, if applicable.)	**Nature of Debts** (Check **one** box.)
Country of debtor's center of main interests: _____ _____ Each country in which a foreign proceeding by, regarding, or against debtor is pending: _____ _____	☐ Debtor is a tax-exempt organization under title 26 of the United States Code (the Internal Revenue Code).	☐ Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." ☐ Debts are primarily business debts.

Filing Fee (Check one box.)	**Chapter 11 Debtors**
☐ Full Filing Fee attached. ☐ Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A. ☐ Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.	**Check one box:** ☐ Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D). ☐ Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D). **Check if:** ☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,190,000. - **Check all applicable boxes:** ☐ 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).

Statistical/Administrative Information — **THIS SPACE IS FOR COURT USE ONLY**

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.
☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

Estimated Number of Creditors									
☐ 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	☐ Over 100,000

Estimated Assets									
☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☐ $1,000,001 to $10 million	☐ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion

Estimated Liabilities									
☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☐ $1,000,001 to $10 million	☐ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion

Voluntary Petition *(This page must be completed and filed in every case.)*	Name of Debtor(s):	
All Prior Bankruptcy Cases Filed Within Last 8 Years (If more than two, attach additional sheet.)		
Location Where Filed:	Case Number:	Date Filed:
Location Where Filed:	Case Number:	Date Filed:
Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet.)		
Name of Debtor:	Case Number:	Date Filed:
District:	Relationship:	Judge:

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I have delivered to the debtor the notice required by 11 U.S.C. § 342(b).

X _____

Signature of Attorney for Debtor(s) (Date)

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.

☐ No.

Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

☐ Exhibit D, completed and signed by the debtor, is attached and made a part of this petition.

If this is a joint petition:

☐ Exhibit D, also completed and signed by the joint debtor, is attached and made a part of this petition.

Information Regarding the Debtor - Venue

(Check any applicable box.)

☐ Debtor has been domiciled or has had a residence, 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.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

☐ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

Certification by a Debtor Who Resides as a Tenant of Residential Property

(Check all applicable boxes.)

☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

_____

(Name of landlord that obtained judgment)

_____

(Address of landlord)

☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and

☐ Debtor has included with this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

☐ Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(l)).

Voluntary Petition
(This page must be completed and filed in every case.)

Name of Debtor(s):

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
[If no attorney represents me and no bankruptcy petition preparer signs the petition] 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.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (if not represented by attorney)

_____
Date

Signature of Attorney*

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____

_____
Telephone Number

_____
Date

*In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect.

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests the relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Signature of a Foreign Representative

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only **one** box.)

☐ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. § 1515 are attached.

☐ Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X _____
(Signature of Foreign Representative)

_____
(Printed Name of Foreign Representative)

_____
Date

Signature of Non-Attorney Bankruptcy Petition Preparer

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached.

_____
Printed Name and title, if any, of Bankruptcy Petition Preparer

_____
Social-Security number (If the bankruptcy petition preparer is not an individual, state the Social-Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

_____
Address

_____

X _____

_____
Date

Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner whose Social-Security number is provided above.

Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

COMMITTEE NOTE

The form is amended to implement Rule 1004.2. Subdivision (a) of that rule requires a chapter 15 petition to state the country of the debtor's center of main interests and to identify each country in which a foreign proceeding by, regarding, or against the debtor is pending. A box is added to the first page of the form for this purpose. Minor stylistic changes are also made.

Because this amendment to the form implements Rule 1004.2, which will take effect on December 1, 2011, if Congress takes no action otherwise, final approval is sought without publication.

B9A (Official Form 9A) (Chapter 7 Individual or Joint Debtor No Asset Case) (12/11)

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Presumption of Abuse under 11 U.S.C. § 707(b)

See "Presumption of Abuse" on the reverse side.

Depending on the documents filed with the petition, one of the following statements will appear.

The presumption of abuse does not arise.

Or

The presumption of abuse arises.

Or

Insufficient information has been filed to date to permit the clerk to make any determination concerning the presumption of abuse. If more complete information, when filed, shows that the presumption has arisen, creditors will be notified.

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So.

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Do Not File a Proof of Claim at This Time" on the reverse side.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Presumption of Abuse	If the presumption of abuse arises, creditors may have the right to file a motion to dismiss the case under § 707(b) of the Bankruptcy Code. The debtor may rebut the presumption by showing special circumstances.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim. If this notice is mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), or (6), you must file a complaint -- or a motion if you assert the discharge should be denied under § 727(a)(8) or (a)(9) -- in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. The bankruptcy clerk's office must receive the complaint or motion and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objections by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

B9B (Official Form 9B) (Chapter 7 Corporation/Partnership No Asset Case) (12/11)

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So.

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Do Not File a Proof of Claim at This Time" on the reverse side.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim. If this notice is mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

B9C (Official Form 9C) (Chapter 7 Individual or Joint Debtor Asset Case) (12/11)

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. Location:
( ) P. M.

Presumption of Abuse under 11 U.S.C. § 707(b)

See "Presumption of Abuse" on the reverse side.

Depending on the documents filed with the petition, one of the following statements will appear.

The presumption of abuse does not arise.

Or

The presumption of abuse arises.

Or

Insufficient information has been filed to date to permit the clerk to make any determination concerning the presumption of abuse. If more complete information, when filed, shows that the presumption has arisen, creditors will be notified.

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office:	**For the Court:**
Telephone number:	Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), or (6), you must file a complaint -- or a motion if you assert the discharge should be denied under § 727(a)(8) or (a)(9) -- in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. The bankruptcy clerk's office must receive the complaint or motion and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objections by the "Deadline to Object to Exemptions" listed on the front side.
Presumption of Abuse	If the presumption of abuse arises, creditors may have the right to file a motion to dismiss the case under § 707(b) of the Bankruptcy Code. The debtor may rebut the presumption by showing special circumstances.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

B9E (Official Form 9E) (Chapter 11 Individual or Joint Debtor Case) (12/11)

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____ (date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:
Notice of deadline will be sent at a later time.

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadline for filing claims will be set in a later court order and will apply to all creditors unless the order provides otherwise. If notice of the order setting the deadline is sent to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). Unless the court orders otherwise, however, the discharge will not be effective until completion of all payments under the plan. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141 (d) (3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

B9E ALT (Official Form 9E ALT) (Chapter 11 Individual or Joint Debtor Case) (12/11)

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side or you might not be paid any money on your claim and may be unable to vote on a plan. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). Unless the court orders otherwise, however, the discharge will not be effective until completion of all payments under the plan. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141 (d) (3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

Notice of deadline will be sent at a later time.

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS **B9F (Official Form 9F) (12/11)**

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadline for filing claims will be set in a later court order and will apply to all creditors unless the order provides otherwise. If notice of the order setting the deadline is sent to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141 (d) (6) (A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File Proof of Claim" listed on the front side, or you might not be paid any money on your claim and may be unable to vote on a plan. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141 (d) (6) (A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

B9G (Official Form 9G) (Chapter 12 Individual or Joint Debtor Family Farmer or Family Fisherman) (12/11)

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 12 bankruptcy case on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____ (date) and was converted to a case under chapter 12 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS **B9G (Official Form 9G) (12/11)**

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor [corporation] *or* [partnership] listed below filed a chapter 12 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter_____ on _____ (date) and was converted to a case under chapter 12 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

B9I (Official Form 9I) (Chapter 13 Case) (12/11)

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 13 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____
on _____ (date) and was converted to a case under chapter 13 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):

For a governmental unit (except as otherwise provided in Fed . R. Bankr. P. 3002(c)(1)):

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS **B9I (Official Form 9I) (12/11)**

Filing of Chapter 13 Bankruptcy Case	A bankruptcy case under Chapter 13 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts pursuant to a plan. A plan is not effective unless confirmed by the bankruptcy court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business, if any, unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1301. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to exceed or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to a discharge under Bankruptcy Code § 1328(f), you must file a motion objecting to discharge in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2) or (4), you must file a complaint in the bankruptcy clerk's office by the same deadline. The bankruptcy clerk's office must receive the motion or the complaint and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

COMMITTEE NOTE

The form's explanation of the "Meeting of Creditors" is amended to take account of the amendment of Rule 2003(e). When a meeting of creditors is adjourned to another date, the rule requires the official presiding at the meeting to file a statement specifying the date and time to which the meeting is adjourned. The explanation on all versions of the form is amended to reflect that requirement. Stylistic changes to the form are also made.

Final approval of these conforming and stylistic amendments is sought without publication.

B 10 (Official Form 10) (12/11)

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____

PROOF OF CLAIM

Name of Debtor:	Case Number:

NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):

COURT USE ONLY

Name and address where notices should be sent:

Telephone number: email:

❒ Check this box if this claim amends a previously filed claim.

Court Claim Number:_____
(*If known*)

Filed on:_____

Name and address where payment should be sent (if different from above):

Telephone number: email:

❒ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

1. Amount of Claim as of Date Case Filed: $_____

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

❒Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: _____
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor: ___ ___ ___ ___	**3a. Debtor may have scheduled account as:** _____ (See instruction #3a)	**3b. Uniform Claim Identifier (optional):** _ (See instruction #3b)

4. Secured Claim (See instruction #4)
Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

Nature of property or right of setoff: ❒Real Estate ❒Motor Vehicle ❒Other
Describe:

Value of Property: $_____

Annual Interest Rate_____% ❒Fixed or ❒Variable
(when case was filed)

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:
$_____

Basis for perfection: _____

Amount of Secured Claim: $_____

Amount Unsecured: $_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

❒ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

❒ Wages, salaries, or commissions (up to $11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. §507 (a)(4).

❒ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

Amount entitled to priority:

❒ Up to $2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).

❒ Taxes or penalties owed to governmental units – 11U.S.C. §507 (a)(8).

❒ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

$_____

**Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

7. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. *(See instruction #7, and the definition of "**redacted**".)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.) ❒ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.) ❒ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)

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

Print Name: _____
Title: _____
Company: _____
Address and telephone number (if different from notice address above):
_____
_____
_____
Telephone number: email:

_____
(Signature) (Date)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:
State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:
If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:
Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).
If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:
Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:
The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim
A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. §506(a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. §507(a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

Evidence of Perfection
Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION

Acknowledgment of Filing of Claim
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim
Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq*.), and any applicable orders of the bankruptcy court.

COMMITTEE NOTE

The form is amended in several respects. A new section—3b—is added to allow the reporting of a uniform claim identifier. This identifier, consisting of 24 characters, is used by some creditors to facilitate automated receipt, distribution, and posting of payments made by means of electronic funds transfers by chapter 13 trustees. Creditors are not required to use a uniform claim identifier.

Language is added to section 4 to clarify that the annual interest rate that must be reported for a secured claim is the rate applicable at the time the bankruptcy case was filed. Checkboxes for indicating whether the interest rate is fixed or variable are also added.

Section **7** of the form is revised to clarify that, consistent with Rule 3001(c), writings supporting a claim or evidencing perfection of a security interest must be attached to the proof of claim. If the documents are not available, the filer must provide an explanation for their absence. The instructions for this section of the form explain that summaries of supporting documents may be attached only in addition to the documents themselves.

Section 8**—**the date and signature box—is revised to include a declaration that is intended to impress upon the filer the duty of care that must be exercised in filing a proof of claim. The individual who completes the form must sign it. By doing so, he or she declares under penalty of perjury that the information provided "is true and correct to the best of my knowledge, information and reasonable belief." That individual must also provide identifying information—name; title; company; and, if not already provided, mailing address, telephone number, and email address—and indicate by checking the appropriate box the basis on which he or she is filing the proof of claim (for example, as creditor or authorized agent for the creditor). Because a trustee or debtor that files a proof of claim under Rule 3004 will indicate that basis for filing here, the checkbox on the first page of the form for stating the filer's status as a trustee or debtor is deleted. When a servicing agent files a proof of claim on behalf of a creditor, the individual completing the form must sign it and must provide his or her own name, as well as the name of the company that is the servicing agent.

Amendments are made to the instructions that reflect the changes made to the form, and stylistic and formatting changes are made to the form and instructions. Spaces are added for providing email addresses in addition to other contact information in order to facilitate communication with the claimant. The provision of this additional information does not affect any requirements for serving or providing official notice to the claimant.

Changes Made After Publication

Page 1 of the form. The checkbox for identifying that the filer of the proof of claim is the debtor or the trustee, rather than a creditor, was deleted.

Committee Note. A statement was added to the Committee Note explaining that the new requests for email addresses are intended only to facilitate communication with the claimant and that the provision of this information does not affect any requirements for serving or providing notice to the claimant.

Summary of Public Comment

10-BK-001. Bankruptcy Judge Paul Mannes (D. Md.). Form 10 contains two places to indicate whether the proof of claim is being filed by a trustee or debtor, rather than by a creditor. The first request for that information should be deleted, and that space should be used to allow the claimant to indicate that it did not receive notice of the filing of the bankruptcy case from the court.

10-BK-002. Linda Spaight (Administrative Office, Bankruptcy Court Administration Division). There is a discrepancy between Rule 3001(c)(1) and paragraph 7 of the instructions to Form 10. The rule requires the attachment of "the original or duplicate" of a writing on which a claim is based, whereas the instructions direct the claimant not to "send original documents, as attachments may be destroyed after scanning."

10-BK-015. Ebony R. Huddleston. This is a good start to revising the proof of claim requirements.

10-BK-023. Wendell J. Sherk. The changes to Official Form 10 are very good and should be adopted.

10-BK-027. Henry Sommer (on behalf of National Association of Consumer Bankruptcy Attorneys). Form 10, either on its face or in the instructions, should state that attachments are required for open-end consumer credit claims and mortgage claims. Not all claimants will be familiar with the rules requiring the attachment of these documents.

10-BK-030. Margaret Grammar Gay (Senior Advisor to the Clerk, Bankr. D.N.M.). Form 10, as well as Supplements 1 and 2, use the term "email." According to the Microsoft Manual of Style for Technical Publications, the word should be spelled "E-mail."

Mortgage Proof of Claim Attachment

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See Bankruptcy Rule 3001(c)(2).

Name of debtor: _____ **Case number**: _____

Name of creditor: _____ **Last four digits** of any number you use to identify the debtor's account: ____ ____ ____ ____

Part 1: Statement of Principal and Interest Due as of the Petition Date

Itemize the principal and interest due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on your Proof of Claim form).

1. **Principal due** (1) $ _____

2. **Interest due**

Interest rate	From mm/dd/yyyy	To mm/dd/yyyy	Amount
_____%	__/__/____	__/__/____	$ _____
_____%	__/__/____	__/__/____	$ _____
_____%	__/__/____	__/__/____	+ $ _____
Total interest due as of the petition date			$ _____

Copy total here ▶ (2) + $ _____

3. **Total principal and interest due** (3) $ _____

Part 2: Statement of Prepetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on the Proof of Claim form).

