COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, DC
June 11-12, 2012

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AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 11–12, 2012

1. Welcome and Opening Remarks

   A. Opening remarks by Chair
   B. Report on March 2012 Judicial Conference session
   C. Transmission of Supreme Court-approved proposed rule amendments to Congress

2. **ACTION** – Approving minutes of January 2012 committee meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Advisory Committee on Civil Rules – Judge David Campbell

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 45 and 37
   B. Preservation and sanctions
   C. Work relating to the 2010 Duke Conference
   D. Pleading
   E. Rule 84 forms
   F. Rule 23 subcommittee work
   G. Minutes and other informational items

5. Report of the Advisory Committee on Bankruptcy Rules – Judge Eugene Wedoff

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 1007(b)(7), 4004(c), 5009(b), 9006(d), 9013, 9014, Official Form 7, Official Forms 9A–9I, Official Form 10, and Official Form 21
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 1014, 7004, 7008, 7012, 7016, 8001–8027, 9023, 9024, 9027, 9033, Official Forms 3A and 3B, Official Forms 6I and 6J, and Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2
   C. Ongoing work on model chapter 13 plan and related rule amendments
   D. Mini-conference on mortgage forms
   E. Minutes and other informational items

6. Report of the Advisory Committee on Evidence Rules – Chief Judge Sidney Fitzwater

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rule 803(10)

B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 801(d)(1)(B) and 803(6), (7), and (8)
C. Minutes and other informational items

7. Report of the Advisory Committee on Appellate Rules – Judge Jeffrey Sutton

A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 13, 14, 24, 28, 28.1, and Form 4
B. **ACTION** – Approving publishing for public comment proposed amendments to Rule 6
C. Minutes and other informational items

8. Report of the Advisory Committee on Criminal Rules – Judge Reena Raggi

A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rule11
B. **ACTION** – Approving proposed amendments to Rules 5 and 58
C. Continued work on proposals to amend Rule 12
D. Minutes and other informational items

9. Other Informational Items

A. Report of the E-Filing Subcommittee – Judge Neil Gorsuch
B. Memorandum on possible substantive changes made by the style projects
C. Interim assessment of the *Strategic Plan for the Federal Judiciary*

10. Next meeting in Boston, MA on January 3 and 4, 2013

COMMITTEES ON RULES OF PRACTICE AND PROCEDURE
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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
Mark R. Kravitz Chair	D	Connecticut	2011	2014
James Cole*	DOJ	Washington, DC	----	Open
Dean C. Colson	ESQ	Florida	2009	2012
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2013
Gregory G. Garre	ESQ	Washington, DC	2011	2014
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
Patrick J. Schiltz	D	Minnesota	2010	2013
James A. Teilborg	D	Arizona	2006	2012
Richard C. Wesley	C	Second Circuit	2011	2014
Diane P. Wood	C	Seventh Circuit	2007	2013
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open

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Principal Staff: Jonathan C. Rose 202-502-1820

* Ex-officio

LIAISON MEMBERS

Liaison for the Advisory Committee on Appellate Rules	**Dean C. Colson**	***(Standing)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Judge James A. Teilborg**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn L. Huff**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1A

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 5-6, 2012
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 5 and 6, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole and Larry D. Thompson, Esquire were unable to attend, but Mr. Thompson participated by telephone. The Department of Justice was represented at the meeting by Elizabeth J. Shapiro, Esquire.

Also participating were the committee's former chair, Judge Lee H. Rosenthal, former lawyer members Douglas R. Cox and William J. Maledon, and the committee's style consultant, Professor R. Joseph Kimble.

Judge Rosenthal chaired a discussion on class action issues with the following panelists: Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules; Daniel C. Girard, Esquire, a former member of the advisory committee; and John H. Beisner, Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Rules Committee Officer
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center
Bernida Evans	Rules Office Management Analyst

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
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Committee Membership Changes

Judge Kravitz announced with regret that the terms of Messrs. Cox and Maledon had expired on October 1, 2011, and both were attending their last Standing Committee meeting. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work and the rules program, and presented each with a plaque signed by Chief Justice John Roberts, Jr. and Judge Thomas F. Hogan, Director of the Administrative Office.

Judge Kravitz introduced the new committee members, Judge Wesley and Mr. Garre, and he summarized their impressive legal backgrounds. He reported that Mr. Thompson was also a newly appointed member of the committee, but was unable to attend the meeting.

Meeting with Supreme Court Justices

Judge Rosenthal reported on a recent meeting held at the Supreme Court that she had attended with Judge Kravitz, Dean Levi, Professor Coquillette, and former committee chair Judge Anthony J. Scirica. They had an extensive and candid exchange with the Chief Justice and other justices on the rules program. The discussion, she said, touched upon such matters as the openness of the rules process, the procedures followed by the rules committees, the effective use of empirical research to support proposed rule amendments, and the rules committees' ongoing relationships with Congress, the bar, and the academy. The meeting, she said, had been very beneficial and met all the committee's objectives. She added that it would make sense to pursue similar dialogues with the Court every five years or so.

Judicial Conference Report

Judge Kravitz reported that the Judicial Conference at its September 2011 session had approved all the proposed amendments to the rules and forms presented by the committee.

Rules Taking Effect on December 1, 2011

Judge Kravitz referred to the amendments to the appellate, criminal, and evidence rules and the bankruptcy rules and forms that took effect by operation of law on December 1, 2011.

Pending Rule Amendments

Judge Kravitz reported that proposed amendments to the appellate, bankruptcy, civil, criminal, and evidence rules had been published for comment in August 2011. Although public hearings had been scheduled, few requests had been submitted by bench and bar to date to testify on the proposals.

Lawsuit Abuse Reduction Act

Ms. Kuperman reported that the proposed Lawsuit Abuse Reduction Act of 2011 (H.R. 966) would restore the mandatory-sanctions provision of FED. R. CIV. P. 11 (sanctions). Adopted in 1983, she said, the provision simply did not work and was later repealed in 1993. In addition, she said, the proposed legislation would eliminate the beneficial safe-harbor provision of Rule 11(c)(2), added in 1993. It gives a party 21 days to withdraw challenged assertions on a voluntary basis.

She pointed out that Judges Rosenthal and Kravitz had written to the chair of the House Judiciary Committee to oppose the bill. Their letter emphasized that the Federal Judicial Center's empirical research had demonstrated that the 1983 version of Rule 11 had produced wasteful satellite litigation and increased the time and costs of civil litigation. She added that the American Bar Association and other organizations had also sent letters to Congress opposing the legislation.

She noted that the House Judiciary Committee had held a hearing on H.R. 966 in March 2011 and then reported out the bill. But there was no further action in the House, although a companion bill (S. 533) was introduced in the Senate.

Sunshine in Litigation Act

Ms. Kuperman reported that Judges Rosenthal and Kravitz had written to the chair of the Senate Judiciary Committee to oppose the proposed Sunshine in Litigation Act of 2011 (S. 623). The bill would prevent a court from issuing a discovery protective order unless it first makes particularized findings of fact that the order would not restrict the disclosure of information relevant to protecting public health or safety. She noted that the bill, similar to others introduced in past Congresses, had been favorably reported out of committee in May 2011, but there had been no further action on it.

Pleading Standards

Ms. Kuperman reported that no legislation was currently pending in Congress to address civil pleading standards in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Consent Decrees

Ms. Kuperman noted that legislation (H.R. 3041) had been introduced to limit the duration of consent decrees issued by federal courts that impose injunctive or other prospective relief against state or local programs or officials. The bill, she said, was being monitored closely by the Judicial Conference's Federal-State Jurisdiction Committee. It would not amend the federal rules directly, but could impact the rules in procedural ways. The legislation, she said, had been referred to Congressional committee, but no further action had taken place on it.

Costs and Burdens of Civil Discovery

Ms. Kuperman reported that the House Judiciary Committee Subcommittee on the Constitution had held a hearing in December 2011 on "the costs and burdens of civil discovery." She noted that Judges Kravitz and Campbell had sent a letter to the subcommittee chair providing an update on the advisory committee's various efforts to reduce discovery costs, burdens, and delays. The letter, she said, urged Congress to allow the Advisory Committee on Civil Rules to continue pursuing these issues under the thorough and deliberate process that Congress created in the Rules Enabling Act. She added that Congressional staff had been invited to, and had attended, the advisory committee's recent meeting in Washington. The committee, she added, will continue to keep members and staff of Congress informed of pertinent developments.

Time to File a Notice of Appeal When a Federal Officer or Employee is a Party

Ms. Kuperman reported that the Congress had enacted legislation amending 28 U.S.C. § 2107 to conform it to the December 2011 change in FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). The statute mirrors the amended rule and clarifies the time for parties to appeal in a civil case 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.

Bankruptcy Legislation

Ms. Kuperman reported that legislation (Pub. L. No. 112-64) had been enacted in December 2011 to extend for another four years the exemption given to qualified reservists and members of the National Guard from application of the means-test presumption of abuse in Chapter 7 bankruptcy cases. She noted that a footnote in an interim bankruptcy rule would have to be updated to incorporate the number of the new public law. In addition, she said, legislation was pending to add some bankruptcy judgeships and increase the filing fee for chapter 11 cases. If enacted, it would require conforming changes to the bankruptcy forms to reflect the higher fee.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose reported that Judge Thomas F. Hogan had assumed his duties as the new Director of the Administrative Office.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported that Judge Jeremy D. Fogel, the new Director of the Federal Judicial Center, had decided to undertake a comprehensive study of case-dispositive motions in civil cases. To that end, he said, the Center was seeking assistance from several law professors to participate in the study and provide law students to help in the research. The Center, he added, was conducting pilot efforts for the project and would present proposals for consideration by the Advisory Committee on Civil Rules at its March 2012 meeting. He suggested that the project would likely be ready to proceed at the start of the next academic year.

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 2-3, 2011.

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 7, 2011 (Agenda Item 10). Judge Sutton reported that the advisory committee had no action items to present.

Informational Items

Judge Sutton thanked the members, reporters, and committee staff for working with congressional staff on the amendment of 28 U.S.C. § 2107 to make it consistent with FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). Even though it involved a relatively minor, technical change, he said, it had taken enormous effort and skill to accomplish the legislative action.

He reported that only one comment had been received to date on the advisory committee's proposed amendment to FED. R. APP. P. 28 (briefs) that would remove the requirement that a brief set forth separate statements of the case and of the facts. The comment, from a prominent appellate judge, opposed combining the two statements.

But, he said, the advisory committee believed that the current requirement of separate statements had generated confusion and redundancy. Combining them would provide lawyers with greater flexibility in making their presentations.

Judge Sutton reported that the advisory committee had not reached a consensus on whether to treat federally recognized Indian tribes the same as states for the purpose of filing amicus briefs under FED. R. APP. P. 29(a) (amicus briefs). The committee, though, did reach a consensus that municipalities should be included with Indian tribes if a Rule 29 amendment were pursued. Judge Sutton added that he had sent a letter to the chief judges of all the courts of appeals soliciting their views on the matter.

Judge Sutton reported that Professor Richard D. Freer of Emory Law School, a guest speaker at the advisory committee's recent meeting had complained about the frequency of federal rule changes. Professor Freer argued that frequent changes increase costs, add confusion for lawyers, complicate electronic searches, and may lead to unintended consequences. He suggested that if rule changes were made less often – such as once every several years – the bar would pay more attention to the rules and submit more and better comments. Judge Sutton noted that the advisory committee was taking the criticism to heart and generally supports deferring and bundling amendments where feasible.

A member endorsed the suggestion generally and added that lawyers often complain about the committees "tinkering" with the rules. Other participants pointed out that the advisory committees do in fact bundle rule amendments where possible. Nevertheless, many rule changes are required by legislation, case law developments, and other factors beyond the committees' control.

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 12, 2011 (Agenda Item 8).

Amendments for Publication

FED. R. BANKR. P. 7054(b) and 7008(b)

Judge Wedoff reported that the proposed amendments to FED. R. BANKR. P. 7054 (judgments and costs) and FED. R. BANKR. P. 7008(b) (attorney's fees) would clarify the procedure for seeking the award of attorney's fees in adversary proceedings. Bankruptcy procedures, he explained, are different from those in civil actions in the district courts.

Civil practice is governed by FED. R. CIV. P. 54(d)(2) (attorney's fees), which specifies that a claim for attorney fees be made by motion unless the substantive law requires proving the fees at trial as an element of damages. The bankruptcy rules, though, have no analog to FED. R. CIV. P. 54(d)(2). Instead, attorney's fees are governed by FED. R. BANKR. P. 7008(b), which specifies that a request for the award of attorney's fees be pleaded as a claim in a complaint or other pleading.

The difference between the civil and bankruptcy rules, he said, creates a trap for the unwary, especially for lawyers who practice regularly in the district courts. Moreover, the difference between bankruptcy practice and civil practice has led bankruptcy courts to adopt different, non-uniform approaches to handling fee applications. The largest bankruptcy court in the country, for example, has adopted the civil practice by local rule.

In a recent decision, the Ninth Circuit bankruptcy appellate panel pointed to a gap in the current bankruptcy rules. It noted that when a party follows FED. R. BANKR. P. 7008(b) and pleads its demand for attorney's fees in the complaint, the bankruptcy rules specify no procedure for awarding them. The panel's opinion expressly invited the advisory committee to close the gap by amending FED. R. BANKR. P. 7054. That rule currently incorporates FED. R. CIV. P. 54(a)-(c) and has its own provision governing recovery of costs by a prevailing party. But it has no provision like FED. R. CIV. P. 54(d)(2) governing recovery of attorney's fees.

Judge Wedoff explained that the advisory committee agreed with the bankruptcy appellate panel and decided to conform the bankruptcy rules to the civil rules – thus requiring that a claim for the award of attorney's fees in an adversary proceeding be made by motion. To do so, the proposed amendments incorporate much of FED. R. CIV. P. 54(d)(2) into a new FED. R. BANKR. P. 7054(b)(2) prescribing the procedure for seeking attorney fees. Current FED. R. BANKR. P. 7008(b), requiring that the demand be pleaded in a complaint or other pleading, would be deleted. Judge Wedoff added that FED. R. CIV. P. 54(d)(2)(D), dealing with referral of matters to a master or magistrate judge, would not be incorporated because it is not relevant to the bankruptcy courts.

Judge Wedoff reported that the advisory committee would also correct a long-standing grammatical error in the first sentence of FED. R. BANKR. P. 7054(b) by changing the verb "provides" to "provide."

The committee without objection by voice vote approved publication of the proposed amendments to FED. R. BANKR. P. 7054(b) and the proposed deletion of FED. R. BANKR. P. 7008(b).

Information Items

PART VIII – THE BANKRUPTCY APPELLATE RULES

Judge Wedoff reported that the advisory committee had been engaged for several years in a major project to revise the Part VIII rules. The principal objectives of the project, he said, are: (1) to align Part VIII more closely with the Federal Rules of Appellate Procedure; and (2) to adjust the rules to the reality that bankruptcy court records today are filed, stored, and transmitted electronically, rather than in paper form.

He explained that the advisory committee had made substantial progress and would return to the Standing Committee in June 2012 seeking permission to publish the revised Part VIII rules for public comment. At this point, the advisory committee just wanted to give the Standing Committee a preliminary look at the first half of the rules, explain the principal changes from the current rules, and address any concerns that members might have. He invited the members to bring any suggestions to the advisory committee's attention.

Professor Gibson noted that Part VIII deals primarily with appeals from a bankruptcy court to a district court or bankruptcy appellate panel. If a case proceeds from there to the court of appeals, the Federal Rules of Appellate Procedure take over. In addition, in 2005 Congress authorized direct appeals from a bankruptcy court to a court of appeals in limited circumstances. Accordingly, the new Part VIII rules also contain provisions dealing with permissive direct appeals.

She noted that Part VIII had largely been neglected since 1983, even though the Federal Rules of Appellate Procedure have since been amended on several occasions and completely restyled in 1998. She pointed out that Part VIII was difficult to follow and needs to be reorganized and rewritten for greater ease of use. In addition, it needs to be updated and made more consistent with the current Federal Rules of Appellate Procedure. She emphasized that the proposed revisions were comprehensive in nature. Some rules would be combined, some deleted, and some moved to new locations.

Professor Gibson explained that the advisory committee had conducted two mini-conferences on the proposed rules with members of the bench and bar. The participants, she said, expressed substantial support for the proposed revisions, but several recommended that additional changes be made to take account of the widespread use of technology in the federal courts. They urged the committee to revise the rules to recognize explicitly that court records in bankruptcy cases now are filed and maintained in electronic form.

Judge Wedoff and Professor Gibson noted that the proposed new Part VIII rules largely adopt the style conventions of the other, restyled federal rules. For example, they

consistently use the word "must" to denote an affirmative obligation to act, even though the other parts of the bankruptcy rules still use the word "shall." He pointed out that the Part VIII rules are largely distinct from the rest of the bankruptcy rules. As a result, there should be no problem with using the modern terminology only in Part VIII and not in other bankruptcy rules.

Professor Gibson noted that the advisory committee had revised and reorganized Part VIII so thoroughly that it would not be meaningful to produce a redlined or side-by-side version comparing the old and new rules. Rather, she said, the committee was using the committee notes to specify where particular provisions in the new rules are located in the current rules.

A participant suggested that it would be helpful to produce a chart showing readers where each provision in the current rules has been relocated. Professor Gibson agreed, but explained that some provisions had been broken up and relocated in several different places. Judge Wedoff agreed to work on producing a chart, but added that it might be of limited value because readers will need to examine the new rules as a whole.

FED. R. BANKR. P. 8001

Professor Gibson noted that proposed FED. R. BANKR. P. 8001 (scope and definitions) was new and had no counterpart in the existing rules. Similar to FED. R. APP. P. 1, it sets forth the scope of the Part VIII rules and contains three definitions: (1) "BAP" to mean a bankruptcy appellate panel; (2) "appellate court" to mean either the district court or the BAP to which an appeal is taken; and (3) "transmit" to mean sending documents electronically (unless a document is sent by or to a pro se litigant, or a local court rule requires a different means of delivering the document).

She explained that the advisory committee had deliberately selected the term "transmit" to highlight a specific process with a strong presumption in favor of electronic transfer of a document or record. A member suggested, though, that the proposed definition of "transmit" was not sufficiently forceful and suggested including a stronger affirmative statement that electronic transmission is to be the norm. Judge Wedoff agreed and added that electronic transmission was already universal in the bankruptcy courts except for pro se litigants. Another member cautioned that it is problematic to use a word like "transmit," which has a much broader common meaning, and ascribe to it an intentionally narrower meaning. Perhaps a unique new term could be devised, such as "e-transmit."

Some members questioned the proposed definition of "appellate court" because it contradicted the ordinary meaning of the term, which normally refers to the courts of appeals. Judge Wedoff and Professor Gibson agreed to have the advisory committee reconsider the definition.

FED. R. BANKR. P. 8002

Professor Gibson reported that proposed FED. R. BANKR. P. 8002 (time to file a notice of appeal) must remain in its current place because 28 U.S.C. § 158(c)(2) refers to it by number. She said that the committee had essentially restyled the existing rule and added a provision to cover inmates confined in institutions.

FED. R. BANKR. P. 8003 and 8004

Professor Gibson explained that proposed Rules 8003 (appeal as of right) and 8004 (appeal by leave) would set forth in two separate rules the provisions governing appeals as of right and appeals by leave. The two are combined in the current FED. R. BANKR. P. 8001 (manner of taking an appeal). The proposed revisions, she said, will conform Part VIII to the Federal Rules of Appellate Procedure.

She noted that under the current bankruptcy appellate rules, an appeal is not docketed in the appellate court until the record is complete and received from the bankruptcy clerk. Proposed FED. R. BANKR. P. 8003(d)(2), however, conforms to the Federal Rules of Appellate Procedure and requires the clerk of the appellate court to docket the appeal earlier, as soon as a notice of appeal is received. Proposed FED. R. BANKR. P. 8004 would continue the current bankruptcy practice of requiring an appellant to file both a notice of appeal and a motion for leave to appeal.