Description	Dates incurred	Amount
1. **Late charges**	_____	(1) $ _____
2. **Non-sufficient funds (NSF) fees**	_____	(2) $ _____
3. **Attorney's fees**	_____	(3) $ _____
4. **Filing fees and court costs**	_____	(4) $ _____
5. **Advertisement costs**	_____	(5) $ _____
6. **Sheriff/auctioneer fees**	_____	(6) $ _____
7. **Title costs**	_____	(7) $ _____
8. **Recording fees**	_____	(8) $ _____
9. **Appraisal/broker's price opinion fees**	_____	(9) $ _____
10. **Property inspection fees**	_____	(10) $ _____
11. **Tax advances (non-escrow)**	_____	(11) $ _____
12. **Insurance advances (non-escrow)**	_____	(12) $ _____
13. **Escrow shortage or deficiency** (Do not include amounts that are part of any installment payment listed in Part 3.)	_____	(13) $ _____
14. **Property preservation expenses. Specify**:_____	_____	(14) $ _____
15. **Other. Specify**:_____	_____	(15) $ _____
16. **Other. Specify**:_____	_____	(16) $ _____
17. **Other. Specify**:_____	_____	(17) + $ _____
18. **Total prepetition fees, expenses, and charges. Add all of the amounts listed above.**		(18) $ _____

Part 3. Statement of Amount Necessary to Cure Default as of the Petition Date

Does the installment payment amount include an escrow deposit?

- ❑ No
- ❑ Yes. Attach to the Proof of Claim form an escrow account statement prepared as of the petition date in a form consistent with applicable nonbankruptcy law.

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1. **Installment payments due**	Date last payment received by creditor	__/__/____		
	Number of installment payments due	(1) _____		
2. **Amount of installment payments due**	_____installments @	$ _____		
	_____installments @	$ _____		
	_____installments @	+ $ _____		
	Total installment payments due as of the petition date	$ _____	Copy total here ►	(2) $ _____
3. **Calculation of cure amount**	**Add total prepetition fees, expenses, and charges**		Copy total from Part 2 here ►	+ $ _____
	Subtract total of unapplied funds (funds received but not credited to account)			- $ _____
	Subtract amounts for which debtor is entitled to a refund			- $ _____
	Total amount necessary to cure default as of the petition date			(3) $ _____

Copy total onto Item 4 of Proof of Claim form

COMMITTEE NOTE

This form is new. It must be completed and attached to a proof of claim secured by a security interest in a debtor's principal residence. The form, which implements Rule 3001(c)(2), requires an itemization of prepetition interest, fees, expenses, and charges included in the claim amount, as well as a statement of the amount necessary to cure any default as of the petition date. If the mortgage installment payments include an escrow deposit, an escrow account statement must also be attached to the proof of claim, as required by Rule 3001(c)(2)(C).

Changes Made After Publication

Part 2. The instruction at the beginning of this part was changed to require itemization of "fees, expenses, and charges due on the claim as of the petition date," rather than "fees, expenses, and charges incurred in connection with the claim as of the petition date."

The parenthetical following "Escrow shortage or deficiency" was changed to state more clearly that amounts that are part of any installment payment listed in Part 3 should not be included here.

Item numbers were added to the left and right columns.

Part 3. A heading labeled "3. Calculation of cure amount" was added.

A line reading "Subtract amounts for which debtor is entitled to a refund" was added.

Summary of Public Comment

10-BK-003. Bankruptcy Judge Marvin Isgur (S.D. Tex.). Home mortgage claimants should be required to submit with their proofs of claim a loan history that reflects amounts received and applied by the lender. His district requires a detailed loan history, rather than just a summary of amounts due as of the petition, and this requirement has worked well. Because the loan history shows how the lender applied payments received from the debtor, the parties are able to reconcile differences in their calculations for themselves. The components of charges are revealed, thereby allowing a comparison of the claimed arrearages with the debtor's

own payment records. Major lenders have developed programs to extract the necessary information from their databases, at a cost of under $10,000. They have expressed a desire for a uniform national form so that they can set up a single automation system to comply with the proposed new rules.

New forms should be adopted, but they should be ones that work. The currently proposed forms should not be adopted without substantial amendment.

10-BK-009. Bankruptcy Judge Elizabeth Magner (E.D. La.). The proposed forms represent an improvement, but more information is needed. Without a history of payment and assessment in date order, the debtor cannot determine whether the claim amounts were properly calculated. In the 25 trials that she has conducted involving mortgage claim calculations, incorrect accounting was discovered in all of the cases. The forms also need to provide an explanation for how the lender calculated the escrow balance, since there are at least three different methods of accounting that might comply with the Real Estate Practices Settlement Act.

Nothing in the published forms is incorrect; the information solicited is just incomplete. Rather than requiring lenders to extract the dates that charges were incurred, a spreadsheet would be easier to produce and would provide better information. It will allow the lender in some cases to see and correct errors itself.

Part 3 of the form, which provides for the calculation of the amount necessary to cure any default as of the petition date, leads to an incorrect calculation of past due escrow balances. The cure amount should include past due, prepetition principal and interest portions of mortgage installment payments, plus escrow balances calculated by a method she has ordered for use in her court. This method "does assume that the past due amounts owed for escrow charges and missed prepetition escrow payments are reflected on the proof of claim as part of the arrearage."

Brett Weiss (National Association of Consumer Bankruptcy Attorneys). Lenders should not be allowed to impose fees for completing and filing proofs of claim, attachments, and supplements.

10-BK-13. Daniel Greenbaum. He expresses excitement and relief for the prospect that the mortgage rules may be implemented. The rules, however, do not go far enough. The mortgage industry has been involved in fraudulent and suspicious lending practices.

10-BK-18. Penny Souhrada. The new mortgage forms will be an important step in insuring that accurate claims are filed. Creditors should not be allowed to charge the debtor with the costs incurred in providing information

that the creditor should already have available.

10-BK-23. Wendell J. Sherk. The mortgage attachment form should apply to all residential mortgages. It is crucial that it contain a payment history, not just a summary. The history reveals the lender's management of the debtor's account. The rule should allow local rules to require additional documentation.

10-BK-25. Richard I. Isacoff, P.C. All creditors, but especially holders of home mortgage claims, should be required to provide a full account transaction history if the debtor requests it. They should have 14 days to comply.

10-BK-27. National Association of Consumer Bankruptcy Attorneys (submitted by Henry Sommer). The mortgage attachments should apply to all residential mortgages. The proof-of-claim attachment should include in Part 3, item 2, a line to subtract amounts that are to be refunded to the debtor's account (such as a sheriff's sale deposit paid by the lender for a sale that was not conducted). The attachment of a payment history should be required. Often disputes about amounts claimed arise from the way in which the lender applied the debtor's payments. A payment history can allow these disputes to be resolved. Since local laws governing foreclosure vary so widely, the Committee Note should clarify that local rules can require additional information. The Committee Notes to the forms should state that, by asking for information about various types of charges, the forms do not express any opinion about whether the mortgagee is entitled to collect them. In particular, the forms should not be deemed to take a position on whether the lender may assess attorney's fees for preparation of a proof of claim.

10-BK-033. Neal R. Allen. The mortgage claimant should be required to attach a chain of title from the original mortgagee to show that it actually owns the note and mortgage or deed of trust.

10-BK-034. Keith Rodriguez (chapter 13 trustee). Rules that require mortgage servicers to provide more specific information are welcomed. Proofs of claim filed by servicers often make it difficult to determine whether the servicer has a right to file the claim.

10-BK-035. Yvonne V. Valdez. She expresses strong support for the requirement of greater information disclosure by mortgage creditors. A payment history should also be provided, as well as a complete chain of title. This information will make it easier to identify errors and miscalculations by the mortgage lender.

B 10 (Supplement 1) (12/11)

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____,
Debtor

Case No. _____

Chapter 13

Notice of Mortgage Payment Change

If you file a claim secured by a security interest in the debtor's principal residence provided for under the debtor's plan pursuant to § 1322(b)(5), you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____

Court claim no. (if known): _____

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

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

New total payment:
Principal, interest, and escrow, if any $ _____

Part 1: Escrow Account Payment Adjustment

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

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

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

Part 2: Mortgage Payment Adjustment

Will the debtor's principal and interest payment change based on an adjustment to the interest rate in the debtor's variable-rate note?

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

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

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

Part 3: Other Payment Change

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

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

Reason for change: _____

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

Part 4: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent.
(Attach copy of power of attorney, if any.)

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

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence—or the holder's agent—to provide notice at least 21 days prior to a change in the amount of the ongoing mortgage installment payments. The form requires the holder of the claim to indicate the basis for the changed payment amount and when it will take effect. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of Rule 9011(b) are satisfied.

Changes Made After Publication

Part 1. The instruction to "Attach a copy of the escrow account statement, prepared according to applicable nonbankruptcy law" was changed to "Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law."

Part 2. The instruction to "Attach a copy of the rate change notice, prepared according to applicable nonbankruptcy law" was changed to "Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law."

Part 4. In the declaration, the word "claim" was changed to "Notice."

Summary of Public Comment

10-BK-005. Bankruptcy Judge Marvin Isgur (S.D. Tex.). Supplement 1 should not instruct the mortgagee to attach an escrow account statement "prepared according to applicable nonbankruptcy law." That instruction, which provides for a RESPA-based analysis, improperly allows the mortgagee to collect the escrow shortage under the plan as part of the cure payment *and* as part of an ongoing adjusted mortgage payment.

10-BK-034. Keith Rodriguez (chapter 13 trustee). Notices of payment change are not always provided. Without that information, disbursements may be made that result in the debtor incurring late charges. The debtor needs complete information to emerge from bankruptcy with a fresh start.

B 10 (Supplement 2) (12/11)

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____, Debtor

Case No. _____

Chapter 13

Notice of Postpetition Mortgage Fees, Expenses, and Charges

If you hold a claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any postpetition fees, expenses, and charges that you assert are recoverable against the debtor or against the debtor's principal residence. File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

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

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

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

- ❑ No
- ❑ Yes. Date of the last notice: ____/____/_____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates incurred		Amount
1. Late charges	_____	(1)	$ _____
2. Non-sufficient funds (NSF) fees	_____	(2)	$ _____
3. Attorney fees	_____	(3)	$ _____
4. Filing fees and court costs	_____	(4)	$ _____
5. Bankruptcy/Proof of claim fees	_____	(5)	$ _____
6. Appraisal/Broker's price opinion fees	_____	(6)	$ _____
7. Property inspection fees	_____	(7)	$ _____
8. Tax advances (non-escrow)	_____	(8)	$ _____
9. Insurance advances (non-escrow)	_____	(9)	$ _____
10. Property preservation expenses. Specify:_____	_____	(10)	$ _____
11. Other. Specify:_____	_____	(11)	$ _____
12. Other. Specify:_____	_____	(12)	$ _____
13. Other. Specify:_____	_____	(13)	$ _____
14. Other. Specify:_____	_____	(14)	$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

❒ I am the creditor.

❒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

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

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence—or the holder's agent—to file a notice of all postpetition fees, expenses, and charges within 180 days after they are incurred. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of Rule 9011(b) are satisfied.

Changes Made After Publication

Part 1. Item numbers were added to the left and right columns.

Part 2. In the declaration, the word "claim" was changed to "Notice."

Summary of Public Comment

10-BK-004. Erin Shank. Mortgage companies should be required to inform debtors of any charges assessed during bankruptcy. In one of her cases, the mortgagee paid property taxes without the debtor's knowledge, even though those taxes were being paid under the plan. Toward the end of the five-year plan, the lender sought to foreclose due to their payment of the taxes. It took over a year and six hearings to straighten the matter out (efforts handled pro bono by the attorney).

10-BK-027. National Association of Consumer Bankruptcy Attorneys (submitted by Henry Sommer). The Committee Note to Supplement 2 should state that creditors are not authorized to charge additional fees for sending a notice of a change in payments or the assessment of additional charges. Outside of bankruptcy, creditors cannot collect fees for such notices.

10-BK-032. Ellen Carlson. The mortgage forms that implement Rule 3002.1 should not be limited to use in chapter 13 cases. They should also apply in chapter 7 asset cases and chapter 11 cases.

B25A (Official Form 25A) (12/11)

United States Bankruptcy Court
_____ District of _____

In re_____, Case No. _____
Debtor

Small Business Case under Chapter 11

[NAME OF PROPONENT]'S PLAN OF REORGANIZATION, DATED [INSERT DATE]

ARTICLE I
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 secured claims; _____ classes of unsecured claims; and _____ classes of equity security holders. 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 [if payment is not in full on the effective date of this Plan with respect to any such claim (to the extent permitted by the Code or the claimant's agreement), identify such claim and briefly summarize the proposed treatment.]

All creditors and equity security holders should refer to Articles III through VI 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 II
CLASSIFICATION OF CLAIMS AND INTERESTS

2.01 Class 1. All allowed claims entitled to priority under § 507 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)).

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 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 III
TREATMENT OF ADMINISTRATIVE EXPENSE CLAIMS, U.S. TRUSTEES FEES, AND PRIORITY TAX CLAIMS

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 (as defined in Article VII), in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor.

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 United States Trustee Fees. All fees required to be paid by 28 U.S.C. §1930(a)(6) (U.S. Trustee Fees) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code. Any U.S. Trustee Fees owed on or before the effective date of this Plan will be paid on the effective date.

ARTICLE IV
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	[State whether impaired or 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 as defined in Article VII, or the date on which such claim is allowed by a final non-appealable order. Except: _____."]
Class 2 – Secured Claim of [Insert name of secured creditor.]	[State whether impaired or unimpaired.]	[Insert treatment of secured claim in this Class, including the form, amount and timing of distribution, if any.] [Add class[es] of secured claims if applicable]
Class 3 - General Unsecured Creditors	[State whether impaired or 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	[State whether impaired or unimpaired.]	[Insert treatment of equity security holders in this Class, including the form, amount and timing of distribution, if any.]

ARTICLE V
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 VI
PROVISIONS FOR EXECUTORY CONTRACTS AND UNEXPIRED LEASES

6.01 Assumed Executory Contracts and Unexpired Leases.

(a) The Debtor assumes the following executory contracts and/or unexpired leases effective upon the [Insert "effective date of this Plan as provided in Article VII," "the date of the entry of the order confirming this Plan," or other applicable date]:

[List assumed executory contracts and/or unexpired leases.]

(b) The Debtor will be conclusively deemed to have rejected all executory contracts and/or unexpired leases not expressly assumed under section 6.01(a) above, or before the date of the order confirming this Plan, upon the [Insert "effective date of this Plan," "the date of the entry of the order confirming this Plan," or other applicable 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 VII
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, as well as who will be serving as directors, officers or voting trustees of the reorganized debtor.]

ARTICLE VIII
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 of Plan. The effective date of this Plan is the first business day following the date that is fourteen days after the entry of the order of confirmation. 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 of the confirmation order 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.]]

ARTICLE IX
DISCHARGE

[If the Debtor is not entitled to discharge under 11 U.S.C. § 1141(d)(3) change this heading to "**NO DISCHARGE OF DEBTOR**."]

9.01. **[Option 1 – If Debtor is an individual and § 1141(d)(3) is not applicable]**
Discharge. 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.

[Option 2 -- If the Debtor is a partnership and section 1141(d)(3) of the Code is not applicable]
Discharge. On the confirmation date of this Plan, the debtor will be discharged from any debt that arose before confirmation of this Plan, subject to the occurrence of the effective date, 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.

[Option 3 -- If the Debtor is a corporation and § 1141(d)(3) is not applicable]

Discharge. On the confirmation date of this Plan, the debtor will be discharged from any debt that arose before confirmation of this Plan, subject to the occurrence of the effective date, 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; (ii) of a kind specified in § 1141(d)(6)(A) if a timely complaint was filed in accordance with Rule 4007(c) of the Federal Rules of Bankruptcy Procedure; or (iii) of a kind specified in § 1141(d)(6)(B).

[Option 4 – If § 1141(d)(3) is applicable]

No Discharge. In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

ARTICLE X
OTHER PROVISIONS

[Insert other provisions, as applicable.]

Respectfully submitted,

By: _____
The Plan Proponent

By:_____
Attorney for the Plan Proponent

COMMITTEE NOTE

Provision 8.02 of Article VIII of the form, which specifies the plan's effective date, is amended to reflect the change in the time periods of Rules 3020(e) and 8002(a) for a stay of the confirmation order and the filing of a notice of appeal. As of December 1, 2009, both time periods were increased from ten to fourteen days. The effective date of the plan will generally be the first business day after those time periods expire. Accordingly, the effective date of the plan is extended to the first business day following the date that is fourteen days after the entry of the order of confirmation. If, however, a stay of the confirmation order remains in effect on the specified effective date, the plan will instead go into effect on the first business day after the stay expires or is terminated, so long as the order of confirmation has not been vacated.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted on this amendment.

Appendix B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

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

* * * * *

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

* * * * *

(7) Unless an approved provider of an instructional course concerning personal financial management has notified the court that a debtor has completed the course after filing the petition:

(A) An individual debtor in a chapter 7 or chapter 13 case shall file a statement of completion of the ~~a~~ course ~~concerning personal financial management~~, prepared as prescribed by the appropriate Official Form.~~:~~; and

(B) An individual debtor in a chapter 11 case shall file the statement ~~in a chapter 11 case in which~~ if

---

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

** In addition to the amendment of Rules 1007(b) and 5009(b), Official Form 23 would be amended to clarify that the debtor should not file the form if the provider of a personal financial management course has already notified the court of the debtor's completion of the course.

§ 1141(d)(3) applies.

COMMITTEE NOTE

Subdivision (b)(7) is amended to relieve an individual debtor of the obligation to file a statement of completion of a personal financial management course if the course provider notifies the court that the debtor has completed the course. Course providers approved under § 111 of the Code may be permitted to file this notification electronically with the court immediately upon the debtor's completion of the course. If the provider does not notify the court, the debtor must file the statement, prepared as prescribed by the appropriate Official Form, within the time period specified by subdivision (c).

Rule 3007. Objections to Claim

(a) ~~OBJECTIONS TO CLAIMS~~ TIME AND MANNER OF SERVICE. An objection to the allowance of a claim and a notice of objection that conforms substantially to the appropriate Official Form shall be ~~in writing and~~ filed and served at least 30 days before any scheduled hearing on the objection or any deadline for the claimant to request a hearing. The objection and notice shall be served as follows:

(1) on the claimant, by first-class mail addressed to the person most recently designated on the original or amended proof of claim as the person to receive notices, at the address so indicated; and

(A) if the objection is to a claim of the United States or any of its officers or agencies, in the manner provided for serving a summons and complaint by Rule 7004(b)(4)

or (5); or

(B) if the objection is to a claim or an insured depository institution, according to Rule 7004(h); and

(2) on the debtor or debtor in possession and the trustee by first-class mail or other permitted means.

~~A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing.~~

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to specify the manner in which an objection to a claim and notice of the objection must be served. It clarifies that Rule 7004 does not apply to the service of most claim objections. Instead, a claimant must be served by first-class mail sent to the person that the claimant most recently designated on its proof of claim to receive notices, at the address so indicated. If, however, the claimant is the United States, an officer or agency of the United States, or an insured depository institution, service must also be made according to the method prescribed by the appropriate provision of Rule 7004. The service methods for the depository institutions are statutorily mandated, and the size and dispersal of the decision-making and litigation authority of the federal government necessitate service on the appropriate United States attorney's office and the Attorney General, as well as the person designated on the proof of claim.

As amended, subdivision (a) no longer requires that a hearing be scheduled or held on every objection. The rule requires the objecting party to provide notice and an opportunity for a hearing on the objection, but, by deleting from the subdivision references to "the hearing," it permits local practices that require a claimant to timely request a hearing or file a response in order to obtain a hearing. The official notice form served with a copy of the objection will inform the claimant of any actions it must take.

Rule 5009. Closing Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, Chapter 13 Individual's Debt Adjustment, and Chapter 15 Ancillary and Cross-Border Cases

* * * * *

(b) NOTICE OF FAILURE TO FILE RULE 1007(b)(7) STATEMENT. If an individual debtor in a chapter 7 or 13 case is required to ~~has not~~ file~~d the~~ a statement under ~~required by~~ Rule 1007(b)(7) and fails to do so within 45 days after the first date set for the meeting of creditors under § 341(a) of the Code, the clerk shall promptly notify the debtor that the case will be closed without entry of a discharge unless the required statement is filed within the applicable time limit under Rule 1007(c).

* * * * *

COMMITTEE NOTE

Subdivision (b) is amended to conform to the amendment of Rule 1007(b)(7). Rule 1007(b)(7) relieves an individual debtor of the obligation to file a statement of completion of a personal financial management course if the course provider notifies the court that the debtor has completed the course. The clerk's duty under subdivision (b) to notify the debtor of the possible closure of the case without discharge if the statement is not timely filed therefore applies only if the course provider has not already notified the court of the debtor's completion of the course.

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) ~~FOR~~ MOTION~~S~~ PAPERS~~= AFFIDAVITS~~. A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than seven days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. ~~and, e~~Except as otherwise provided in Rule 9023, ~~opposing affidavits~~ any written response shall ~~may~~ be served not later than one day before the hearing, unless the court permits otherwise~~them to be served at some other time~~.

* * * * *

COMMITTEE NOTE

The title of this rule is amended to draw attention to the fact that it prescribes time limits for the service of motion papers. These time periods apply unless another Bankruptcy Rule or a court order, including a local rule, prescribes different time periods. Rules 9013 and 9014 should also be consulted regarding motion practice. Rule 9013 governs the form of motions and the parties who must be served. Rule 9014 prescribes the procedures applicable to contested matters, including the method of serving motions commencing contested matters and subsequent papers.

Subdivision (d) is amended to apply to any written response to a motion, rather than just to opposing affidavits. The caption of the subdivision is amended to reflect this change. Other changes are stylistic.

Rule 9013. Motions: Form and Service

A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion, other than one which may be considered ex parte, shall be served by the moving party within the time determined under Rule 9006(d). The moving party shall serve the motion on:

(a) the trustee or debtor in possession and on those entities specified by these rules; or

(b) the entities the court directs if these rules do not require service or specify the entities to be served ~~if service is not required or the entities to be served are not specified by these rules, the moving party shall serve the entities the court directs~~.

* * * * *

COMMITTEE NOTE

A cross-reference to Rule 9006(d) is added to this rule to call attention to the time limits for the service of motions, supporting affidavits, and written responses to motions. Rule 9006(d) prescribes time limits that apply unless other limits are fixed by these rules, a court order, or a local rule. The other changes are stylistic.

Rule 9014. Contested Matters

* * * * *

(b) SERVICE. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004 and within the time determined under Rule 9006(d). Any written response to the motion shall be served within the time determined under Rule 9006(d). Any paper served after the motion shall be served in the manner provided by Rule 5(b) F.R. Civ. P.

* * * * *

COMMITTEE NOTE

A cross-reference to Rule 9006(d) is added to subdivision (b) to call attention to the time limits for the service of motions, supporting affidavits, and written responses to motions. Rule 9006(d) prescribes time limits that apply unless other limits are fixed by these rules, a court order, or a local rule.

B6C (Official Form 6C) (12/12) (08/11 publication draft)

In re ____, **Case No.** ________________________
Debtor **(If known)**

SCHEDULE C - PROPERTY CLAIMED AS EXEMPT

Debtor claims the exemptions to which debtor is entitled under:
(Check one box)
□ 11 U.S.C. § 522(b)(2)
□ 11 U.S.C. § 522(b)(3)

□ Check if debtor claims a homestead exemption that exceeds $146,450.*

DESCRIPTION OF PROPERTY	CURRENT MARKET VALUE OF PROPERTY WITHOUT DEDUCTING EXEMPTIONS	SPECIFY LAW PROVIDING EACH EXEMPTION	VALUE OF CLAIMED EXEMPTION (Check only one box for each exemption.)
			❑ Exemption limited to $______________ ❑ Full fair market value of the exempted property
			❑ Exemption limited to $______________ ❑ Full fair market value of the exempted property
			❑ Exemption limited to $______________ ❑ Full fair market value of the exempted property
			❑ Exemption limited to $______________ ❑ Full fair market value of the exempted property
			❑ Exemption limited to $______________ ❑ Full fair market value of the exempted property
			❑ Exemption limited to $______________ ❑ Full fair market value of the exempted property
			❑ Exemption limited to $______________ ❑ Full fair market value of the exempted property
			❑ Exemption limited to $______________ ❑ Full fair market value of the exempted property

* *Amount subject to adjustment on 4/1/13, and every three years thereafter with respect to cases commenced on or after the date of adjustment.*

COMMITTEE NOTE

Schedule C—Property Claimed As Exempt—is amended to provide the option of declaring as exempt the full fair market value of property. This option, suggested by the Supreme Court in *Schwab v. Reilly*, 130 S. Ct. 2652, 2668 (2010), allows a debtor to state the intent to exempt the entire value of property, even if that value is found to be greater than the debtor's estimate of the property value. Alternatively, as under the prior version of Schedule C, a debtor may claim an exemption limited to a certain dollar amount.

The amendment also rearranges the order of the columns in Schedule C so that the column for the current market value of the property follows the description of the property.

B 7 (Official Form 7) (12/12) (08/11 publication draft)

UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

In re:_____ _____, Case No. _____
Debtor (if known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs. To indicate payments, transfers and the like to minor children, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m).

Questions 1 - 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19 - 25. **If the answer to an applicable question is "None," mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed full-time or part-time. An individual debtor also may be “in business” for the purpose of this form if the debtor engages in a trade, business, or other activity, other than as an employee, to supplement income from the debtor’s primary employment.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any persons in control of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; and any managing agent of the debtor. 11 U.S.C. § 101(2), (31).

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1. Income from employment or operation of business

None ☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business, including part-time activities either as an employee or in independent trade or business, from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT SOURCE

2. Income other than from employment or operation of business

None ☐

State the amount of income received by the debtor other than from employment, trade, profession, operation of the debtor's business during the **two years** immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE

---

3. Payments to creditors

Complete a. or b., as appropriate, and c.

None ☐

a. *Individual or joint debtor(s) with primarily consumer debts:* List all payments on loans, installment purchases of goods or services, and other debts to any creditor made within **90 days** immediately preceding the commencement of this case unless the aggregate value of all property that constitutes or is affected by such transfer is less than $600. Indicate with an asterisk (*) any payments that were made to a creditor on account of a domestic support obligation or as part of an alternative repayment schedule under a plan by an approved nonprofit budgeting and credit counseling agency. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING

None ☐

b. Debtor whose debts are not primarily consumer debts: List each payment or other transfer to any creditor made within **90 days** immediately preceding the commencement of the case unless the aggregate value of all property that constitutes or is affected by such transfer is less than $5,850*. If the debtor is an individual, indicate with an asterisk (*) any payments that were made to a creditor on account of a domestic support obligation or as part of an alternative repayment schedule under a plan by an approved nonprofit budgeting and credit counseling agency. (Married debtors filing under chapter 12 or chapter 13 must include payments and other transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS/ TRANSFERS	AMOUNT PAID OR VALUE OF TRANSFERS	AMOUNT STILL OWING

**Amount subject to adjustment on 4/01/13, and every three years thereafter with respect to cases commenced on or after the date of adjustment.*

None ☐ c. *All debtors:* List all payments made within **one year** immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR AND RELATIONSHIP TO DEBTOR	DATE OF PAYMENT	AMOUNT PAID	AMOUNT STILL OWING

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4. Suits and administrative proceedings, executions, garnishments and attachments

None ☐ a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT OR AGENCY AND LOCATION	STATUS OR DISPOSITION

None ☐ b. Describe all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY

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5. Repossessions, foreclosures and returns

None ☐ List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSSESSION, FORECLOSURE SALE, TRANSFER OR RETURN	DESCRIPTION AND VALUE OF PROPERTY

---

6. Assignments and receiverships

None ☐ a. Describe any assignment of property for the benefit of creditors made within **120 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF ASSIGNEE	DATE OF ASSIGNMENT	TERMS OF ASSIGNMENT OR SETTLEMENT

None ☐ b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CUSTODIAN	NAME AND LOCATION OF COURT CASE TITLE & NUMBER	DATE OF ORDER	DESCRIPTION AND VALUE Of PROPERTY

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7. Gifts

None ☐ List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than $200 in value per individual family member and charitable contributions aggregating less than $100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON OR ORGANIZATION	RELATIONSHIP TO DEBTOR, IF ANY	DATE OF GIFT	DESCRIPTION AND VALUE OF GIFT

---

8. Losses

None ☐ List all losses from fire, theft, other casualty or gambling within **one year** immediately preceding the commencement of this case **or since the commencement of this case**. (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES AND, IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS

---

9. Payments related to debt counseling or bankruptcy

None ☐ List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS OF PAYEE	DATE OF PAYMENT, NAME OF PAYER IF OTHER THAN DEBTOR	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

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10. Other transfers

None ☐ a. List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **two years** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED

None ☐ b. List all property transferred by the debtor within **ten years** immediately preceding the commencement of this case to a self-settled trust or similar device of which the debtor is a beneficiary.