FED. R. BANKR. P. 8005

Professor Gibson explained that proposed FED. R. BANKR. P. 8005 (election to have an appeal heard by the district court) governs appeals in those circuits that have a BAP. Under 28 U.S.C. § 158(c)(1), an appeal in those circuits is heard by the BAP unless a party to the appeal elects to have it heard by the district court. The proposed rule provides the procedure for exercising that election, and it eliminates the current requirement that the election be made on a separate document. Instead, a new Official Form will be devised for the election. Proposed Rule 8005(c) specifies that a party seeking a determination of the validity of an election must file a motion in the court in which the appeal is then pending.

FED. R. BANKR. P. 8006

Professor Gibson noted that proposed FED. R. BANKR. P. 8006 (certification of a direct appeal to the court of appeals) overlaps substantially with the Federal Rules of Appellate Procedure. Under 28 U.S.C. § 158(d)(2), a case may be certified for direct appeal from a bankruptcy court in three ways. First, the bankruptcy court, the district court, or the BAP may make the certification itself based on one of the direct appeal criteria specified in 28 U.S.C. § 158(d)(2)(A). Second, the certification may be made by all the parties to the appeal. Third, the bankruptcy court, district court, or BAP must make the certification if a majority of the parties on both sides of the appeal ask the court to make it.

Judge Wedoff explained that the proposed rule provides the procedures for implementing each of the three options. Since the bankruptcy court is likely to have the most knowledge about a case, proposed Rule 8006(b) specifies that a case will remain pending in the bankruptcy court, for purposes of certification only, for 30 days after the effective date of the first notice of appeal. The 30-day hold gives the bankruptcy court time to make a certification. Once the certification has been made, the case is in the court of appeals, and the request for permission to take a direct appeal must be filed with the circuit clerk within 30 days. The court of appeals has discretion to take the direct appeal, and the procedure is similar to that under 28 U.S.C. § 1292(b).

Judge Sutton reported that the Advisory Committee on Appellate Rules was working closely with the bankruptcy advisory committee on revising the Part VIII rules, with Professor Struve and Professor Amy Barrett serving as liaisons to the project. He noted that the appellate advisory committee had drafted corresponding changes in FED. R. APP. P. 6 (appeal in a bankruptcy case) by adding a new subdivision 6(c) to address permissive direct appeals from a bankruptcy court.

He reported that appellate advisory committee members had questioned the choice of the verb "transmit" in FED. R. APP. P. 6 and debated several other potential terms. In addition, he said, concern had been voiced over the wisdom of introducing a new term, such as "transmit,""provide," or "furnish," but only in FED. R. APP. P. 6. It would be inconsistent with the terminology used in the other appellate rules. The appellate courts, moreover, are not as far advanced with electronic filing as the bankruptcy courts and may not be ready to receive other types of appeals in the same manner as bankruptcy appeals. But, he added, it may well be acceptable as a practical matter to live with two different verbs in the rules for a while. A member suggested using the term "send," but Judge Sutton pointed out that in the electronic environment, the clerk of the bankruptcy court may merely provide the appellate court with links to the bankruptcy court record, rather than actually send or transmit the record to the appellate court.

Judge Sutton suggested convening an ad hoc subcommittee, comprised of at least one person from each advisory committee, to consider a uniform way of describing the transmission of records throughout the federal rules. Several participants endorsed the concept and emphasized the desirability of using the same language across all the rules. Others warned, though, that the project could be very complicated because many other provisions in the rules also need to be amended to take account of technology, and they cited several examples. A member cautioned that whatever terminology is selected must accommodate the continuing need for paper records and paper copies.

Professor Gibson said that the new bankruptcy appellate rules, scheduled to be published in August 2012, will be the test case for the new terminology. Judge Sutton added that eventually all the federal rules will have to be accommodated to the electronic world. But that project, he said, will take considerable time to accomplish. He emphasized that the immediate problem facing the advisory committees was to decide before publication on the right terminology for the proposed new Part VIII bankruptcy rules and the amendments to FED. R. APP. P. 6.

Judge Kravitz appointed Judge Gorsuch to chair an ad hoc subcommittee to consider devising a standard way of describing electronic filing and transmission throughout the rules. He asked the chairs of the appellate, bankruptcy, civil, and criminal advisory committees to provide at least one representative each.

FED. R. BANKR. P. 8007

Professor Gibson noted that proposed FED. R. BANKR. P. 8007 (stay pending appeal) would continue the practice of current FED. R. BANKR. P. 8005 that requires a party ordinarily to seek relief pending an appeal in the bankruptcy court first.

A member pointed out that proposed Rule 8007(b)(2) did not provide for the situation in which a bankruptcy court fails to issue a timely ruling. He said that the Federal Rules of Appellate Procedure in that circumstance authorize a party to ask the court of appeals for relief. Professor Gibson replied that the advisory committee will consider the matter.

FED. R. BANKR. P. 8008

Professor Gibson explained that proposed FED. R. BANKR. P. 8008 (indicative rulings) had been adapted from the new indicative ruling provisions in the civil and appellate rules. Proposed FED. R. BANKR. P. 8008(a) is parallel to FED. R. CIV. P. 62.1. It specifies what action a bankruptcy court may take on a motion for relief that it lacks authority to grant because an appeal has been docketed and is pending. The moving party must notify the appellate court if the bankruptcy court states either that it would grant the motion or the motion raises a substantial issue.

She pointed out that the rule is complicated because an appeal may be pending in the district court, the BAP, or the court of appeals. Proposed FED. R. BANKR. P. 8008(c) governs the indicative ruling procedure in the district court and the BAP, while FED. R. APP. P. 12.1 takes over if the appeal is pending in the court of appeals.

FED. R. BANKR. P. 8009 and 8010

Professor Gibson reported that proposed FED. R. BANKR. P. 8009 (record and issues on appeal) and FED. R. BANKR. P. 8010 (completing and transmitting the record) would govern the record on appeal. They apply to direct appeals to the court of appeals, as well as to appeals to the district court or BAP.

Rule 8009 differs from the Federal Rule of Appellate Procedure because it continues the current bankruptcy practice of requiring the parties to designate the record on appeal. That procedure is necessary because a bankruptcy case is a large umbrella that may cover thousands of documents, of which only a few may be at issue on appeal.

Proposed FED. R. BANKR. P. 8009(f) would govern sealed documents. If a party designates a sealed document as part of the record, it must identify the document without revealing secret information and file a motion with the appellate court to accept it under seal. If the motion is granted, the bankruptcy clerk transmits the sealed document to the appellate court.

Professor Gibson noted that the advisory committee was still refining proposed FED. R. BANKR. P. 8010 to specify a court reporter's duty to provide a transcript and file it with the appellate court. The majority of bankruptcy courts, she said, record proceedings by machine. A transcript is prepared by a transcription service when ordered through the clerk. She suggested that the court reporters may not always know in which court an appeal is pending and where they must file the transcript.

FED. R. BANKR. P. 8011

Professor Gibson reported that proposed FED. R. BANKR. P. 8011 (filing, service, and signature) had been derived from current FED. R. BANKR. P. 8008 (filing and service) and FED. R. APP. P. 25 (filing and service). She noted that it followed the format, style, and some of the detail of FED. R. APP. P. 25, but placed more emphasis on electronic filing and service.

FED. R. BANKR. P. 8012

Professor Gibson reported that proposed FED. R. BANKR. P. 8012 (corporate disclosure statement) was a new provision derived from FED. R. APP. P. 26.1.

RULES AND FORMS PUBLISHED FOR COMMENT IN AUGUST 2011

Judge Wedoff reported that the advisory committee had received 11 comments and one request to testify on the proposed rules and forms published in August 2011. The only significant area of concern reflected in the comments, he said, related to the proposed amendment to Official Form 6C, dealing with exemptions. Prompted by the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), the revised form would give debtors the option of stating the value of their claimed exemptions as "the full fair market value of the exempted property." Some trustees, he said, are concerned that the change will encourage people to claim the entire value of the property even though they are not entitled to it.

STERN V. MARSHALL

Judge Wedoff reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Stern v. Marshall,* 131 S. Ct. 2594 (2011). He pointed out that Professor McKenzie was leading the committee's efforts and had identified three concerns.

First, he said, the scope of the decision was unclear. The holding itself was narrow. It stated that even though that the Bankruptcy Code designates a counterclaim by a bankruptcy estate against a creditor as a "core" bankruptcy proceeding that a bankruptcy judge may decide with finality, that statutory grant of authority is inconsistent with Article III of the Constitution. A non-Article III bankruptcy judge cannot exercise the authority constitutionally because the counterclaim is really a non-bankruptcy matter.

It is not clear, he said, whether the constitutional prohibition will be held to apply to other matters designated by the statute as "core," especially fraudulent conveyance claims. The Supreme Court, he explained, has previously described fraudulent conveyance actions as essentially common law claims like those usually reserved to the Article III courts.

Second, there is uncertainty over the extent to which litigant consent may cure the defect and authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond the judge's authority. The governing statute, 28 U.S.C. § 157(b) and (c), specifies that a bankruptcy judge may decide "core" bankruptcy proceedings with finality. If a matter is not a "core" proceeding, the bankruptcy judge

may only file proposed findings and conclusions for disposition by the district court, unless the parties consent to entry of a final order or judgment by the bankruptcy judge.

The bankruptcy rules, he explained, currently contain a mechanism for obtaining litigant consent, but only in "non-core" proceedings. FED. R. BANKR. P. 7008(a) (general pleading rules) provides that parties must specify in their pleadings whether an adversary proceeding is "core" or "non-core" and, if "non-core," whether the pleader consents to entry of final orders or judgment by the bankruptcy judge. The problem, he said, is that the term "core" now is ambiguous. As a result of *Stern v. Marshall*, he suggested, there are now statutory "core" proceedings, enumerated in 28 U.S.C. § 157(b), and constitutional "core" proceedings. The advisory committee, he said, was considering proposed rule amendments to resolve the ambiguity.