NAME OF TRUST OR OTHER DEVICE	DATE(S) OF TRANSFER(S)	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY OR DEBTOR'S INTEREST IN PROPERTY

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11. Closed financial accounts

None ☐ List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within **one year** immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE OF ACCOUNT, LAST FOUR DIGITS OF ACCOUNT NUMBER, AND AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING

---

12. Safe deposit boxes

None ☐ List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER DEPOSITORY	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER, IF ANY

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13. Setoffs

None ☐ List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF

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14. Property held for another person

None ☐ List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY

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15. Prior address of debtor

None ☐ If debtor has moved within **three years** immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY

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16. Spouses and Former Spouses

None ☐ If the debtor resides or resided in a community property state, commonwealth, or territory (including Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within **eight years** immediately preceding the commencement of the case, identify the name of the debtor's spouse and of any former spouse who resides or resided with the debtor in the community property state.

NAME

---

17. Environmental Information.

For the purpose of this question, the following definitions apply:

"Environmental Law" means any federal, state, or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or material into the air, land, soil, surface water, groundwater, or other medium, including, but not limited to, statutes or regulations regulating the cleanup of these substances, wastes, or material.

"Site" means any location, facility, or property as defined under any Environmental Law, whether or not presently or formerly owned or operated by the debtor, including, but not limited to, disposal sites.

"Hazardous Material" means anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law.

None ☐ a. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law:

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ b. List the name and address of every site for which the debtor provided notice to a governmental unit of a release of Hazardous Material. Indicate the governmental unit to which the notice was sent and the date of the notice.

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS OF GOVERNMENTAL UNIT	DOCKET NUMBER	STATUS OR DISPOSITION

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18 . Nature, location and name of business

None ☐ a. *If the debtor is an individual*, list the names, addresses, taxpayer-identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partner in a partnership, sole proprietor, or was self-employed in a trade, profession, or

other activity either full- or part-time within **six years** immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within **six years** immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, addresses, taxpayer-identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within **six years** immediately preceding the commencement of this case.

If the debtor is a corporation, list the names, addresses, taxpayer-identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities within **six years** immediately preceding the commencement of this case.

NAME	LAST FOUR DIGITS OF SOCIAL-SECURITY OR OTHER INDIVIDUAL TAXPAYER-I.D. NO. (ITIN)/ COMPLETE EIN	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES

None ☐ b. Identify any business listed in response to subdivision a., above, that is "single asset real estate" as defined in 11 U.S.C. § 101.

NAME	ADDRESS

The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within **six years** immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership, a sole proprietor, or self-employed in a trade, profession, or other activity, either full- or part-time.

*(An individual or joint debtor should complete this portion of the statement **only** if the debtor is or has been in business, as defined above, within six years immediately preceding the commencement of this case. A debtor who has not been in business within those six years should go directly to the signature page.)*

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19. Books, records and financial statements

None ☐ a. List all bookkeepers and accountants who within **two years** immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS	DATES SERVICES RENDERED

None ☐ b. List all firms or individuals who within **two years** immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

NAME	ADDRESS	DATES SERVICES RENDERED

None ☐ c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

NAME	ADDRESS

None ☐ d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued by the debtor within **two years** immediately preceding the commencement of this case.

NAME AND ADDRESS	DATE ISSUED

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20. Inventories

None ☐ a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY	INVENTORY SUPERVISOR	DOLLAR AMOUNT OF INVENTORY (Specify cost, market or other basis)

None ☐ b. List the name and address of the person having possession of the records of each of the inventories reported in a., above.

DATE OF INVENTORY	NAME AND ADDRESSES OF CUSTODIAN OF INVENTORY RECORDS

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21 . Current Partners, Officers, Directors and Shareholders

None ☐ a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

NAME AND ADDRESS	NATURE OF INTEREST	PERCENTAGE OF INTEREST

None ☐ b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting or equity securities of the corporation.

NAME AND ADDRESS	TITLE	NATURE AND PERCENTAGE OF STOCK OWNERSHIP

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22 . Former partners, officers, directors and shareholders

None ☐ a. If the debtor is a partnership, list each member who withdrew from the partnership within **one year** immediately preceding the commencement of this case.

NAME	ADDRESS	DATE OF WITHDRAWAL

None ☐ b. If the debtor is a corporation, list all officers or directors whose relationship with the corporation terminated within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS	TITLE	DATE OF TERMINATION

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23 . Withdrawals from a partnership or distributions by a corporation

None ☐ If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during **one year** immediately preceding the commencement of this case.

NAME & ADDRESS OF RECIPIENT, RELATIONSHIP TO DEBTOR	DATE AND PURPOSE OF WITHDRAWAL	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

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24. Tax Consolidation Group.

None ☐ If the debtor is a corporation, list the name and federal taxpayer-identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within **six years** immediately preceding the commencement of the case.

NAME OF PARENT CORPORATION	TAXPAYER-IDENTIFICATION NUMBER (EIN)

---

25. Pension Funds.

None ☐ If the debtor is not an individual, list the name and federal taxpayer-identification number of any pension fund to which the debtor, as an employer, has been responsible for contributing at any time within **six years** immediately preceding the commencement of the case.

NAME OF PENSION FUND	TAXPAYER-IDENTIFICATION NUMBER (EIN)

* * * * * *

[If completed by an individual or individual and spouse]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date _____ Signature of Debtor _____

Date _____ Signature of Joint Debtor (if any) _____

[If completed on behalf of a partnership or corporation]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct to the best of my knowledge, information and belief.

Date _____ Signature _____

Print Name and Title _____

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

___continuation sheets attached

Penalty for making a false statement: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571

DECLARATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required by that section.

Printed or Typed Name and Title, if any, of Bankruptcy Petition Preparer

Social-Security No. (Required by 11 U.S.C. § 110.)

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social-security number of the officer, principal, responsible person, or partner who signs this document.

Address

Signature of Bankruptcy Petition Preparer

Date

Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 18 U.S.C. § 156.

COMMITTEE NOTE

The definition of "insider" is amended to conform to the statutory definition of the term. See 11 U.S.C. § 101(31). Under the Code definition, ownership of 5% or more of the voting shares of a corporate debtor does not automatically make the owner an insider of the corporation. And in order to be an affiliate of the debtor and an insider on that basis, ownership or control of at least 20% of the outstanding voting securities of the debtor is required. 11 U.S.C. § 101(2). The phrase "any owner of 5% or more of the voting or equity securities" is therefore deleted. Because § 101(31) provides that a person in control of a debtor corporation is an insider, that term is substituted for the deleted phrase.

In re _____
Debtor(s)

Case Number: _____
(If known)

According to the information required to be entered on this statement (check one box as directed in Part I, III, or VI of this statement):

☐ **The presumption arises.**
☐ **The presumption does not arise.**
☐ **The presumption is temporarily inapplicable.**

CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION

In addition to Schedules I and J, this statement must be completed by every individual chapter 7 debtor. If none of the exclusions in Part I applies, joint debtors may complete one statement only. If any of the exclusions in Part I applies, joint debtors should complete separate statements if they believe this is required by § 707(b)(2)(C).

Part I. MILITARY AND NON-CONSUMER DEBTORS

1A	**Disabled Veterans.** If you are a disabled veteran described in the Declaration in this Part 1A, (1) check the box at the beginning of the Declaration, (2) check the box for "The presumption does not arise" at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement. ☐ **Declaration of Disabled Veteran.** By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. §901(1)).
1B	**Non-consumer Debtors.** If your debts are not primarily consumer debts, check the box below and complete the verification in Part VIII. Do not complete any of the remaining parts of this statement. ☐ **Declaration of non-consumer debts.** By checking this box, I declare that my debts are not primarily consumer debts.
1C	**Reservists and National Guard Members; active duty or homeland defense activity.** Members of a reserve component of the Armed Forces and members of the National Guard who were called to active duty (as defined in 10 U.S.C. § 101(d)(1)) after September 11, 2001, for a period of at least 90 days, or who have performed homeland defense activity (as defined in 32 U.S.C. § 901(1)) for a period of at least 90 days, are excluded from all forms of means testing during the time of active duty or homeland defense activity and for 540 days thereafter (the "exclusion period"). If you qualify for this temporary exclusion, (1) check the appropriate boxes and complete any required information in the Declaration of Reservists and National Guard Members below, (2) check the box for "The presumption is temporarily inapplicable" at the top of this statement, and (3) complete the verification in Part VIII. **During your exclusion period you are not required to complete the balance of this form, but you must complete the form no later than 14 days after the date on which your exclusion period ends, unless the time for filing a motion raising the means test presumption expires in your case before your exclusion period ends.** ☐ **Declaration of Reservists and National Guard Members.** By checking this box and making the appropriate entries below, I declare that I am eligible for a temporary exclusion from means testing because, as a member of a reserve component of the Armed Forces or the National Guard a. ☐ I was called to active duty after September 11, 2001, for a period of at least 90 days and ☐ I remain on active duty /or/ ☐ I was released from active duty on _____, which is less than 540 days before this bankruptcy case was filed; OR b. ☐ I am performing homeland defense activity for a period of at least 90 days /or/ ☐ I performed homeland defense activity for a period of at least 90 days, terminating on _____, which is less than 540 days before this bankruptcy case was filed.

Part II. CALCULATION OF MONTHLY INCOME FOR § 707(b)(7) EXCLUSION

2 **Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed.

a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 3-11.**

b. ☐ Married, not filing jointly, with declaration of separate households. By checking this box, debtor declares under penalty of perjury: "My spouse and I are legally separated under applicable non-bankruptcy law or my spouse and I are living apart other than for the purpose of evading the requirements of § 707(b)(2)(A) of the Bankruptcy Code." **Complete only Column A ("Debtor's Income") for Lines 3-11.**

c. ☐ Married, not filing jointly, without the declaration of separate households set out in Line 2.b above. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.**

d. ☐ Married, filing jointly. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.**

	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	**Column A Debtor's Income**	**Column B Spouse's Income**
3	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
4	**Income from the operation of a business, profession or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part V.**	$	$
5	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 5. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part V.**	$	$
6	**Interest, dividends and royalties.**	$	$
7	**Pension and retirement income.**	$	$
8	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose.** Do not include alimony or separate maintenance payments or amounts paid by your spouse if Column B is completed. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.	$	$
9	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 9. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below:	$	$

Line 4:

a.	Gross receipts	$
b.	Ordinary and necessary business expenses	$
c.	Business income	Subtract Line b from Line a

Line 5:

a.	Gross receipts	$
b.	Ordinary and necessary operating expenses	$
c.	Rent and other real property income	Subtract Line b from Line a

Line 9:

Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor $ _____	Spouse $ _____

10	**Income from all other sources.** Specify source and amount. If necessary, list additional sources on a separate page. **Do not include alimony or separate maintenance payments paid by your spouse if Column B is completed, but include all other payments of alimony or separate maintenance.** Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. a. $ b. $ Total and enter on Line 10	$	$
11	**Subtotal of Current Monthly Income for § 707(b)(7).** Add Lines 3 thru 10 in Column A, and, if Column B is completed, add Lines 3 through 10 in Column B. Enter the total(s).	$	$
12	**Total Current Monthly Income for § 707(b)(7).** If Column B has been completed, add Line 11, Column A to Line 11, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 11, Column A.	$	

Part III. APPLICATION OF § 707(b)(7) EXCLUSION

13	**Annualized Current Monthly Income for § 707(b)(7).** Multiply the amount from Line 12 by the number 12 and enter the result.	$
14	**Applicable median family income.** Enter the median family income for the applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	$
15	**Application of Section 707(b)(7).** Check the applicable box and proceed as directed. ☐ **The amount on Line 13 is less than or equal to the amount on Line 14.** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete Part VIII; do not complete Parts IV, V, VI or VII. ☐ **The amount on Line 13 is more than the amount on Line 14.** Complete the remaining parts of this statement.	

Complete Parts IV, V, VI, and VII of this statement only if required. (See Line 15.)

Part IV. CALCULATION OF CURRENT MONTHLY INCOME FOR § 707(b)(2)

16	**Enter the amount from Line 12.**	$
17	**Marital adjustment.** If you checked the box at Line 2.c, enter on Line 17 the total of any income listed in Line 11, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If you did not check box at Line 2.c, enter zero. a. $ b. $ c. $ Total and enter on Line 17.	$
18	**Current monthly income for § 707(b)(2).** Subtract Line 17 from Line 16 and enter the result.	$

Part V. CALCULATION OF DEDUCTIONS FROM INCOME

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

19A

National Standards: food, clothing and other items. Enter in Line 19A the "Total" amount from IRS National Standards for Food, Clothing and Other Items for the applicable number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.

$

19B

National Standards: health care. Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 19B.

Persons under 65 years of age			**Persons 65 years of age or older**		
a1.	Allowance per person		a2.	Allowance per person	
b1.	Number of persons		b2.	Number of persons	
c1.	Subtotal		c2.	Subtotal	

$

20A

Local Standards: housing and utilities; non-mortgage expenses. Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.

$

20B

Local Standards: housing and utilities; mortgage/rent expense. Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 42; subtract Line b from Line a and enter the result in Line 20B. **Do not enter an amount less than zero.**

a.	IRS Housing and Utilities Standards; mortgage/rental expense	$
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42	$
c.	Net mortgage/rental expense	Subtract Line b from Line a.

$

21

Local Standards: housing and utilities; adjustment. If you contend that the process set out in Lines 20A and 20B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:

_____

_____

_____

$

22A	**Local Standards: transportation; vehicle operation/public transportation expense.** You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 8. ☐ 0 ☐ 1 ☐ 2 or more. If you checked 0, enter on Line 22A the "Public Transportation" amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 22A the "Operating Costs" amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
22B	**Local Standards: transportation; additional public transportation expense.** If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 22B the "Public Transportation" amount from IRS Local Standards: Transportation. (This amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
23	**Local Standards: transportation ownership/lease expense; Vehicle 1.** Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) ☐ 1 ☐ 2 or more. Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 42; subtract Line b from Line a and enter the result in Line 23. **Do not enter an amount less than zero.**	$
24	**Local Standards: transportation ownership/lease expense; Vehicle 2.** Complete this Line only if you checked the "2 or more" Box in Line 23. Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 42; subtract Line b from Line a and enter the result in Line 24. **Do not enter an amount less than zero.**	$
25	**Other Necessary Expenses: taxes.** Enter the total average monthly expense that you actually incur for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**	$
26	**Other Necessary Expenses: involuntary deductions for employment.** Enter the total average monthly payroll deductions that are required for your employment, such as retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as voluntary 401(k) contributions.**	$
27	**Other Necessary Expenses: life insurance.** Enter total average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**	$
28	**Other Necessary Expenses: court-ordered payments.** Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. **Do not include payments on past due obligations included in Line 44.**	$

a.	IRS Transportation Standards, Ownership Costs	$
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 42	$
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.

a.	IRS Transportation Standards, Ownership Costs	$
b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 42	$
c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.