Third, there is a potential for reading *Stern v. Marshall* as having created a complete jurisdictional hole in which a bankruptcy court may not be able to do anything at all in some cases – either to enter a final order or to submit proposed findings and conclusions. He explained that 28 U.S.C. § 157(c) specifies that if a matter is not a "core" proceeding under 28 U.S.C. § 157(b), a bankruptcy judge may enter proposed findings of fact and conclusions of law for disposition by the district court. After *Stern v. Marshall*, some statutory "core" proceedings are now unconstitutional for the bankruptcy court to decide with finality. Therefore, there is a question as to whether 28 U.S.C. § 157(c), which specifically authorizes a bankruptcy judge to issue proposed findings and conclusions in "a matter that is not a core proceeding," refers only to matters that are not core under 28 U.S.C. § 157(b) or also includes matters that are not "core" under the Constitution.

If § 157(c) refers only to matters that are not "core" under the statute, bankruptcy judges would have no authority to issue proposed findings and conclusions of law in matters that the statute explicitly defines as "core" matters. And for some of these statutory "core" matters, the Constitution prevents bankruptcy judges from entering a final judgment. The potential void, he said, could arise relatively frequently. It would apply to all counterclaims by a bankruptcy estate against creditors filing claims against the estate, and it might also be held to include fraudulent conveyance cases.

QUARTERLY REPORTING BY ASBESTOS TRUSTS

Judge Wedoff reported that the advisory committee had decided to take no action on a proposal for a new rule that would require asbestos trusts created in accordance with § 524(g) of the Bankruptcy Code to file quarterly reports with the bankruptcy courts. The committee, he said, had concerns over its authority to issue a rule to that effect under the Rules Enabling Act because the trusts are created at the conclusion of a chapter 11 case. He noted that the committee had obtained input on the proposal from various interested organizations, and the great majority stated that a rule was not appropriate.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the advisory committee's forms modernization project was making substantial progress and was linked ultimately to the Administrative Office's development of the Next Generation electronic system to supersede CM/ECF. He said that the new forms produced by the committee had been designed in large measure to take advantage of electronic filing and reporting. They are clearer, easier to read, and have instructions integrated into the questions. As a result, though, some attorneys have complained that the new forms are appreciably longer than the current versions and will require more time to complete.

The advisory committee, he said, was very sensitive to these concerns and was trying to shorten the forms where possible, while still eliciting more accurate information. Moreover, he said, the length of the forms will be substantially reduced by not having separate instructions filed.

He added that the advisory committee would like to expedite implementation of the new forms, especially consumer forms that deal with debtor income and expenses. The committee, he said, was planning to bring some of the forms to the Standing Committee at its next meeting and seek authority to publish them for public comment.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 2, 2011 (Agenda Item 6). Judge Campbell reported that the advisory committee had no action items to present.

Information Items

POTENTIAL RULE ON PRESERVATION FOR FUTURE LITIGATION

Judge Campbell reported that a panel at the May 2010 Duke Law School conference on civil litigation had urged the advisory committee to adopt a new national rule governing preservation of evidence in civil cases. The panel, he said, presented the outline of a proposed preservation rule, including eight specific elements that it said needed to be addressed in order to provide appropriate guidance to bench and bar. The proposal, he said, had been referred to the committee's discovery subcommittee, and Ms. Kuperman was asked to prepare a memorandum on the state of the law regarding preservation obligations and sanctions.

Judge Campbell pointed out that the committee's research revealed that federal case law is unanimous in holding that the duty to preserve discoverable information is triggered when a party reasonably anticipates being a party to litigation. But, he said, no consensus exists in the case law regarding: (1) when a party should reasonably anticipate being brought into litigation; and (2) the extent of the preservation duty. Rather, the law is fact-driven and left to resolution on a case-by-case basis.

As for the law on sanctions for failure to preserve, the courts of appeals are in disagreement. Some circuits hold that mere negligence is sufficient for a court to invoke sanctions, while others require some form of willfulness or bad faith before sanctions may be imposed. Some courts, moreover, have tried to specify what kinds of conduct may result in what kinds of sanctions.

Judge Campbell reported that the advisory committee wanted to ascertain the extent of preservation problems, and it asked the Federal Judicial Center to study the frequency of spoliation motions in the federal courts. That study, conducted by Emery Lee, reviewed over 131,000 cases filed in 19 district courts in 2007 and 2008. It found that spoliation motions had been filed in only 209 cases, or 0.15% of the total. About half those motions related to electronically stored information. The study revealed, moreover, that sanctions had been imposed against both plaintiffs and defendants.

In addition, the committee examined the existing laws that impose preservation obligations. It found that there is a substantial body of statutes that deal with preservation, covering many different subjects. But no coherent pattern emerges from them.

Judge Campbell reported that the discovery subcommittee had focused on what elements should be included in a proposed rule, and Professor Marcus produced initial discussion drafts to show three different possible approaches to a rule. The first was a very detailed rule, as proposed by the Duke panel. It included specific provisions giving examples of the types of events that constitute reasonable anticipation of litigation and trigger a duty to preserve. It addressed the scope of the duty to preserve, including the subject matter, the sources of information, the types of information, and the form of preservation. It also laid out time limits on the scope of the duty, such as how far back a custodian must retain information and how long the obligation to preserve continues. It contained a presumptive number of record custodians who must be identified and instructed to preserve information. The rule was also detailed on sanctions, specifying what kinds of conduct will lead to what kinds of sanctions.

The second proposed rule, he said, was substantially more general, addressing the trigger, scope, and duration of the duty to preserve and the selection of sanctions, but in less detail. Essentially, it directed parties to behave reasonably in all dimensions.

The third proposed rule addressed only sanctions and did not specify the trigger, scope, or duration of preservation obligations. Instead, it focused exclusively on the area of greatest concern to lawyers and their clients – the area, moreover, where there is the greatest disagreement and uncertainty in the law. The expectation was that by addressing the key problem of sanctions, the rule would give guidance to the people who make preservation decisions and relieve much of the uncertainty about the trigger and scope of the duty to preserve.

The third rule also distinguished between sanctions and curative measures. The latter consist of targeted actions designed to cure the consequences flowing from a failure to preserve information, such as allowing extra time for discovery or requiring the party who failed to preserve to pay the costs of seeking substitutes for the missing information. Under the proposed rule, remedial measures could be imposed if a preservation duty were not followed.

Imposition of more serious sanctions – such as an adverse inference instruction, claim preclusion, dismissal, or entry of judgment – would require something more than a mere failure to preserve. A showing would have to be made of some kind of knowing conduct, such as willfulness or bad faith. The rule also laid out the factors that a judge should consider in imposing sanctions, including the level of notice given the custodians, the reasonableness and proportionality of the efforts, whether there was good faith consultation, the sophistication of the parties, the actual demands made for preservation, and whether a party sought quick guidance from a judge.

Judge Campbell reported that the three rules had been discussed at a one-day mini-conference in Dallas in September with invited attorneys, judges, law professors, and technical experts. The committee, he said, heard very thoughtful, competing views from the participants. The discussions were very helpful, and several participants submitted papers elaborating on their positions.

In essence, he said, corporate representatives argued that the sheer cost of preserving information in anticipation of litigation is an urgent problem that calls for a strong, detailed rule providing clear guidance to record custodians. In particular, they complained about the uncertainty that corporations face in not knowing where and when a suit will be filed against them, what the claims will be, and what information may be relevant in each case. They are concerned about the heavy costs of over-preserving information. But, more importantly, they fear the harm to their reputation that may result from accusations of spoliation.

On the other hand, plaintiffs' lawyers argued that a detailed national rule would lead to greater destruction of information because of its negative implications. It would encourage custodians to destroy information not explicitly spelled out in the rule. They

emphasized that there will always be information that simply does not fit within the details of a rule, but must nevertheless be preserved.

Department of Justice representatives argued that case law should be allowed to continue running its course, and no preservation rule should be adopted at this time. They argued, in particular, that the first of the three proposed rules would lead to over-preservation by government agencies, as they would be forced to preserve records whenever there is a dispute over a claim with the government.

Judge Campbell noted that the discovery subcommittee met at the close of the mini-conference and later by telephone. It then reported in detail on the mini-conference at the full advisory committee's November 2011 meeting. After lengthy discussion, the committee decided that the subcommittee needed to continue to receive input and explore the three potential options. Under its new chair, Judge Paul W. Grimm, the subcommittee will continue to consider all the issues as open and report back at the advisory committee's March 2012 meeting.

Several members suggested that the first of the three proposed rules, the detailed option, would not be workable because of the endless variety of possible situations that may arise. A detailed new national rule, moreover, could lead to satellite litigation, as with the 1983 amendments to FED. R. CIV. P. 11 (sanctions). A sanctions-only rule, on the other hand, such as the third proposal, would resolve the serious split among the circuits on the law of sanctions, and it might well be effective in sending strong signals regarding pre-litigation conduct.

Judge Campbell suggested that even if the committee were to adopt a new federal rule on spoliation, a myriad of different rules will still exist in the state courts. Accordingly, there will not be national uniformity in any event. The problems of uncertainty will continue because state law often governs preservation obligations. A participant added that the rules on preservation are largely rules of attorney conduct, which lie within the traditional province of the states. Because of the relevance of state law, the federal courts would be on stronger jurisdictional grounds if the rule were limited to sanctions.

A member added that in most cases no federal proceeding is pending when the duty to preserve first attaches. It was suggested that the advisory committee take a limited focus because it may lack authority under the Rules Enabling Act to adopt pre-litigation preservation standards.

A participant pointed out that the scope of the obligation to preserve before trial is related to the scope of discovery under FED. R. CIV. P. 26(b)(1). Therefore, it may not be possible to have a rule that narrows the scope of what information must be preserved before a case is filed if that provision is at odds with what information must be produced

in discovery after a case is filed. Moreover, apart from the duty to preserve certain records and information, substantial additional cost is incurred in searching the information. Thus, even if it were inexpensive just to preserve information, it would still be expensive for the parties to search through it. Therefore, it might be necessary to reconsider the scope of discovery under Rule 26(b)(1).

FED. R. CIV. P. 45

Judge Campbell reported that the proposed amendments to Rule 45 (subpoena) had been published in August 2011. They make four basic changes: (1) simplifying the rule by having a subpoena issued in the name of the presiding court, authorizing nationwide service, and having local enforcement in the district where the witness is; (2) allowing the court where discovery is taken in appropriate instances to send disputes back to the court presiding over the case; (3) overruling the *Vioxx* line of cases that authorize subpoenas for out-of-state parties and a party's corporate officers to testify at trial from a distance of over 100 miles; and (4) clarifying the obligation of a serving party to provide notice.

He said that a public hearing had been scheduled for January 27, 2012, but the committee had received only two requests to testify. As a result, the hearing may be canceled and the requesting parties asked to put their views in writing or participate in a teleconference.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell reported that a subcommittee chaired by Judge John G. Koeltl was studying the many recommendations for improvements in civil litigation made by participants at the May 2010 Duke Law School conference. He noted that the subcommittee was focusing on five categories of proposals to implement suggestions made at the conference.

First, one of the common themes voiced by lawyers at the conference was that judges need to be more active in case management. But merely promulgating additional rules will not produce better managers. Therefore, the subcommittee was coordinating with the Federal Judicial Center to improve judicial education programs and enhance informational resources. Among other things, a new civil case-management section of the *Benchbook for U.S. District Court Judges* had been drafted.

Second, Judge Campbell noted that efforts were being made to tap into local efforts around the country to test new procedures for managing litigation. A number of case-management pilot programs were underway, and the committee was working with the Federal Judicial Center to identify and monitor them. In addition, the committee

would ask chief judges around the country to keep it informed about pertinent local developments.

Judge Campbell reported that one of the initiatives that the committee was encouraging was a project to develop a standard protocol for initial discovery in employment discrimination cases. Drafted jointly by lawyers representing both plaintiffs and defendants, the protocol identifies the information that each side must exchange at the outset of an employment case, without the need for depositions or interrogatories. No objections are allowed except for attorney-client privilege. The protocol, he said, will be made available to all federal courts, and all the judges on the advisory committee will adopt it and encourage their colleagues to do the same.

Third, the advisory committee had encouraged additional empirical work, especially by the Federal Judicial Center, on how federal courts are actually handling their cases on a daily basis. One study by the Center was focusing on the early stages of a civil case, including initial scheduling orders, Rule 26(f) planning conferences, and Rule 16(b) initial pretrial conferences. The study revealed that court dockets show that the initial scheduling orders required by FED. R. CIV. P. 16(b)(1) are issued in only about half the civil cases in the district courts. But, he cautioned, docket information may not be sufficiently reliable because there are no uniform ways of recording the pertinent data, and the absence of public records may be the result of inadequate docketing practices. In addition to reviewing the docket sheets, the Center will conduct a survey of lawyers to ascertain what events occurred early in their cases.

Fourth, Judge Campbell noted that the committee had invited judges and lawyers from the Alexandria Division of the Eastern District of Virginia to discuss their experiences with that court's "rocket docket." He added that all the judges on the court share a common philosophy that cases must be handled promptly, and the bar works very well within that court culture.

Fifth, Judge Campbell said that several specific rule amendments were being considered in light of the Duke Conference, including: reducing the time to hold an initial case management conference from 120 to 60 days; eliminating the moratorium on discovery until after the Rule 26(f) conference is held; requiring parties to talk to the court about discovery problems before filing motions; amending Rule 26 to emphasize the importance of proportionality; reducing obstructive objections; limiting the presumed number of depositions in a case to five and the presumptive maximum time of a deposition from seven hours to four; reducing the presumptive number of interrogatories below the current 25; postponing contention interrogatories until later in a case; reducing service time; mandating that judges hold a scheduling conference; and emphasizing in Rule 1 that lawyers must cooperate with each other. He added that rules language was being drafted to help in considering these various ideas.

Professor Cooper added that another area for potential rulemaking was the relationship between pleading motions and discovery. Two competing proposals had been offered. One would suspend discovery until the court rules on a motion to dismiss for failure to state a claim. The other would create a presumption in favor of ruling on a motion to dismiss only after some discovery has occurred.

Judge Campbell said that the central theme at the Duke conference had been that parties generally believe that civil litigation takes too long and costs too much. The advisory committee, he said, was contemplating conducting a "Duke II" conference, but had not yet made a decision on the matter.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee had no immediate plans to propose rule amendments dealing with pleading standards. The committee was actively reviewing the developing case law, and the Federal Judicial Center was continuing to conduct empirical research on the frequency of motions to dismiss and their disposition.

The Center's research had found a statistically significant increase in the number of motions filed, but not in the rate of granting motions. It was not possible to tell whether more cases were being dismissed out of the system because courts often grant motions to dismiss with leave to amend. A follow-up study by the Center had shown no statistically significant increase in plaintiffs excluded from the system by motions to dismiss or cases terminated by motions to dismiss, other than in financial instrument cases. On the other hand, some law professors have conducted their own research and claim that there has in fact been an increase in dismissals from the system.

Professor Cooper noted that the advisory committee had been presented with a large number of suggested changes in pleading standards and various suggestions for integrating pleading practice with discovery practice. He noted that there were many opportunities and possibilities for rule changes, but the committee was not contemplating proposing any rule for publication in the coming year.

PLEADING FORMS

Professor Cooper pointed out that FED. R. CIV. P. 84 (forms) specifies that the illustrative civil forms in the appendix "suffice" under the rules. He noted specifically that the form for pleading negligence had been approved by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007). But lower federal courts have found a tension between Supreme Court cases and the current pleading forms, especially Form 18 (complaint for patent infringement).

The larger question, he said, was why the committee was still in the forms business. There was a clear need for illustrative forms in 1938 to show the bar how the new federal rules would work in practice. That objective, however, may no longer be important. Moreover, the committee has generally not paid a great deal of attention to the forms over the years. Although some, such as Form 5 (notice of a lawsuit) and Form 6 (waiver of service of a summons) had been very carefully coordinated with FED. R. CIV. P. 4(d) (waiver of service), most forms do not receive much attention.

He noted that the advisory committees have adopted different approaches towards drafting forms, and the forms are used in different ways for different purposes. The civil and appellate forms, for example, are promulgated through the full Rules Enabling Act process. The official bankruptcy forms, on the other hand, follow the first several steps of that process, but are prescribed by the Judicial Conference. The criminal forms do not go through the Rules Enabling Act process at all. They are drafted by the Administrative Office with some consultation with the criminal advisory committee..

The Standing Committee, he said, had appointed an ad hoc subcommittee on forms, composed of members of the advisory committees, to consider the appropriate role of the committees in preparing forms. Among other things, the subcommittee will consider whether the current variety of approaches is appropriate or whether there is a need for more uniformity. There appears to be little support for adopting a uniform approach, as sufficient coordination may be achieved through the Standing Committee's review of the advisory committees' recommendations. The subcommittee will also consider whether it is advisable for any of the forms to continue to follow all the steps of the full Rules Enabling Act process. He added that there was no urgency in making those decisions.

CLASS ACTIONS

Judge Campbell reported that the advisory committee had recently formed a subcommittee on class actions, chaired by Judge Michael W. Mosman, and it had begun to identify issues that might possibly warrant future rulemaking.

Professor Marcus provided background on the development of Rule 23. He explained that after the important 1966 amendments to FED. R. CIV. P. 23 (class actions), the advisory committee took no action on class actions for 25 years. In 1991, the Judicial Conference, on the recommendation of its ad hoc committee on asbestos litigation, directed the committee to study whether Rule 23 should be amended to improve the disposition of mass tort cases.

In response, the committee considered a wide range of different possible changes in the rule and sought extensive input from the bench and bar. In 1996, it published a limited number of significant amendments. They would have required a court to consider whether a class claim is sufficiently mature and whether the probable relief to individual class members justifies the costs and burdens of class litigation (commonly referred to as the "just ain't worth it" test). They would also have explicitly permitted certification of settlement classes and a discretionary interlocutory appeal from certification decisions.

During the publication period, the proposed amendments to revise the certification process proved to be very controversial. Moreover, the Supreme Court issued its decision in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997), dealing with settlement certification. As a result, the committee decided to proceed only with the proposed addition of Rule 23(f) authorizing a discretionary interlocutory appeal. That provision took effect in 1998 and has proved successful.

In 2000, the committee continued working on the rule. Its additional efforts resulted in several amendments that took effect in 2003, including improving the timing of the court's certification decision, strengthening the process for reviewing proposed class-action settlements, and authorizing a second opt-out opportunity for certain class members to seek exclusion from the settlement. It also added Rule 23(g) governing the appointment of class counsel, including interim class counsel, and Rule 23(h) governing the award of attorney's fees.

Judge Campbell pointed out that the amendments pursued by the advisory committee did not address the problems of overlapping classes, recurrent efforts to certify a class through judge-shopping, or recurrent efforts to approve a settlement. Professor Cooper, he noted, had devised creative ideas on addressing those issues by rule, but they attracted too much controversy.

Judge Campbell reported that the advisory committee was considering whether Rule 23 needs to be amended to take account of several recent developments, including enactment of the Class Action Fairness Act and recent class-action case law. The committee, he said, had compiled a list of potential issues that might be addressed and was considering whether the time was ripe to give further consideration to Rule 23. On the other hand, he said, any significant change in the rule would likely be controversial, and the committee has several other, more important projects on its agenda.

INTERLOCUTORY APPEAL FROM ATTORNEY-CLIENT PRIVILEGE DECISION

Professor Cooper reported that a suggestion had been referred to the advisory committee for a rule amendment that would allow appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. Although referred to the civil committee, he said, the matter should also be considered by the other advisory committees.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of December 12, 2011 (Agenda Item 9).

Amendments for Final Approval

FED. R. CRIM. P. 16(a)(2)

Judge Raggi reported that the advisory committee was proposing an amendment to FED. R. CRIM. P. 16(a)(2) (discovery and inspection) that would clarify an ambiguity introduced during the 2002 restyling of the criminal rules. The change would make it clear that the restyling of the rule had made no change in the protection given to government work product.