29	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	$
30	**Other Necessary Expenses: childcare.** Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**	$
31	**Other Necessary Expenses: health care.** Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 19B. **Do not include payments for health insurance or health savings accounts listed in Line 34.**	$
32	**Other Necessary Expenses: telecommunication services.** Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service—such as pagers, call waiting, caller id, special long distance, internet service, or business cell phone service—to the extent necessary for your health and welfare or that of your dependents or for the production of income if not reimbursed by your employer. **Do not include any amount previously deducted.**	$
33	**Total Expenses Allowed under IRS Standards.** Enter the total of Lines 19 through 32.	$

Subpart B: Additional Living Expense Deductions

Note: Do not include any expenses that you have listed in Lines 19-32

34	**Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List the monthly expenses in the categories set out in lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents. a. Health Insurance $ b. Disability Insurance $ c. Health Savings Account $ Total and enter on Line 34	$
	If you do not actually expend this total amount, state your actual total average monthly expenditures in the space below: $ _____	
35	**Continued contributions to the care of household or family members.** Enter the total average actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.	$
36	**Protection against family violence.** Enter the total average reasonably necessary monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.	$
37	**Home energy costs.** Enter the total average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. **You must provide your case trustee with documentation of your actual expenses, and you must demonstrate that the additional amount claimed is reasonable and necessary.**	$
38	**Education expenses for dependent children less than 18.** Enter the total average monthly expenses that you actually incur, not to exceed $147.92* per child, for attendance at a private or public elementary or secondary school by your dependent children less than 18 years of age. **You must provide your case trustee with documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**	$

**Amount subject to adjustment on 4/01/13, and every three years thereafter with respect to cases commenced on or after the date of adjustment.*

39	**Additional food and clothing expense.** Enter the total average monthly amount by which your food and clothing expenses exceed the combined allowances for food and clothing (apparel and services) in the IRS National Standards, not to exceed 5% of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must demonstrate that the additional amount claimed is reasonable and necessary**.	$
40	**Continued charitable contributions.** Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).	$
41	**Total Additional Expense Deductions under § 707(b).** Enter the total of Lines 34 through 40	$

Subpart C: Deductions for Debt Payment

42 **Future payments on secured claims.** For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance**.** The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 42.

	Name of Creditor	Property Securing the Debt	Average Monthly Payment	Does payment include taxes or insurance?
a.			$	☐ yes ☐ no
b.			$	☐ yes ☐ no
c.			$	☐ yes ☐ no
			Total: Add Lines a, b and c.	

$

43 **Other payments on secured claims.** If any of debts listed in Line 42 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 42, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	1/60th of the Cure Amount
a.			$
b.			$
c.			$
			Total: Add Lines a, b and c

$

44	**Payments on prepetition priority claims.** Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. **Do not include current obligations, such as those set out in Line 28.**	$

45	**Chapter 13 administrative expenses.** If you are eligible to file a case under chapter 13, complete the following chart, multiply the amount in line a by the amount in line b, and enter the resulting administrative expense. a. Projected average monthly chapter 13 plan payment. $ b. Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) x c. Average monthly administrative expense of chapter 13 case Total: Multiply Lines a and b	$
46	**Total Deductions for Debt Payment.** Enter the total of Lines 42 through 45.	$
	Subpart D: Total Deductions from Income	
47	**Total of all deductions allowed under § 707(b)(2).** Enter the total of Lines 33, 41, and 46.	$
	Part VI. DETERMINATION OF § 707(b)(2) PRESUMPTION	
48	**Enter the amount from Line 18 (Current monthly income for § 707(b)(2))**	$
49	**Enter the amount from Line 47 (Total of all deductions allowed under § 707(b)(2))**	$
50	**Monthly disposable income under § 707(b)(2).** Subtract Line 49 from Line 48 and enter the result	$
51	**60-month disposable income under § 707(b)(2).** Multiply the amount in Line 50 by the number 60 and enter the result.	$
52	**Initial presumption determination.** Check the applicable box and proceed as directed. ☐ **The amount on Line 51 is less than $7,025***. Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII. Do not complete the remainder of Part VI. ☐ **The amount set forth on Line 51 is more than $11,725***. Check the box for "The presumption arises" at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII. Do not complete the remainder of Part VI. ☐ **The amount on Line 51 is at least $7,025*, but not more than $11,725*.** Complete the remainder of Part VI (Lines 53 through 55).	
53	**Enter the amount of your total non-priority unsecured debt**	$
54	**Threshold debt payment amount.** Multiply the amount in Line 53 by the number 0.25 and enter the result.	$
55	**Secondary presumption determination.** Check the applicable box and proceed as directed. ☐ **The amount on Line 51 is less than the amount on Line 54.** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII. ☐ **The amount on Line 51 is equal to or greater than the amount on Line 54.** Check the box for "The presumption arises" at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII.	
	Part VII: ADDITIONAL EXPENSE CLAIMS	
56	**Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses. a. Expense Description Monthly Amount $ b. $ c. $ Total: Add Lines a, b and c $	

**Amounts are subject to adjustment on 4/01/13, and every three years thereafter with respect to cases commenced on or after the date of adjustment.*

Part VIII: VERIFICATION	
57	I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)* Date: _____ Signature: _____ *(Debtor)* Date: _____ Signature: _____ *(Joint Debtor, if any)*

In re _____
Debtor(s)

Case Number: _____
(If known)

According to the calculations required by this statement:
☐ **The applicable commitment period is 3 years.**
☐ **The applicable commitment period is 5 years.**
☐ **Disposable income is determined under § 1325(b)(3).**
☐ **Disposable income is not determined under § 1325(b)(3).**
(Check the boxes as directed in Lines 17 and 23 of this statement.)

CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME

In addition to Schedules I and J, this statement must be completed by every individual chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. REPORT OF INCOME

1	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 2-10.** b. ☐ Married. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.**		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	**Column A Debtor's Income**	**Column B Spouse's Income**
2	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
3	**Income from the operation of a business, profession, or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part IV.** a. Gross receipts $ b. Ordinary and necessary business expenses $ c. Business income Subtract Line b from Line a	$	$
4	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part IV.** a. Gross receipts $ b. Ordinary and necessary operating expenses $ c. Rent and other real property income Subtract Line b from Line a	$	$
5	**Interest, dividends, and royalties.**	$	$
6	**Pension and retirement income.**	$	$
7	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose.** Do not include alimony or separate maintenance payments or amounts paid by the debtor's spouse. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.	$	$

8	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act | Debtor $ _____ | Spouse $ _____	$	$
9	**Income from all other sources.** Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9. **Do not include alimony or separate maintenance payments paid by your spouse, but include all other payments of alimony or separate maintenance. Do not include** any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. a. | $ b. | $	$	$
10	**Subtotal.** Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).	$	$
11	**Total.** If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.	$	

Part II. CALCULATION OF § 1325(b)(4) COMMITMENT PERIOD

12	**Enter the amount from Line 11.**	$
13	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, AND if you contend that calculation of the commitment period under § 1325(b)(4) does not require inclusion of the income of your spouse, enter on Line 13 the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you or your dependents and specify, in the lines below, the basis for excluding this income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero. a. | $ b. | $ c. | $ Total and enter on Line 13.	$
14	**Subtract Line 13 from Line 12 and enter the result.**	$
15	**Annualized current monthly income for § 1325(b)(4).** Multiply the amount from Line 14 by the number 12 and enter the result.	$
16	**Applicable median family income.** Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	$
17	**Application of § 1325(b)(4).** Check the applicable box and proceed as directed. ☐ **The amount on Line 15 is less than the amount on Line 16.** Check the box for "The applicable commitment period is 3 years" at the top of page 1 of this statement and continue with this statement. ☐ **The amount on Line 15 is not less than the amount on Line 16.** Check the box for "The applicable commitment period is 5 years" at the top of page 1 of this statement and continue with this statement.	

Part III. APPLICATION OF § 1325(b)(3) FOR DETERMINING DISPOSABLE INCOME

18	**Enter the amount from Line 11.**	$

19	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, enter on Line 19 the total of any income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero. a. $ b. $ c. $ Total and enter on Line 19.	$
20	**Current monthly income for § 1325(b)(3).** Subtract Line 19 from Line 18 and enter the result.	$
21	**Annualized current monthly income for § 1325(b)(3).** Multiply the amount from Line 20 by the number 12 and enter the result.	$
22	**Applicable median family income.** Enter the amount from Line 16.	$
23	**Application of § 1325(b)(3).** Check the applicable box and proceed as directed. ☐ **The amount on Line 21 is more than the amount on Line 22.** Check the box for "Disposable income is determined under § 1325(b)(3)" at the top of page 1 of this statement and complete the remaining parts of this statement. ☐ **The amount on Line 21 is not more than the amount on Line 22.** Check the box for "Disposable income is not determined under § 1325(b)(3)" at the top of page 1 of this statement and complete Part VII of this statement. **Do not complete Parts IV, V, or VI.**	

Part IV. CALCULATION OF DEDUCTIONS FROM INCOME

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

24A	**National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous.** Enter in Line 24A the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.	$
24B	**National Standards: health care.** Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 24B.	

Persons under 65 years of age			**Persons 65 years of age or older**		
a1.	Allowance per person		a2.	Allowance per person	
b1.	Number of persons		b2.	Number of persons	
c1.	Subtotal		c2.	Subtotal	

$

25A	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.	$

<table>
<tr><td>25B</td><td>Local Standards: housing and utilities; mortgage/rent expense. Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 47; subtract Line b from Line a and enter the result in Line 25B. Do not enter an amount less than zero.
<table>
<tr><td>a.</td><td>IRS Housing and Utilities Standards; mortgage/rent expense</td><td>$</td></tr>
<tr><td>b.</td><td>Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47</td><td>$</td></tr>
<tr><td>c.</td><td>Net mortgage/rental expense</td><td>Subtract Line b from Line a.</td></tr>
</table></td><td>$</td></tr>
<tr><td>26</td><td>Local Standards: housing and utilities; adjustment. If you contend that the process set out in Lines 25A and 25B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:
_____
_____
_____</td><td>$</td></tr>
<tr><td>27A</td><td>Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.
Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. ☐ 0 ☐ 1 ☐ 2 or more.
If you checked 0, enter on Line 27A the “Public Transportation” amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 27A the “Operating Costs” amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)</td><td>$</td></tr>
<tr><td>27B</td><td>Local Standards: transportation; additional public transportation expense. If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 27B the “Public Transportation” amount from IRS Local Standards: Transportation. (This amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)</td><td>$</td></tr>
<tr><td>28</td><td>Local Standards: transportation ownership/lease expense; Vehicle 1. Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) ☐ 1 ☐ 2 or more.
Enter, in Line a below, the “Ownership Costs” for “One Car” from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 47; subtract Line b from Line a and enter the result in Line 28. Do not enter an amount less than zero.
<table>
<tr><td>a.</td><td>IRS Transportation Standards, Ownership Costs</td><td>$</td></tr>
<tr><td>b.</td><td>Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47</td><td>$</td></tr>
<tr><td>c.</td><td>Net ownership/lease expense for Vehicle 1</td><td>Subtract Line b from Line a.</td></tr>
</table></td><td>$</td></tr>
</table>

29	**Local Standards: transportation ownership/lease expense; Vehicle 2.** Complete this Line only if you checked the "2 or more" Box in Line 28. Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 47; subtract Line b from Line a and enter the result in Line 29. **Do not enter an amount less than zero.** a. IRS Transportation Standards, Ownership Costs — $ b. Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 47 — $ c. Net ownership/lease expense for Vehicle 2 — Subtract Line b from Line a.	$
30	**Other Necessary Expenses: taxes.** Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**	$
31	**Other Necessary Expenses: involuntary deductions for employment.** Enter the total average monthly deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as voluntary 401(k) contributions.**	$
32	**Other Necessary Expenses: life insurance.** Enter total average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**	$
33	**Other Necessary Expenses: court-ordered payments.** Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. **Do not include payments on past due obligations included in Line 49.**	$
34	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	$
35	**Other Necessary Expenses: childcare.** Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**	$
36	**Other Necessary Expenses: health care.** Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 24B. **Do not include payments for health insurance or health savings accounts listed in Line 39.**	$
37	**Other Necessary Expenses: telecommunication services.** Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service—such as pagers, call waiting, caller id, special long distance, internet service, or business cell phone service—to the extent necessary for your health and welfare or that of your dependents or for the production of income if not reimbursed by your employer. **Do not include any amount previously deducted.**	$
38	**Total Expenses Allowed under IRS Standards.** Enter the total of Lines 24 through 37.	$

Subpart B: Additional Living Expense Deductions

Note: Do not include any expenses that you have listed in Lines 24-37

39	**Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List the monthly expenses in the categories set out in lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents. a. Health Insurance $ b. Disability Insurance $ c. Health Savings Account $ Total and enter on Line 39 **If you do not actually expend this total amount**, state your actual total average monthly expenditures in the space below: $ _____	$
40	**Continued contributions to the care of household or family members.** Enter the total average actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. **Do not include payments listed in Line 34.**	$
41	**Protection against family violence.** Enter the total average reasonably necessary monthly expenses that you actually incur to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.	$
42	**Home energy costs.** Enter the total average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities that you actually expend for home energy costs. **You must provide your case trustee with documentation of your actual expenses, and you must demonstrate that the additional amount claimed is reasonable and necessary.**	$
43	**Education expenses for dependent children under 18.** Enter the total average monthly expenses that you actually incur, not to exceed $147.92 per child, for attendance at a private or public elementary or secondary school by your dependent children less than 18 years of age. **You must provide your case trustee with documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**	$
44	**Additional food and clothing expense.** Enter the total average monthly amount by which your food and clothing expenses exceed the combined allowances for food and clothing (apparel and services) in the IRS National Standards, not to exceed 5% of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must demonstrate that the additional amount claimed is reasonable and necessary**.	$
45	**Charitable contributions.** Enter the amount reasonably necessary for you to expend each month on charitable contributions in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2). **Do not include any amount in excess of 15% of your gross monthly income.**	$
46	**Total Additional Expense Deductions under § 707(b).** Enter the total of Lines 39 through 45.	$

Subpart C: Deductions for Debt Payment

Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance**.** The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 47.

47		Name of Creditor	Property Securing the Debt	Average Monthly Payment	Does payment include taxes or insurance?	
	a.			$	☐ yes ☐ no	
	b.			$	☐ yes ☐ no	
	c.			$	☐ yes ☐ no	
				Total: Add Lines a, b, and c		$

48	**Other payments on secured claims.** If any of debts listed in Line 47 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 47, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.	