She explained that Rule 16(a) allows a defendant to inspect papers and materials held by the government. Before restyling, Rule 16(a)(1)(C) had contained enumerated exceptions to that access, including one for the government's work product. The restyled rule, however, eliminated the exceptions.

The district courts, she said, have rejected claims that the 2002 amendments had changed the substance of the rule, using the doctrine of a "scrivener's error" to deny access by the defendant to the government's work product. As a result, there appear to be no serious practical problems and no urgency to make a correction. Nevertheless, she said, the advisory committee agreed unanimously that it was inappropriate to have an ambiguous restyled rule and decided to pursue an amendment.

The committee, she pointed out, believed that the proposed change was technical and could be made without publication. Nevertheless, it recognized that the Standing Committee needed to make that policy decision.

The committee without objection by voice vote approved the proposed technical and conforming amendment for final approval by the Judicial Conference without publication.

Information Items

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee was considering the Attorney General's recommendation to amend FED. R. CRIM. P. 6(e) (recording and disclosing grand jury proceedings). The amendment would provide procedures for authorizing disclosure of historically significant grand jury materials after a suitable period of years.

The proposal, she said, was in response to a district court decision that ordered the release of grand jury materials dealing with President Nixon's testimony before the Watergate grand jury. The district court issued the release order relying on its inherent authority, even though FED. R. CRIM. P. 6(e) contains no provision expressly authorizing release of the materials.

She noted that the Department of Justice did not agree that the court had inherent authority to order disclosure, but it did not appeal the decision. Instead, it asked the advisory committee to amend Rule 6 to allow disclosure after a specified period of years. The proposal, she said, was being studied by a subcommittee chaired by Judge John F. Keenan.

FED. R. CRIM. P. 16

Judge Raggi reported that the advisory committee – after extensive study and debate – had decided not to pursue amendments to FED. R. CRIM. P. 16 (discovery and inspection) to codify the duty of prosecutors to turn over exculpatory information to the defendant. The committee, however, agreed to address the matter in a "best practices" section of the *Benchbook for U.S. District Court Judges.* She said that she had met with Judge Paul L. Friedman, chairman of the Federal Judicial Center's Benchbook Committee, and a draft section had been prepared.

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 28, 2011 (Agenda Item 11). Judge Fitzwater noted that the advisory committee had no action items to present.

Information Items

SYMPOSIUM ON THE RESTYLED FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the restyled Federal Rules of Evidence had taken effect on December 1, 2011. The advisory committee, he said, had held its October 2011 meeting in Williamsburg, Virginia, at the William and Mary Marshall-Wythe College of Law. The meeting was preceded by a symposium on the restyled rules, hosted by William and Mary at the committee's request.

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater noted that the advisory committee was considering a proposal to amend Rule 801(d)(1)(B) (hearsay exemption for certain prior consistent statements). It would make prior consistent statements admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The amendment, he said, was based on the premise that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements. The needed jury instruction, moreover, is almost impossible for jurors to understand.

He noted that there was a difference of opinion in the advisory committee on whether to pursue a change in the rule, and the members would appreciate receiving any further advice from the Standing Committee on the matter. He also noted that the committee, with the help of the Federal Judicial Center, was planning to send a questionnaire to all district judges soliciting their views on the advisability of the proposed amendment.

A member supported making the proposed change in Rule 801, but cautioned against sending out questionnaires to all judges on potential rule changes, especially where a proposed rule is not particularly significant. He said that it could set a bad precedent for other committees to send out surveys on a regular basis.

PRIVILEGES PROJECT

Judge Fitzwater reported that the advisory committee undertook a project several years ago to compile the federal common law on evidentiary privileges. The initiative, he said, was not intended to result in a codification of the evidentiary privileges or in new federal rules. Rather, it was expected to lead to a Federal Judicial Center monograph providing a restatement of the federal common law. Because of the potential sensitivity of the project, however, the committee decided not to proceed further without Standing Committee guidance and approval.

Professor Capra explained that the committee had undertaken similar types of projects in the past. For example, when Congress enacted the evidence rules in 1975, it made several changes in the rules proposed by the judiciary, but it did not change the accompanying committee notes. As a result, some of the notes are inconsistent with the text of the rules. At the committee's request, he compiled the inconsistencies and produced a Federal Judicial Center monograph under his own name. Later, the advisory committee authorized him to write a monograph on the discordance between some of the rules and the prevailing case law. Both publications were very helpful to the bar.

Professor Capra said that the law of privileges is very important, but it is not codified. The advisory committee began developing a set of privilege rules to reflect the federal common law. After initial efforts, the project, under the leadership of Professor Kenneth S. Broun, was deferred because of the committee's other priorities, such as restyling the rules. He added that the project was a low priority for the committee and would be put aside if other matters need attention. After having completed the restyling project, however, the committee now has a light pending agenda.

Members asked whether the advisory committee itself was planning to approve the work and whether the project was the best use of the committee's time and the judiciary's limited resources. Several agreed that it would be a beneficial project, but it should have a relatively low priority. Judge Kravitz added that it was fine to produce the paper, but he would not recommend giving it official advisory committee approval.

A participant recommended that the project continue because there has been recurring interest by Congress over the years in enacting privileges by law. Professor Capra added that since 1996, the advisory committee had been asked to comment on six different proposals dealing with privileges.

A member said that the Standing Committee should defer to the advisory committee's best judgment on the matter. If the advisory committee finds the project useful, especially since Congress may ask for input on privileges, it should continue.

Judge Fitzwater and Professor Capra suggested allowing Professor Broun to continue on the work on the matter and report to the advisory committee as needed at its meetings. A committee consensus developed to adopt their suggestion.

COMMITTEE JURISDICTIONAL REVIEW

The committee authorized Judge Kravitz and Professor Coquillette to complete for the committee a self-evaluation questionnaire for the Judicial Conference's Executive Committee on the need for the committee's continued existence, the scope of its jurisdiction, and its workload, composition, and operating processes.

PANEL DISCUSSION ON CLASS ACTIONS

Judge Rosenthal presided over a panel discussion on class actions with Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules, Daniel C. Girard, Esquire, a former member of the advisory committee, and John H. Beisner, Esquire.

Judge Rosenthal noted that the discussion was in accord with the committee's tradition of spending time at its January meetings in examining long-term trends and issues that may affect the rules process in the future, but do not require immediate changes in the rules. She explained that the Class Action Fairness Act of 2005 (CAFA) had now been in place for seven years and the courts have issued several important class-action decisions in the last few years. In light of the committee's statutory obligation to monitor the continuing operation and effect of the federal rules, she said, it was an opportune time to start thinking about whether any changes in FED. R. CIV. P. 23 might be needed in the future. Class actions, she added, are a high profile area of the law and involve a great deal of money and interest.

The panel, she pointed out, consisted of an attorney who primarily represents plaintiffs and a lawyer and a law professor who normally have represented defendants. She asked them to focus on the impact of the recent cases on class-action practice and to identify any potential rule changes that might have a beneficial impact on class-action litigation.

The panel discussed a wide range of issues, but the exchange can be categorized as falling into the following four broad topics:

1. Front-loading of cases;
2. Class definition;
3. Settlement classes; and
4. Competing classes and counsel.

1. FRONT-LOADING OF CASES

In re Hydrogen Peroxide

The panel discussed the impact of *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2009). In the case, the Third Circuit held that the district court was obligated at the certification phase of a class action to apply a rigorous analysis of the available evidence and make findings supported by a preponderance of the evidence (rather than a mere threshold showing) that each element of Rule 23 has been met.

The district court was required to resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits. Specifically, it should have resolved the battle of the experts over whether the alleged injury could be demonstrated by proof common to the class, rather than individual to its members. The decision, moreover, expressed concern that the district court's order certifying the class would place unwarranted pressure on the defendant to settle non-meritorious claims – elevating that concern, in effect, into a policy factor to consider in the certification process.

Although not all courts follow *Hydrogen Peroxide*, it was suggested that the practical impact of the case has been that plaintiffs are now confronted with an early merits-screening test. They must present their evidence at the certification stage or risk losing the case if the court denies certification. That conclusion, moreover, was seen as bolstered by several other cases, including the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

In *Wal-Mart*, the Supreme Court ruled that if the plaintiffs had evidence of company-wide employment discrimination, they had to present it by the time of the certification hearing. A key question, therefore, is whether the courts will now impose a higher standard of "commonality," as in *Wal-Mart*, which would necessitate more expansive discovery, or whether they will read *Wal-Mart* as limited to the unique employment setting and continue the traditional concept of commonality.

Discovery at certification

A panelist argued that *Hydrogen Peroxide* has created a much more expensive class-certification process, particularly in complex cases. He said that there is considerable uncertainty for the lawyers on how discovery is to take place after the pleading stage. Discovery may have to be conducted before certification is heard and expert witnesses may be subjected to a full *Daubert* analysis.

It was noted that expert testimony now is often a central feature at the certification stage, and extensive case law is developing on the subject, including whether *Daubert* applies at the class-certification stage. In *Wal-Mart*, the treatment of expert witnesses at certification was an important factor in the majority opinion, and *Hydrogen Peroxide* was largely a battle of the experts.

It was suggested that plaintiffs' lawyers often feel disadvantaged by the front-loading of discovery. At the same time, defendants traditionally have preferred to bifurcate discovery and avoid excessive costs by limiting discovery at certification and deferring full-blown discovery on the merits until later.

In front-loading the discovery, though, the recent decisions have raised questions about how much merits discovery is actually required up front and whether the discovery

can continue to be bifurcated if plaintiffs are now required to prove the merits of the certification issues. The discovery problems are complicated, moreover, because discovery is now largely electronic and does not lend itself very well to phasing.

A panelist said that the recent decisions have caused additional work and difficulties for the parties but have not created a crisis situation. It appears, for example, that meritorious class actions are not being killed in the cradle, as plaintiffs are afforded a fair chance to explain to the court why they believe that their class can be certified.

One panelist argued that what information both sides should put forward in class certification briefing is becoming much clearer. The information necessarily will vary from case to case, but much of the discovery is simply not relevant for certification purposes. The judges, he said, are closely managing the cases and overseeing the discovery.

The focus now for the parties, he said, is on providing useful information that a court needs to make the certification decision. Judges, for example, often ask the lawyers whether particular discovery is really needed for certification or can be deferred until later in order to meet the schedule for class certification. Some judges also indicate to the parties what sort of discovery will be needed for certification and set a time for certification briefing, leaving it up to the lawyers to figure out the details of what discovery must be exchanged for certification.

A panelist noted that *Hydrogen Peroxide* cited the advisory committee note to the 2003 amendments to Rule 23, which sets forth the concept of a "trial plan that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." The recent cases, he said, have been sending a uniform message that the district court should instruct the parties to gather their available information and figure out what a class trial would look like. The court, thus, exercises the gateway function of deciding whether the jury will have the evidence it needs to make a decision that the entire class is entitled to relief. The key issue is whether the evidence varies so much among the individual plaintiffs that the jury is unable to decide that the defendant is liable to all members of the class.

Early practicable time for making the certification decision

In light of the additional information that now has to be gathered for certification, the panel discussed whether courts are being more flexible in applying Rule 23(c)(1)(A)'s requirement that certification occur at "an early practicable time." There appears to be little uniformity among the courts, however, as courts cite the language of the rule to support every conceivable outcome. Some make the certification decision very early in the case, while others defer it until much later. A few districts specify

categorically that a class certification motion be made within 90 days, while in others, the certification process occurs at the close of discovery.

Early dispositive motions

It was reported that the trend towards front-loading of class-action litigation has led to an increasing tendency to find ways to dispose of cases at an early stage. As a matter of good practice, therefore, a defendant who believes that a national class action cannot be certified under any circumstances should force the plaintiffs to come forward at an early stage and move for class certification.

Since CAFA, many more class-action cases are being brought in the federal courts that involve state laws, and more motions are being filed that challenge jurisdiction. Some state laws, moreover, appear to grant relief for class members in circumstances that may not meet the criteria for standing in the Article III federal courts.

It was suggested that there has been some drift away from analyzing class membership questions under the criteria specified in Rule 23(a) and (b) and framing them instead as matters of standing. A defendant, thus, moves to strike class allegations at the pleading stage, challenging the definition of the class through a dispositive motion, claiming that the class includes members who do not have standing. The trend may be a reaction to the sheer complexity of the issues in a multi-state post-CAFA class action, the high costs of conducting discovery, and a lack of clear guidance. In essence, the dispositive motions assert that there is some fundamental flaw in a particular class and, therefore, no need to go through the expense of discovery and the certification process.

In addition, there is some confusion over the ability of an individual plaintiff to act in a representative capacity. Some defendants claim that unless a plaintiff's claim is a mirror image of the claim of every other person in the class, in ways that do not necessarily relate to the presentation of common proof, the plaintiff does not have standing to act on behalf of others in a representative capacity.

2. CLASS DEFINITION

Preponderance and Commonality

It was suggested that there is uncertainty over what is meant by "preponderance" in Rule 23(b)(3). Under the current language of the rule, it was argued, plaintiffs are faced with a "winner take all" proposition. The court has to decide whether common issues of law and fact predominate. If they do, the court will certify the class. If they do not, certification will be denied.

It was noted that if common issues of law and fact do not predominate under Rule 23(b)(3), a court may still certify a class action under Rule 23(c)(4) for particular common issues. There is, however, very little guidance as to when a court may certify an issues class. Although a body of case law is developing on issues classes, it varies from circuit to circuit.

Recent cases show that the courts are sharply divided on Rule 23(c)(4). One circuit has ruled that an issues class is a housekeeping remedy, and predominance still must be shown. Another has held that predominance need not be shown, and a court only has to consider whether resolution of the issue will materially advance the case.

A panelist said that issues classes are not commonly invoked by counsel because lawyers prefer a more complete outcome to their litigation. They are not normally interested in litigating on a piece-meal basis. As a practical matter, there are too many complications in issues-class litigation, and it is generally not worth it for them. Another panelist disagreed, however, and suggested that issues classes are quite important and have been used effectively in environmental tort cases and employment cases.

It was recommended that the Advisory Committee on Civil Rules monitor the developing case law and ultimately evaluate whether to consider a rule amendment that adjusts the standards of Rule 23(c)(4) to give the courts greater guidance on when a class may be certified that has both common issues and individual issues. The panelists pointed out that courts that have wrestled with the rule have said that the matter is unclear. It was also noted that the ALI had spent a great deal of time on issues classes as part of its recent restatement project. If properly defined, it was argued, an amended federal rule on issues classes could be beneficial to the mass adjudication of cases.

It was pointed out that there is a mechanism for dealing with predominance issues arising from state-law variations, especially in post-CAFA cases involving consumer claims arising under the laws of multiple states. In these cases, defendants generally argue that the claims have to be considered individually under different state consumer protection laws. Although a national class action may still be maintained, as in the *De Beers* litigation in the Third Circuit, a case may effectively be divided into sub-classes on a state-by-state basis for litigation purposes. In the settlement context, the analysis of state law variations historically was an issue of "manageability." Defense counsel would argue that the court cannot litigate the case on a manageable basis because the jury would have to be charged on the law of 50 states.

It was pointed out that one factor that has increased the number of class-action cases in the federal courts is the strategy of plaintiffs – reinforced by a general skepticism of federal courts towards nationwide classes – to break down a class into several subclasses, such as a separate class action for each state. That tendency will continue to occur in employment cases, as classes are broken down into smaller class actions,

especially after *Wal-Mart v. Dukes*. The trend will result in more class actions, and multiple class actions on the same subject. The Judicial Panel on Multidistrict Litigation will routinely draw the federal cases together to conduct the discovery on a common basis. In the end, though, separate certification determinations will have to be made in each class action.

In the past, commonality was not an important issue and was often stipulated. The real issue, rather, was predominance. But the Supreme Court has now said that the common issue has to be central to the validity of each of the claims. It has to be a central, dispositive issue to class certification. Commonality, moreover, is used in other rules, such as Rule 20 (joinder), which contains the exact same language. So one issue for the future will be whether *Wal-Mart* will have an impact on joinder.

Rule 23(b)(2) classes

It was suggested that *Wal-Mart v. Dukes* represents a potential sea change, not only regarding "commonality" under Rule 23(a), but also for classes under Rule 23(b)(2). A panelist said that the most remarkable aspect of the *Wal-Mart* decision, and potentially the most important aspect, was the section dealing with Rule 23(b)(2). The Court's statements that back pay could not be brought as part of a (b)(2) action because it was not "incidental" were a major departure from the decisions of the courts of appeals. Moreover, the Supreme Court suggested that there may be a due process problem with any monetary claim in a (b)(2) action, even a claim for statutory damages or incidental damages.

Accordingly, many difficult questions arise as to the scope of Rule 23(b)(2) after *Wal-Mart*, and there will be a great deal of analysis of the decision and the ensuing case law. Questions will arise, for example, on whether some problems can be dealt with by allowing opt-out classes under (b)(2) or hybrid classes under (b)(2) and (b)(3).

Arbitration Clause Cases

It was argued that *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740 (2011), may have the most important impact of any of the recent class-action cases, for it has been seen as effectively eviscerating many small claims cases. Although the Supreme Court noted in *Amchem* (which dealt with mass torts) that class actions are really about small claims cases, rather than mass torts, it later dealt a virtual death knell to many small claims cases in *Concepcion.*

It was suggested that one of the issues that plaintiffs thought was left open in *Concepcion* was whether a "no class-arbitration" clause may be invalidated if the plaintiffs can show that it is impossible to vindicate their rights other than through class

arbitration. One court of appeals ruled recently, however, that the argument could not survive after *Concepcion*.

3. SETTLEMENT CLASSES

The need for a Rule 23 amendment on settlement classes

A panelist said that many of the court decisions since *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), have wrestled with what must be shown in the context of certifying a settlement class. Although *Amchem* said that the district court does not have to worry about "manageability" in a settlement case under Rule 23(b)(3), the class must still meet the tests of preponderance, commonality, and adequacy, and the case has to be treated as if it were going to trial. In the Third Circuit's *De Beers* litigation, for example, the court's opinion noted that "(e)ver since the Supreme Court's landmark decisions in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), one of the most vexing questions in modern class action practice has been the proper treatment of settlement classes, especially in cases national in scope that may also implicate state law."

Judge Kravitz asked the panel whether FED. R. CIV. P. 23 should be amended to deal specifically with settlement classes.

The panelists agreed that the absence of a settlement-class provision has created problems and has tended to push settlements, especially in mass-tort cases, outside the court system. Since *Amchem*, the parties in these cases have had to construct work-around solutions to achieve settlements, often a settlement that lies outside judicial supervision under Rule 23(e).

The absence of a workable settlement-class device is seen as a major problem in mass torts because there is no supervision of the parties' actions or the attorney's fees. Defendants, moreover, are concerned about engaging in settlements outside the courts because they are left to their own devices. They must hope that the terms of the settlement stick because they have not been sanctioned by a court.

A panelist summarized three specific impacts of *Amchem*. First, he said, more cases are now proceeding to non-class settlements, where there are no criteria and no supervision. Second, several cases have struck down non-judicial settlements, forcing the parties to go back to the court and try cases that all the parties wanted to settle. Third, the requirements for a litigation class place defendants in an awkward position. If they claim under *Amchem* that the case is suitable for class certification and trial, and then fail to settle, they may have stipulated to something that will harm them for litigation purposes. The internal problem for the defendants is what they must do to support and

enforce a settlement after they have asserted to the court that the case is suitable for certification as a litigation class.

A panelist added that the absence of a clearly defined standard for certification of a settlement class is exploited by tactical, professional objectors. In essence, they want a financial reward in return for dropping their objections. Greater clarity in the rule, he said, would not solve the problem of non-meritorious objections entirely, but it would take an argument away from nuisance objectors.