	Name of Creditor	Property Securing the Debt	1/60th of the Cure Amount
a.			$
b.			$
c.			$
			Total: Add Lines a, b, and c

		$
49	**Payments on prepetition priority claims.** Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. **Do not include current obligations, such as those set out in Line 33.**	$
50	**Chapter 13 administrative expenses.** Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.	

a.	Projected average monthly chapter 13 plan payment.	$
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x
c.	Average monthly administrative expense of chapter 13 case	Total: Multiply Lines a and b

		$
51	**Total Deductions for Debt Payment.** Enter the total of Lines 47 through 50.	$
	Subpart D: Total Deductions from Income	
52	**Total of all deductions from income.** Enter the total of Lines 38, 46, and 51.	$
	Part V. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)	
53	**Total current monthly income.** Enter the amount from Line 20.	$
54	**Support income.** Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.	$
55	**Qualified retirement deductions.** Enter the monthly total of (a) all amounts withheld by your employer from wages as contributions for qualified retirement plans, as specified in § 541(b)(7) and (b) all required repayments of loans from retirement plans, as specified in § 362(b)(19).	$
56	**Total of all deductions allowed under § 707(b)(2).** Enter the amount from Line 52.	$

57 **Deduction for special circumstances.** If there are special circumstances that justify additional expenses for which there is no reasonable alternative, describe the special circumstances and the resulting expenses in lines a-c below. If necessary, list additional entries on a separate page. Total the expenses and enter the total in Line 57. **You must provide your case trustee with documentation of these expenses and you must provide a detailed explanation of the special circumstances that make such expenses necessary and reasonable.**

	Nature of special circumstances	Amount of expense
a.		$
b.		$
c.		$
		Total: Add Lines a, b, and c

$

58 **Total adjustments to determine disposable income.** Add the amounts on Lines 54, 55, 56, and 57 and enter the result. $

59 **Monthly Disposable Income Under § 1325(b)(2).** Subtract Line 58 from Line 53 and enter the result. $

Part VI: ADDITIONAL INFORMATION

60 **Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
	Total: Add Lines a, b, and c	$

61 **Change in income or expenses.** If any change from the income or expenses you reported in this form has occurred or is virtually certain to occur during the 12-month period following the date of the filing of your petition, state in the space below: each line affected, the reason for the change, the date of the change, and the amount by which the income or expense reported on the affected line would be increased or decreased. For example, if the wages reported in Line 2 have increased or decreased, or are definitely scheduled to increase or decrease in the future, you would make an entry listing Line 2, the reason for the increase or decrease, the date it has occurred or will occur, and the amount of the change. Make a similar entry for increases or decreases in expenses reported earlier in this form. Add a separate page with additional lines, if necessary.

Line to change	Reason for change	Date of change	Increase (+) or decrease (-)	Amount of change
				$
				$
				$

Part VII: VERIFICATION

62 I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

Date: _____ Signature: _____
(Debtor)

Date: _____ Signature: _____
(Joint Debtor, if any)

COMMITTEE NOTE

The chapter 13 form is amended in response to the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Adopting a forward-looking approach, the Court there held that the calculation of a chapter 13 debtor's projected disposable income under §1325(b) of the Code may take into account changes to income or expenses reported elsewhere on this form that, at the time of plan confirmation, have occurred or are virtually certain to occur. Those changes could result in either an increased or decreased projected disposable income.

A new line 61 is added to Form 22C for the reporting of those changes, and the title of Part VI is changed to reflect its broadened content. Only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined exclusively by the information provided on Form 22C. Therefore they are the only debtors required to provide the information about changes to income and expenses on this form. Debtors whose annualized current monthly income falls at or below the applicable median must report on Schedules I and J any changes to income and expenses that are reasonably expected to occur within the next year.

In reporting changes to income on line 61, a debtor must indicate whether the amounts reported in Part I of the form—which are monthly averages of various types of income received during the six months prior to the filing of the bankruptcy case—have already changed or are virtually certain to change during the 12 months following the filing of the bankruptcy petition. For each change, the debtor must indicate the line of this form on which the changed amount was reported, the reason for the change, the date of its occurrence, whether the change was an increase or decrease of income, and the amount of the change.

In reporting changes to expenses on line 61, a debtor must list changes to the debtor's actual expenditures reported in Part IV that are virtually certain to occur during the 12 months following the filing of the bankruptcy petition. With respect to the deductible amounts reported in Part IV that are determined by the IRS national and local standards, only changed amounts that result from changed circumstances in the debtor's life—such as the addition of a family member or the surrender of a vehicle—should be reported. For each change in expenses, the same information required to be provided for income changes must be reported.

Because of the addition of new line 61, the line for the debtor's verification is renumbered as 62.

The chapter 7 and chapter 13 forms are amended to permit the deduction of telecommunications expenses (Line 32 on Form 22A and line 37 on Form 22C) that are necessary for the production of income if those expenses have not been reimbursed by the debtor's employer. If a debtor is self-employed, those expenses are deductible as ordinary and necessary operating expenses at line 4 on Form 22A and line 3 on Form 22C.

TAB 9-F

Appendix C

Minutes of the Bankruptcy Rules Committee Meeting on April 7-8, 2011, will be distributed separately.

TAB 10

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

May 12, 2011

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Recommendation to Approve Revised Judicial Conference Procedures Governing Work of Rules Committees*

FROM: Judge Lee H. Rosenthal

At the January 2011 meeting, we provided draft revisions to the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure.* As you recall, these *Procedures* govern the work of the rules committees and are routinely included in the broadly circulated brochures containing the proposed rule changes for public comment. We recommended that these *Procedures* be revised. Once this committee has approved revisions, they will be sent to the Judicial Conference with a recommendation for approval.

The need for revision is shown by a review of the *Procedures*. The Judicial Conference first promulgated them in June 1983. The Conference approved revisions in 1989 to reflect the 1988 amendments to the Rules Enabling Act. These amendments required an increase in public notice of proposed rule changes and prescribed open meetings. The 1988 revisions also made provisions requiring a follow-up notice to every individual who commented on a proposed rule more flexible.

The rules committees have worked under the same set of *Procedures* since 1989. During this time, the committees' work, records, and communications have been significantly affected by a number of changes, including the internet. And experience with the rulemaking process has revealed some recurring practical difficulties with the *Procedures*. It is time to revise them again.

The draft of the revised *Procedures* included in the January 2011 agenda book accounted for the impact of the internet, addressed some of the practical difficulties, proposed ways to make the

process more efficient, and followed the style protocols used in drafting the rules. Since January, the reporters and Andrea Kuperman have been working on a number of other issues, including the standard for republication; what comprises the records of the committees, particularly with respect to correspondence; what records are to be posted on the rulemaking website and what records are maintained in the Administrative Office; whether transcripts should be prepared of public hearings; and when hearings can be canceled due to insufficient interest.

The revised draft attached to this memo accounts for the reporters' resolution of these issues, makes clear which procedures are mandatory and which are simply descriptions of usual practice, and contains further stylistic revisions. A redlined version comparing them to the present version is also attached. The Committee is asked to review the revised *Procedures*, make comments and suggestions for further refinements or changes, and consider whether to submit them to the Judicial Conference with a recommendation that they be approved.

I want to thank all the reporters and particularly Andrea Kuperman for the careful work that has gone into the revisions made since January and look forward to the discussion.

L.H.R.

Proposed Revised Procedures "Clean" Version

§ 440 Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071–2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts. Under the Act, the Judicial Conference must appoint a standing committee, and may appoint advisory committees to recommend new and amended rules. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the "Standing Committee") and its Advisory Committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules. *See* 28 U.S.C. § 2073(a)(1); *cf.* JCUS-SEP 83, pp. 65–67. These procedures do not limit the rules committees' authority. Failure to comply with them does not invalidate any rules-committee action. *Cf.* 28 U.S.C. § 2073(e).

§ 440.20 Advisory Committees

§ 440.20.10 *Functions*

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

§ 440.20.20 *Suggestions and Recommendations*

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

§ 440.20.30 *Drafting Rule Changes*

(a) *Meetings*

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

and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) *Preparing Draft Changes*

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

(c) *Considering Draft Changes*

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

§ 440.20.40 *Publication and Public Hearings*

(a) *Publication*

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

(1) notify members of Congress, federal judges, and the chief justice of each state's highest court, with a link to the judiciary's rulemaking website; and
(2) provide copies of the proposed change to legal-publishing firms with a request to timely include it in publications.

(b) *Public-Comment Period*

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

(c) *Hearings*

The advisory committee must conduct public hearings on the proposed change unless eliminating them is approved under paragraph (d) of this section or not enough witnesses ask to testify at a particular hearing. The hearings are held at the times and places that the advisory committee's chair determines. Notice of the times and places

must be published in the *Federal Register* and on the judiciary's rulemaking website. The hearings must be recorded. Whenever possible, a transcript should be produced by a qualified court reporter.

(d) *Expedited Procedures*

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

§ 440.20.50 *Procedures After the Comment Period*

(a) *Summary of Comments*

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

(b) *Advisory Committee Review; Republication*

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

(c) *Submission to the Standing Committee*

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

(1) be accompanied by a separate report of the comments received;
(2) explain the changes made after the original publication; and
(3) include an explanation of competing considerations examined by the advisory committee.

§ 440.20.60 *Preparing Minutes and Maintaining Records*

(a) *Minutes of Meetings*

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

(b) *Records*

The advisory committee's records consist of:

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

(c) *Public Access to Records*

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

§ 440.30 Standing Committee

§ 440.30.10 *Functions*

The Standing Committee's functions include:

(1) coordinating the work of the advisory committees;
(2) suggesting proposals for them to study;
(3) considering proposals they recommend for publication for public comment; and
(4) for proposed rule changes that have completed that process, deciding whether to accept or modify the proposals and transmit them with its own recommendation to the Judicial Conference, recommit them to the advisory committee for further study and consideration, or reject them.

§ 440.30.20 *Procedures*

(a) *Meetings*

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

(b) *Attendance by the Advisory Committee Chairs and Reporters*

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

(c) *Action on Proposed Rule Changes or Committee Notes*

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

(d) *Transmission to the Judicial Conference*

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

§ 440.30.30 *Preparing Minutes and Maintaining Records*

(a) *Minutes of Meetings*

The Secretary prepares minutes of Standing Committee meetings.

(b) *Records*

The Standing Committee's records consist of:

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

(c) *Public Access to Records*

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

Proposed Revised Procedures "Redline" Version

~~PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE~~

~~Scope~~

~~These procedures govern the operations of~~§ 440 Procedures for the Judicial Conference's Committee on Rules of Practice~~, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new~~ and Procedure and Its Advisory Rules Committees

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071–2077, authorizes the Supreme Court to prescribe general rules of practice~~,~~ and procedure~~, and evidence and amendments to existing rules.~~

~~**Part I -**~~ and rules of evidence for the federal courts. Under the Act, the Judicial Conference must appoint a standing committee, and may appoint advisory committees to recommend new and amended rules. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the "Standing Committee") and its Advisory Committees

~~1. Functions~~

~~Each~~ on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules. *See* 28 U.S.C. § 2073(a)(1); *cf.* JCUS-SEP 83, pp. 65–67. These procedures do not limit the rules committees' authority. Failure to comply with them does not invalidate any rules-committee action. *Cf.* 28 U.S.C. § 2073(e).

§ 440.20 Advisory ~~Committee shall carry on "a~~Committees

§ 440.20.10 *Functions*

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

§ 440.20.~~—~~20 ***Suggestions and Recommendations***

Suggestions and recommendations ~~with respect to~~on the rules ~~should be sent to the Secretary, Committee on Rules of Practice and Procedure,~~are submitted to the Secretary of the Standing Committee at the Administrative Office of the United States Courts, Washington, D.C. ~~20544, who shall, to the extent feasible, acknowledge in writing every written suggestion~~ The Secretary will acknowledge the suggestions or recommendation~~ so received~~ s and~~ shall~~ refer ~~all suggestions and~~

recommendationsthem to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

a. An Advisory Committee shall meet at suchcommittee. If the Standing Committee takes formal action on them, that action will be reflected in the Standing Committee's minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 ***Drafting Rule Changes***

(a) *Meetings*

Each advisory committee meets at the times and places asthat the Chairman may authorizechair designates. All Advisory Committee committee meetings shallmust be open to the public, except when the committee so meeting, — in open session and with a majority present, — determines that it is in the public interest thatto have all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting.. Each meeting shallmust be preceded by notice of the time and place of the meeting, including publication published in the *Federal Register* and on the judiciary's rulemaking website, sufficientsufficiently in advance to permit interested persons to attend.

(b) *Preparing Draft Changes*

b. The reporter assigned to each Aadvisory Ccommittee shallshould prepare for the committee, under the direction of the Ccommittee or its Chairmanchair, prepare initial draft rules changes, "Ccommittee Nnotes" explaining their purpose, and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Ccommittee.

c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication

(c) *Considering Draft Changes*

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

~~4~~ **§ 440.~~—~~20.40** ***Publication and Public Hearings***

(a) ~~a. When publication~~*Publication*

Before any proposed rule change is ~~approved by~~published, the Standing Committee~~, t~~ must approve publication. The Secretary ~~shall~~ then arranges for ~~the~~ printing and ~~circulation of~~circulating the proposed ~~rules~~ change~~s~~ to the bench ~~and~~, bar, and ~~to the~~ public ~~generally.~~. Publication ~~shall~~should be as wide as ~~practicable~~possible. ~~Notice of t~~ The ~~proposed rule shall~~change must be published in the *Federal Register* ~~*and copies provided to appropriate legal publishing*~~and on the judiciary's rulemaking website. The Secretary must:

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

(2) provide copies of the proposed change to legal-publishing firms with a request ~~that they be~~to timely include~~d in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.~~

~~b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of~~ it in publications.

(b) *Public-Comment Period*

A public-comment period on the proposed change must extend for at least six months ~~from the time of publication of~~after notice is published in the *Federal Register* ~~*shall be permitted*~~, unless a shorter period is approved under ~~the provisions of subparagraph~~ paragraph (d) of this ~~paragraph~~section.

(c) ~~c.~~*Hearings*

~~An A~~The advisory ~~C~~committee ~~shall~~must conduct public hearings on ~~all~~the proposed ~~rules~~ change~~s~~ unless ~~elimination of such hearings~~eliminating them is approved under ~~the provisions of subparagraph d of this paragraph. The hearings shall be held at such~~paragraph (d) of this section or not enough witnesses ask to testify at a particular hearing. The hearings are held at the times and places ~~as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the~~ that the advisory committee's chair determines. Notice of the times and places must be published in the *Federal Register*~~. *Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.*~~

~~*d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the*~~ and on the judiciary's rulemaking website.

The hearings must be recorded. Whenever possible, a transcript should be produced by a qualified court reporter.

(d) *Expedited Procedures*

The Standing Committee ~~or its chairman when~~may shorten the ~~Standing Committee~~public-comment period or ~~its chairman~~eliminate public hearings if it determines that the administration of justice requires ~~that~~ a proposed rule change ~~should~~ to be expedited and that appropriate notice to the public ~~notice and comment may be achieved by a shortened comment period, without public hearings, or both.~~can still be provided and public comment obtained. The Standing Committee may also eliminate ~~the~~ public notice and comment ~~requirement if, in the case of~~for a technical or conforming amendment~~, it~~ if the Committee determines that ~~notice and comment~~they are ~~not appropriate or necessary~~unnecessary. ~~Whenever such~~ When an exception is made, the ~~Standing Committee shall~~chair must advise the Judicial Conference ~~of the exception and the reasons for the exception.~~

~~5. Subsequent Procedures~~

~~a. At the conclusion of the comment period the reporter shall~~ and provide the reasons.

§ 440.20.50 *Procedures After the Comment Period*

(a) *Summary of Comments*

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

(b) *Advisory Committee ~~shall review the proposed rules changes in the light of the~~Review; Republication*

The advisory committee reviews the proposed change in light of any comments and testimony. If the ~~A~~advisory ~~C~~committee makes ~~any~~ substantial change~~s~~, the proposed rule should be republished for an additional period ~~for~~of public ~~notice and comment may be provided.~~

~~b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon,~~ comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

(c) *Submission to the Standing Committee*

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

(1) be accompanied by a separate report of the comments received ~~and shall~~ ;
(2) explain ~~any~~the changes made ~~subsequent to~~after the original publication~~.~~ ~~The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.~~

~~6. Records~~

~~a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee~~; and
(3) include an explanation of competing considerations examined by the advisory committee.

§ 440.20.60 *Preparing Minutes and Maintaining Records*

(a) *Minutes of Meetings*

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

(b~~.~~) *Records*

The advisory committee's records ~~of an Advisory Committee shall~~ consist of ~~the~~ :

- written suggestions received from the public; ~~the~~
- written comments received from the public on drafts of proposed rules~~,~~ ~~responses thereto,~~;
- the committee's responses to public suggestions and comments;
- other correspondence with the public about proposed rule changes;
- electronic recordings and transcripts of public hearings~~, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee~~ (when prepared);
- the reporter's summaries of public comments and of testimony from public hearings;
- agenda books and materials prepared for committee meetings;
- minutes of committee meetings;
- approved drafts of rule~~s~~ changes; and
- reports to the Standing Committee~~. The records shall be maintained at~~

(c) *Public Access to Records*

The records must be posted on the judiciary's rulemaking website, except for general public correspondence about proposed rule changes and electronic recordings of hearings when transcripts are prepared. This correspondence and archived records are maintained by the Administrative Office of the United States Courts ~~for a minimum of two years~~ and ~~shall be~~are available for public inspection ~~during reasonable office hours. Thereafter the records may be transferred to a Government~~

~~Records Center in accordance with applicable Government retention and disposition schedules.~~

~~c. Any portion of minutes, relating to~~. Minutes of a closed meeting ~~and~~may be made available to the public~~, may contain such~~ but with any deletions ~~as may be~~ necessary to avoid frustrating the purpose~~s~~ of closing the meeting ~~as provided in subparagraph 3a.~~

~~d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.~~

~~**Part II -**~~ under § 440.20.30(a).

§ 440.30 Standing Committee

~~7~~ § 440.~~—~~30.10 *Functions*

The Standing Committee ~~shall coordinate~~'s functions include:

(1) coordinating the work of the ~~several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its~~advisory committees;
(2) suggesting proposals for them to study;
(3) considering proposals they recommend for publication for public comment; and
(4) for proposed rule changes that have completed that process, deciding whether to accept or modify the proposals and transmit them with its own recommendation to the Judicial Conference, ~~or~~ recommit them to the ~~appropriate Advisory C~~advisory committee for further study and consideration, or reject them.

~~8~~ § 440.~~—~~30.20 *Procedures*

(a~~.~~) *Meetings*

The Standing Committee ~~shall~~ meet~~s~~ at ~~such~~the times and places ~~as~~that the ~~Chairman may authorize~~chair designates. ~~All~~ Committee meetings ~~shall~~must be open to the public, except when the ~~c~~Committee ~~so meeting,~~— in open session and with a majority present~~;~~ — determines that it is in the public interest ~~that~~to have all or part of the ~~remainder of the~~ meeting ~~on that day shall be~~ closed ~~to the public~~ and states the reason ~~for closing the meeting.~~ Each meeting ~~shall~~must be preceded by notice of the time and place ~~of the meeting, including publication~~ published in the *Federal Register* and on the judiciary's rulemaking website, ~~sufficient~~sufficiently in advance to permit interested persons to attend.

b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall

(b) *Attendance by Chairs and Reporters*

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

(c) *Action on Proposed Rule Changes or Committee Notes.*

c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.

d. proposed change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) *Transmission to the Judicial Conference*

The Standing Committee shall must transmit to the Judicial Conference the proposed rules changes and Ccommittee Nnotes approved by it that it approves, together with the Advisory Committee advisory-committee report. The Standing Committee's report to the Judicial Conference shall includes its own recommendations and explains any changes that it has made.

9. Records

a. The Secretary shall prepare minutes of all

§ 440.30.30 *Preparing Minutes and Maintaining Records*

(a) *Minutes of Meetings*

The Secretary prepares minutes of Standing Committee meetings.

(b.) The records of the *Records*

The Standing Committee shall 's records consist of :

- the minutes of Standing and Advisory Standing-Committee and advisory-committee meetings;
- agenda books and materials prepared for Standing Committee meetings, ;
- reports to the Judicial Conference; and
- official correspondence concerning about rules changes, including correspondence with Advisory Committee Chairmen. The records shall be maintained at advisory-committee chairs

(c) *Public Access to Records*

The records must be posted on the judiciary's rulemaking website, except for official correspondence about rule changes. This correspondence and archived records are maintained by the Administrative Office of the United States Courts ~~for a minimum of two years~~ and ~~shall be~~are available for public inspection ~~during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.~~

~~c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.~~

. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.30.20(a).

Procedures Presently in Effect

PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice, procedure, and evidence and amendments to existing rules.

Part I - Advisory Committees

1. Functions

   Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary.

2. Suggestions and Recommendations

   Suggestions and recommendations with respect to the rules should be sent to the Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written suggestion or recommendation so received and shall refer all suggestions and

recommendations to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

   a. An Advisory Committee shall meet at such times and places as the Chairman may authorize. All Advisory Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

   b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.

   c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication to the Standing Committee, or its Chairman, with a written report explaining the Committee's action, including any minority or other separate views.

4. Publication and Public Hearings

a. When publication is approved by the Standing Committee, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally. Publication shall be as wide as practicable. Notice of the proposed rule shall be published in the Federal Register and copies provided to appropriate legal publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.

b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of at least six months from the time of publication of notice in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph d of this paragraph.

c. An Advisory Committee shall conduct public hearings on all proposed rules changes unless elimination of such hearings is approved under the provisions of subparagraph d of this paragraph. The hearings shall be held at such times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the Federal Register. Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.

d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the

Standing Committee or its chairman when the Standing Committee or its chairman determines that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both. The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception.

5. Subsequent Procedures

   a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public notice and comment may be provided.

   b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.

b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Any portion of minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting as provided in subparagraph 3a.

d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

a. The Standing Committee shall meet at such times and places as the Chairman may authorize. All Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.

c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.

d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory

Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

a. The Secretary shall prepare minutes of all Standing Committee meetings.

b. The records of the Standing Committee shall consist of the minutes of Standing and Advisory Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

TAB 11

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

MEMORANDUM

TO: Members, Committee on Rules of Practice and Procedure

FROM: Lee H. Rosenthal

RE: Judiciary Planning

DATE: May 11, 2011

I attach a memo that responds to a request by Judge Charles Breyer, the Judiciary Planning Coordinator, for information on the Standing Committee's work in implementing strategic initiatives and goals from the *Strategic Plan for the Federal Judiciary*. In January 2011, in response to a request of the Executive Committee, the Standing Committee identified two strategic initiatives and a goal from the *Strategic Plan*. For your convenience, the January 2011 memorandum from the Standing Committee to the Advisory Committee on Judiciary Planning is attached.

At the February 2011 meeting of the Executive Committee, Judge Breyer reported on the efforts of the various Judicial Conference committees to implement the *Strategic Plan*. The approach to strategic planning for the Judicial Conference and its committees calls for the Executive Committee to identify strategic planning priorities. On March 14, 2011, the Executive Committee selected four strategies and one goal from the *Strategic Plan* as priorities for the next two years, as follows:

Strategy 1.1. Pursue improvements in the delivery of justice on a nationwide basis.

Strategy 1.3. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Strategy 2.1. Allocate and manage resources more efficiently and effectively.

Strategy 4.1. Harness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts.

Goal 7.2b. Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.

Also attached is the May 5, 2011 letter from Judge Breyer, seeking information on the work of the Standing Committee in implementing the *Strategic Plan*. Specifically, Judge Breyer requests information about the Standing Committee's planned approach to assessing whether its identified initiatives will have met their desired outcomes. The Executive Committee has asked Judge Breyer to prepare an interim assessment of the judiciary's progress in implementing the *Strategic Plan* by September 2012. An update on the Judicial Conference committees' work on their strategic initiatives will be provided at the Executive Committee's meeting in August 2011.

The Standing Committee is asked to review the descriptions of our strategic initiatives (*see* Attachment 2 of Judge Breyer's letter), revise or update them as appropriate, and add any new strategic initiatives we may be pursuing. For each initiative, we are also asked to include a statement about the initiative's purpose and desired outcome, and describe the planned approach for assessing whether its desired outcome has been achieved. We are also asked to review the Judicial Conference committees that are the "partners" or "stakeholders" for our initiatives and make sure that they are appropriately involved in or informed about our efforts. The goal is to encourage "communication and collaboration on cross-cutting issues facing the judiciary."

As noted in our earlier response to the Judiciary Planning Committee, although in a sense the work of the rules committees as contained in the Standing Committee's entire agenda book provides a general response to the Planning Committee's request, the Planning Committee defines "strategic initiative" in a more limited way: "A project, study or effort that has the potential to make a significant contribution to the accomplishment of a strategy or goal set forth in the Strategic Plan for the Federal Judiciary. The completion of a strategic initiative should result in a completed study or analysis, a new capability or service, a new policy, or the accomplishment of a measurable goal or objective." Our draft response, which is attached to this memo, is based on this definition. I welcome your thoughts on the draft response.

Attachments

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

[DRAFT] MEMORANDUM

TO: Advisory Committee on Judiciary Planning

FROM: Lee H. Rosenthal

CC: Judge David Sentelle
James C. Duff, Esq.

DATE: June __, 2011

In a May 5, 2011 letter, Judge Charles Breyer, Judiciary Planning Coordinator, reported on the Executive Committee's five priorities from the *Strategic Plan for the Federal Judiciary*. Judge Breyer asked that the Committee on Rules of Practice and Procedure (the "Standing Committee") verify and update, as appropriate, the information previously provided about the strategic initiatives that the Standing Committee is pursuing, identifying desired outcomes for each initiative. Judge Breyer also asked that the Standing Committee begin considering how to measure or assess its progress in implementing the *Strategic Plan*. Judge Breyer finally asked that the Standing Committee review the Judicial Conference committees that are the partners or stakeholders for its initiatives, and make sure that they are appropriately involved in or informed about these efforts. This memorandum is intended to be responsive to these requests.

As with our January 2011 response to the Judiciary Planning Committee's request to identify strategic initiatives, in a sense the work of the rules committees as contained in the Standing Committee's entire agenda book provides a general response to the Judiciary Planning Committee's request for an update on strategic initiatives. However, the Judiciary Planning Committee defines "strategic initiative" in a more limited way: "A project, study or effort that has the potential to make a significant contribution to the accomplishment of a strategy or goal set forth in the Strategic Plan for the Federal Judiciary. The completion of a strategic initiative should result in a completed study

or analysis, a new capability or service, a new policy, or the accomplishment of a measurable goal or objective." Our response is based on this definition.

Strategic Initiatives

The Standing Committee continues to pursue the strategic initiative identified in January 2011 of working with the Advisory Committee on Civil Rules to implement the results of the May 2010 Conference on Civil Litigation held at the Duke University School of Law. This initiative is related to Strategy 1.1 ("[p]ursue improvements in the delivery of justice on a nationwide basis"), Strategy 5.1 ("[e]nsure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process"), and Goal 5.1b ("[a]dopt measures designed to provide flexibility in the handling of cases, while reducing cost, delay, and other unnecessary burdens to litigants in the adjudication of disputes"). The Duke Conference presented a wide array of views on litigation problems and exploration of the most promising opportunities to improve federal civil litigation. The Conference generated specific and general suggestions for changing both rules and litigation practices. The suggestions included changes to the federal rules; changes to judicial and legal education; the development of protocols, guidelines, and projects to test and refine continued improvements; and the development of materials to support these efforts. The Civil Rules Committee has formed a subcommittee to consider the suggestions raised at the conference and ways to implement them. Some aspects of the work, such as judicial education, the development of supporting materials, and the development and implementation of pilot projects, will be coordinated with the Federal Judicial Center ("FJC") and other Judicial Conference committees, particularly the Committee on Court Administration and Case Management ("CACM").

The advisory committee is focusing its immediate attention on three issues: (1) the rules governing discovery, particularly in complex or highly contested cases; (2) the rules governing pleading, in light of recent Supreme Court cases; and (3) the rules that directly involve case management, to determine if rule amendments are need to improve reliable and effective application.

A primary desired outcome of the Rules Committees' work is to determine whether clarifying certain rules, particularly those governing discovery rights and obligations and the sanctions for failing to meet these obligations, would reduce costs and delays in civil litigation, and if so, to propose amending the rules to achieve those clarifications. A second desired outcome is to determine whether and what rule changes would make judges more effective case managers, better able to tailor motions, discovery, and other pretrial work to what is proportional to each case, and if so, to propose those rule changes. The Committees will use the Rules Enabling Act process to achieve and measure progress. That process will involve gathering empirical data, with the FJC's help; holding miniconferences to learn from the bench and bar; publishing proposed amendments for public comment, including hearings; and proposing rule changes through the Committees to the Judicial Conference and the Supreme Court.

Another primary strategic initiative identified in January 2011 was for the Standing

Committee to work with the Advisory Committee on Criminal Rules on its analysis of whether the present rules and related materials adequately support the disclosure obligations of prosecutors. The FJC has conducted a major study. The Criminal Rules Committee has recommended that no rule change be made, but that the FJC should consider publishing a "Good Practices" guide to criminal discovery and should consider revising the District Judges' Bench Book to give judges greater guidance in protecting defendants' right to obtain exculpatory and impeaching information. This initiative is associated with Strategy 1.1, to pursue improvements in the delivery of justice on a nationwide basis. The desired outcome is to make sure the rules effectively support prosecutors' disclosure obligations and to work with other entities and committees on creating supporting materials and judicial education programs that further support effectively enforcing disclosure obligations. As noted, part of this initiative has been completed because the Criminal Rules Committee has determined that no rule change is appropriate at this time to support disclosure obligations. Success of the remainder of this initiative will be assessed by the progress of the Rules Committees' work with the FJC on a "Good Practices" guide and on whether the District Judges' Bench Book should be revised. The Rules Committees will continue to monitor disclosure obligations to assess whether the rules and other supporting materials that may be developed continue adequately to support the disclosure obligations.

In addition to those initiatives identified in the Standing Committee's January 2011 response, the Advisory Committee on the Criminal Rules has been working for years to identify ways in which technology can be used to make the preparation and development of criminal cases more efficient, without risking constitutional limits or sacrificing the important role of in person appearances and communications. An initial package of amendments to achieve this initiative has been approved by the Judicial Conference and the Supreme Court and is pending before Congress. If Congress takes no action to the contrary, the amendments will become effective December 1, 2011. The advisory committee will continue to examine ways in which technological advances can be applied for this purpose. This work is directly responsive to Strategy 4.1, to "[h]arness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts." If these proposals become effective on December 1, 2011, the advisory committee will monitor the practice of the courts under the amendments to ensure that the effect is to increase efficiency without introducing unfairness. Although this initiative has begun with the Advisory Committee on the Criminal Rules, the Appellate, Bankruptcy, and Civil Rules Committees are also examining their rules to determine whether a coordinated revision to reflect the impact of electronic filing and to take advantage of technological advances is appropriate. That work is in its early stages, with the Advisory Committee on the Bankruptcy Rules taking the lead. This work will also be assessed through the Rules Enabling Act process.

Another additional initiative involves the work of the Advisory Committee on the Bankruptcy Rules on revising the bankruptcy forms. The Forms Modernization Project is designed to simplify the extensive financial information that debtors are currently required to supply, elicit more accurate responses, reduce redundant re-entry of information, take advantage of new technology, and facilitate the capture of individual data elements for statistical and operational purposes. This initiative fits

within Strategy 4.1 ("[h]arness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts"), as well as Strategy 5.1 ("[e]nsure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process"). Drafts of the first set of revised forms are currently undergoing testing, with the goal of an August 2012 publication for public comment of a set of revised forms for individual debtors. The Bankruptcy Rules Committee is working closely with the Committee on the Administration of the Bankruptcy System on the forms project, and the FJC has also been significantly involved. The Bankruptcy Rules Committee has sought input from others involved in the bankruptcy system, including clerks of court and bankruptcy judges. The desired outcome of this initiative is to improve the forms by making them easier to use, by eliciting more accurate information from debtors and parties, and by making the intake and litigation process more efficient through more effective use of technology. The success of this initiative will be assessed through the Rules Enabling Act process and the monitoring of the experience with the forms before and after adoption.

These initiatives involve working with the FJC and with CACM. Both the FJC and CACM are essential partners in conducting empirical studies, in developing supporting materials to assist judges in understanding and implementing the rules, and in improving judicial education and lawyer education to make the rules more effective. The Standing Committee will continue to work on ways to improve collaboration with the FJC and with CACM to achieve these and other initiatives.

Judiciary Priorities

Judge Breyer's letter noted that the Executive Committee has identified Goal 7.2b, to communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary, as a priority. The Standing Committee is committed to working to achieve Goal 7.2b. The Rules Committees have worked very hard to build effective communication with a number of different bar organizations and groups and with members of Congress and their staff on rules issues. In particular, the Committees have worked very hard to convey the principled and transparent nature of the process that Congress created under the Rules Enabling Act. The Rules Committees also have worked very hard to increase the understanding of their work and the nature of the rulemaking process. That work is vital to achieving the bar's effective participation in, and support for, the Committees' work and to achieving an effective working relationship with Congress in changing rules and related statutes as necessary to improve the administration of justice.

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

MEMORANDUM TO: ADVISORY COMMITTEE ON JUDICIARY PLANNING

The Advisory Committee on Judiciary Planning has requested the Committee on Rules of Practice and Procedure (and all other Judicial Conference committees) (1) "to identify strategic initiatives it is pursuing," indicating the anticipated completion date and whether the initiative is being conducted in partnership with other Judicial Conference committees, and (2) to "[r]eview the *Strategic Plan for the Federal Judiciary* . . . and suggest which of its issues, strategies, or goals the Executive Committee should consider to be high priorities over the next two years." Although in a sense the work of the rules committees as contained in the Committee's entire agenda book provides a general response to this request, the Long Range Planning Committee defines "strategic initiative" in a more limited way: "A project, study or effort that has the potential to make a significant contribution to the accomplishment of a strategy or goal set forth in the Strategic Plan for the Federal Judiciary. The completion of a strategic initiative should result in a completed study or analysis, a new capability or service, a new policy, or the accomplishment of a measurable goal or objective." The following response is based on this definition.

Strategic Initiatives

A primary "strategic initiative" the Committee on Practice and Procedure is pursuing is to work with the Advisory Committee on Civil Rules in implementing the results of the May 2010 Conference held at the Duke University School of Law. At that conference, more than seventy moderators, panelists, and speakers presented a wide array of views on litigation problems and exploration of the most promising opportunities to improve federal civil litigation. The conference generated specific and general suggestions for changing both rules and litigation practices. The suggestions included changes to the federal rules; changes to judicial and legal education; the

development of protocols, guidelines, and projects to test and refine continued improvements; and the development of materials to support these efforts. The advisory committee has formed a subcommittee to consider the suggestions raised at the conference and ways to implement them. Some aspects of the work, such as judicial education, the development of supporting materials, and the development and implementation of pilot projects, will be coordinated with the Federal Judicial Center ("FJC") and other Judicial Conference committees, including the Committee on Court Administration and Case Management. The advisory committee is focusing its immediate attention on two issues: (1) discovery in complex or highly contested cases; and (2) review of pleading standards in light of recent Supreme Court cases. The completion date for the entire initiative is unknown.

Another primary strategic initiative is to work with the Advisory Committee on Criminal Rules on its ongoing analysis of whether the present rules and related materials adequately support the disclosure obligations of prosecutors. The FJC has conducted a major study and the advisory committee is studying not only the possibility of rules changes but also whether the District Judges' Bench Book should be revised to give judges greater guidance in protecting defendants' right to obtain exculpatory and impeaching information. The completion date is unknown.

Judiciary Priorities

The strategy or goal that the Committee on Rules of Practice and Procedure recommends that the Executive Committee consider to be a high priority over the next two years is the following.

1. Strategy 6.1, "Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress." Goal 6.1a, "Improve the early identification of legislative issues in order to improve the judiciary's ability to respond and communicate with Congress on issues affecting the administration of justice."

United States District Court
Northern District of California
United States Courthouse
San Francisco, California 94102

Chambers of
Charles R. Breyer
United States District Judge

May 5, 2011

Honorable Lee H. Rosenthal
United States District Court
Bob Casey United States Courthouse
515 Rusk Street, Room 11535
Houston, TX 77002-2600

Dear Lee:

As the Judiciary Planning Coordinator, I am writing to report on the five priorities from the *Strategic Plan for the Federal Judiciary* that the Executive Committee has identified. I also request your assistance in reporting to the Executive Committee about the implementation of the plan.

Executive Committee Priorities

As you know, at its March 14, 2011 meeting, the Executive Committee identified four strategies and one goal from the *Strategic Plan* as priorities for the next two years. Briefly, the Executive Committee's priorities are to 1) improve the delivery of justice, 2) secure sufficient resources, 3) manage and allocate resources efficiently and effectively, 4) harness technology's potential, and 5) work with outside organizations to improve public understanding of the judiciary. A statement from the Executive Committee about these five priorities is included as Attachment 1.

I would like to thank you for educating me about the strategic initiatives that the Committee on Rules of Practice and Procedure is pursuing to implement the *Strategic Plan*. Both of these initiatives are directly linked the Executive Committee's priority strategy of pursuing improvements in the delivery of justice. The Executive Committee is hopeful that the judiciary can make significant progress implementing the results of the 2010 Conference on Civil Litigation, and ensuring that rules and related materials adequately support the disclosure obligations of prosecutors.

Action Requested

To help me keep the Executive Committee apprised of committee efforts to implement the *Strategic Plan*, staff has prepared some materials for your review and consideration. (See Attachment 2). We request two actions of all committees. First, we

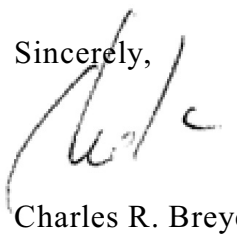
ask that you verify and update, as appropriate, the information about the strategic initiatives that your committee is pursuing. In particular, it would be helpful to identify desired outcomes for each initiative. For the second action, we ask that committees begin to consider how to measure or assess progress in implementing the *Strategic Plan*. At your June meeting, we ask that you identify your planned approach to assessing whether or not each initiative's outcome will have been met – including, where appropriate, the measures or metrics that may be used to gauge progress. The Executive Committee has asked me for an interim assessment of the judiciary's progress in implementing the *Strategic Plan* by September 2012, and information about how you plan to measure progress will be of great help in preparing this assessment.

Information about the work of the Rules Committee in implementing the *Strategic Plan* is critical, and I thank you for taking the time to provide it to me. The Executive Committee appreciated the report that I was able to provide in February, and the work of your committee that the report reflected.

I have one final request for the Committee as it considers the judiciary planning agenda topic next month. Please take a moment and review the Judicial Conference committees that are the partners or stakeholders for your initiatives, and make sure that they are appropriately involved in or informed about these efforts. One of the reasons that the Executive Committee decided to establish a new approach to planning was to encourage communication and collaboration on cross-cutting issues facing the judiciary. I understand that there is already considerable coordination, but I would be remiss if I did not continue to emphasize these efforts.

Thank you for all of your hard work. If you have any questions about this request, or suggestions about the planning process, please let me know. Also available to field your questions and gather your suggestions is Brian Lynch, the Administrative Office's Long-Range Planning Officer. Brian can be reached at 202-502-1405 or Brian_Lynch@ao.uscourts.gov.

Sincerely,



Charles R. Breyer

Enclosures

cc: Honorable David Bryan Sentelle

Attachment 1

EXECUTIVE COMMITTEE PRIORITIES
STRATEGIC PLAN FOR THE FEDERAL JUDICIARY

The Executive Committee's responsibility for facilitating and coordinating judiciary planning includes priority-setting. When the Judicial Conference approved the *Strategic Plan for the Federal Judiciary*, it also approved the following as part of the planning approach for the Conference and its committees:

> With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee will identify issues, strategies, or goals to receive priority attention over the next two years. (JCUS-SEP 10, pp. 5-6).

At its March 14, 2011 meeting, the Executive Committee identified four strategies and one goal that should receive priority attention over the next two years:

Strategy 1.1. Pursue improvements in the delivery of justice on a nationwide basis.

Strategy 1.3. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Strategy 2.1. Allocate and manage resources more efficiently and effectively.

Strategy 4.1. Harness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts.

Goal 7.2b. Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.

All of the strategies and goals in the *Strategic Plan* are important, and should continue to be pursued. Some elements of the *Strategic Plan* are of immediate concern, while others should be addressed in the long term. Thus, given limited time and resources, over the next two years particular attention should be directed toward the priority strategies and the priority goal. Given the cross-cutting nature of the goal and strategies that have been identified as priorities, continued coordination of efforts across committees is essential.

In assessing the implementation of the *Strategic Plan*, the Executive Committee will closely follow the progress of efforts to pursue the above-listed priorities. The Committee may request additional information and reports from Conference committees about implementation efforts in these areas. The Committee may also request that certain committees take on new initiatives relating to *Strategic Plan* priorities, or participate as a stakeholder in an initiative that is being led by another committee.

Rules of Practice and Procedure Committee - Judiciary Strategic Initiatives

Action Requested: Please review the table below describing the strategic initiatives that the Committee on Rules of Practice and Procedure is currently

1) Verify and update, as appropriate, the information regarding the committee's strategic initiatives, including new initiatives.
    a) If possible, include a statement about each initiative's purpose and desired outcome.
2) Identify the planned approach to assessing each strategic initiative, including, as appropriate, the metrics or measures to be used to gauge progress.

Strategic Initiative	Purpose	Desired Outcome/Related Strategies and Goals	Timeframe for Completion	Partnerships
Implementing the Results of the 2010 Conference on Civil Litigation. Work with the Advisory Committee on Civil Rules to implement the results of the May 2010 Conference held at the Duke University School of Law.		Strategy 1.1; Strategy 5.1; Goal 5.1.b.	The Advisory Committee on Civil Rules is focusing its immediate attention on two issues: (1) discovery in complex or highly contested cases; and (2) review of pleading standards in light of recent Supreme Court cases. The completion date for the entire initiative is unknown.	• Court Administration and Case Management Committee • Advisory Committee on Civil Rules • Federal Judicial Center
Planned Assessment Approach				
Rules Regarding Disclosure Obligations of Prosecutors. Work with the Advisory Committee on Criminal Rules on its ongoing analysis of whether the present rules and related materials adequately support the disclosure obligations of prosecutors.		Strategy 1.1.	The FJC has conducted a major study and the Advisory Committee on Criminal Rules is studying not only the possibility of rules changes but also whether the District Judges' Bench Book should be revised to give judges greater guidance in protecting defendants' right to obtain exculpatory and impeaching information. The completion date is unknown.	• Advisory Committee on Criminal Rules • Federal Judicial Center
Planned Assessment Approach				

TAB 12

December 2011						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

February 2012						
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March 2012						
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January 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1 New Year's Day	**2**	**3**	**4**	**5**	**6**	**7**
8	**9**	**10**	**11**	**12**	**13**	**14**
15	**16** Martin Luther King Jr. Day	**17**	**18**	**19**	**20**	**21**
22	**23**	**24**	**25**	**26**	**27**	**28**
29	**30**	**31**				
						U.S. Federal Holidays are in Red.

December 2011 | **Printfree.com** Main Calendars Page | February 2012

May 2012						
S	M	T	W	T	F	S
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July 2012						
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August 2012						
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26	27	28	29	30	31	

June 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17 **Father's Day**	18	19	20 **Summer Begins**	21	22	23
24	25	26	27	28	29	30
						U.S. Federal Holidays are in Red.

May 2012 | **Printfree.com** Main Calendars Page | July 2012