Approval of Settlements

Judge Rosenthal reported that the rules committees retreated in the 1990s from the decision to seek approval of a separate provision for settlement classes because *Amchem* and *Ortiz* were pending in the Supreme Court. But there was also strong and negative reaction to the committee's published rule, especially from law professors who argued that it would unleash the forces of collusion and lead to rampant reverse auctions.

At the same time, defendants feared that loosening the standards for certification of settlement classes would bleed over inevitably to loosen the standards for litigation class actions. They warned that the proposal would invite more class actions because it would be easier for potential plaintiffs to obtain settlement awards. In light of these concerns, she said, there was no consensus for the committee to proceed with the proposal.

She added that the 2003 amendments to Rule 23 were designed to put rigor into the evaluation of a settlement's fairness, reasonableness and adequacy and to strengthen the oversight of attorney's fees. The amendments, though, deliberately did not address whether the standards for certifying a settlement class should be different from those for certifying a trial class. She asked whether conditions have changed since 2003 and whether the absence of a settlement class certification standard in Rule 23, coupled with other concerns raised by the panelists, are sufficiently acute to warrant pursuing rule amendments.

A panelist explained that effective brakes are currently in place to deal with abusive settlements. Most class actions, moreover, are litigated in a relatively small number of district courts. The judges are sophisticated and experienced and know how to deal with issues of fairness and compensation.

A panelist urged pursuing a distinct rule addressing settlement classes. He noted that the current requirements for certification are clear, perhaps too clear, and are inconsistent with the realities of the settlement process. The defendants, in reality, are waiving their defenses and do not have a trial plan because their objective is a settlement without a trial. Nevertheless, *Amchem* requires them to go through a certification process

that does not make a lot of sense for them. Another panelist did not see a pressing need for a settlement-class rule in anti-trust, securities, and financial services cases, but agreed that it could be helpful in mass-tort cases.

A panelist argued that the primary focus of a proposed settlement-class rule should not be on the class-certification process. He pointed out that settlements in mass-tort cases do not reach the stage of court approval under Rule 23(e)(2) because the plaintiffs cannot meet the certification requirements of Rule 23(a) and (b).

Rather, an amended rule should build on Rule 23(e)(2), which specifies that a settlement must be "fair, reasonable, and adequate." The rule would alter *AmChem's* statement that Rule 23(e) is not a substitute for Rule 23(a) and (b). Instead, the inquiry in a settlement-class case would proceed directly to Rule 23(e), essentially skipping over Rule 23(a) and (b).

The amendment could augment the court's inquiry under Rule 23(e)(2) by requiring it to examine the fairness of compensation among the different members of the class and determine whether variations in individual entitlement are adequately reflected in the proposed settlement. Injuries of class members, for example, may well range from mere fear of injury to permanent disability. It was pointed out that most mass-tort settlements do in fact consider those distinctions and typically provide a grid of different compensation levels for different levels of injury. They also establish some sort of due process arrangements for making the awards.

The recent ALI principles of aggregate litigation deal with certification of a settlement class and provide that a settlement class does not have to meet the standards for a litigation class. They specify the various fairness factors that must be applied to settlements and address second opt-outs and objectors. It was recommended that the civil advisory rules committee review the ALI deliberations to see whether any of the proposals it considered would be suitable for a federal rule change.

It was reported that the ALI also had taken a hard look at cy-près cases. Its principles of aggregate litigation create a presumption that undistributed money is given to the class. If there is a cy-près issue, it is normally because it is difficult to distribute the money, and a recipient or recipients must be selected that mirrors the purpose of the class.

Although just one part of the larger ALI project to address settlement classes, the cy-près portion of the new principles has been cited more often than all other provisions of the principles combined. It has recently been adopted as the law of a federal circuit and cited by two other circuits. A panelist recommended that if the advisory committee decides to proceed with amendments to address settlement classes, cy-près should be an important component of them.

Role of the state attorneys general in class settlements

It was pointed out that the attorneys general of the states review class-action settlements carefully and play a useful and appropriate role. The attorneys general have a sharing arrangement and work well together in reviewing settlements and taking action where appropriate.

Under CAFA a defendant has to give notice of a settlement to the attorneys general of the affected states within 90 days. After the notice, the lawyers may receive calls from a group of attorneys general inquiring into the facts and details of the case and the settlement. They are also often asked to present supporting information to justify their fees. In addition, when a truly abusive settlement is announced, law professors, concerned lawyers who may have had competing cases, as well as the attorneys general, normally come forward to object.

It was agreed that the impact of the efforts of the attorneys general has been to raise the bar generally for negotiating and presenting settlements. Courts, moreover, are very conscious in overseeing how much money is distributed to the class, how soon it is distributed, and how much the lawyers receive in fees.

In light of the effectiveness of the review of settlements by the attorneys general, the panel was asked whether there is still a need for Rule 23(e)'s requirement that the presiding judge review and approve all settlements. The panelists replied that judicial supervision is still appropriate and pointed out that the attorneys general do not intervene in every case.

4. COMPETING CLASSES AND COUNSEL

Duplication of efforts

A panelist pointed to the problems arising when many different counsel file similar class actions, as often occurs under the federal anti-trust laws. Historically, the cases have been coordinated by having the Multidistrict Litigation Panel sweep them into a single proceeding for pretrial purposes. Recently, though, lawyers for both plaintiffs and defendants have been invoking the "first-filed" rule. Thus, if the defendants have no objection to the location of the first-filed case, their lawyers file motions to stay or dismiss all other class actions, and the matter never reaches the MDL panel. Likewise, plaintiffs who file the first case defend their turf by filing motions to stay or dismiss all later cases.

It was reported that law firms filing class-action cases have a significant problem in controlling the work of other, competing lawyers. When a law firm representing a class of plaintiffs reaches the point of resolving the case with the defendants, it is often

confronted with other lawyers seeking fees for having performed unnecessary or counter-productive services. The lawyers were not asked to perform the work for the class, and their intervention may in fact be an impediment to resolution of the case. Defendants should not have to pay for the unnecessary services, nor should fees be diverted from the lawyers who actually handled the important work on the case.

It was pointed out that the Southern District of New York has developed a body of case law specifying that before class counsel is appointed, services that duplicate the work rendered by other counsel are not compensable. And after the appointment of counsel, only services performed at the direction of lead counsel are compensable. That process was said to be working effectively and might be considered for inclusion in an amended rule.

Appointment of Counsel

It was reported that Rule 23(g), part of the 2003 rule amendments, has worked very well and is beneficial for practitioners. It allows the court to appoint interim class counsel after a case has been filed to represent the class up through certification. Then at certification the court decides whom to appoint as class counsel. There is some question, though, as to whether the rule applies when there is just one case.

A panelist said that Rule 23(g) should be applied early and often, for it is essential for the courts to control the appointment of counsel and the payment of attorney fees. In many CAFA cases, for example, a lawyer must negotiate with other lawyers who have filed duplicative cases in order to reach agreement on the hard policy decisions on how best to frame the case to achieve court certification. It leads to a good deal of tactical behavior among counsel that has little to do with the presentation of the case for certification. To make those hard policy decisions, he said, it is important to have only one lead lawyer, or maybe two lawyers, in charge of the case. Better outcomes are reached when a court asserts strong control at the front end of a case, and Rule 23(g) is the perfect vehicle to achieve that control.

A panelist said that when there is an MDL proceeding, which brings many class actions together, some courts forgo Rule 23(g) and rely on their inherent authority and do one of two things. On the one hand, they may instruct the counsel of all the many overlapping cases that they should get together and file a consolidated complaint that is, in effect, an amalgam of all the actions. Usually, as a part of that process, a management team emerges to take responsibility for the new complaint, which essentially initiates a new action. On the other hand, where there are many single-state actions in the MDL proceeding, the cases will not be combined because each state wants to stand on its own. Typically a liaison counsel is appointed by the court to bring all the counsel together. He added that counsel are not usually brought together for fee-sharing purposes, although they generally have made some arrangements on their own.

Federal-State coordination

Judge Rosenthal noted that CAFA has increased the number of federal class actions and affected the nature and extent of federal-state issues. She asked whether the pre-CAFA problems have abated and whether Rule 23 is adequate in dealing with current federal-state coordination issues.

It was agreed that CAFA is working much as its proponents intended. Cases with interstate implications are migrating to the federal courts, while those involving local controversies remain in the state courts.

A panelist said that the remaining coordination problems arise mostly in one state. When there is a multi-state controversy after CAFA, most class actions will be filed in the federal courts. But if a group of plaintiffs live in the same state as the defendant, their class action will be heard in the state courts. He said that it is common to have a national MDL proceeding that consolidates class actions proceedings for all the federal cases, except those in one state. In that state, there will be a parallel class action in the state courts for local residents. Despite the separate proceedings, coordination normally occurs among counsel and the courts.

The panelists noted that the federal MDL judges have become very proficient in handling MDL proceedings and in reaching out to work cooperatively with the state courts in mass-tort cases. They added that state court judges have their own difficult issues to resolve, and coordination with their federal colleagues has been very beneficial.

CONCLUSIONS

Judge Rosenthal summarized the various concerns voiced by the panelists and asked each to pick the single most promising potential rule amendment that would have a beneficial impact on class-action practice.

Front-loading of cases

One panelist cited the front-loading of cases after *Hydrogen Peroxide* as an important issue that needs to be addressed. He suggested drafting a rule to give the parties and the courts more guidance on exactly what information a plaintiff must produce for class certification. The parties, he said, are uncertain about the impact of all the recent cases. They want an early ruling on class certification, but they also want to avoid discovery costs and prefer to continue with some form of bifurcated discovery.

Class definition

Another panelist suggested a rule that revisits the issue of predominance and acknowledges that most cases appropriate for class adjudication in fact have individual issues. To pretend that such is not the case, he said, results in a waste of time and much unproductive behavior. There is, moreover, a difficult intersection among several class-definition issues, including the current ambiguity over issues classes under Rule 23(c)(4), the use of (b)(2)-(b)(3) hybrid classes, certification of settlement-only classes, and handling (b)(3) classes that have some individual issues with bifurcated liability and damages.

Rather than having an "all or nothing" approach to certification based on whether common issues predominate or not, the committee might prepare a rule that gives the courts direction and discretion in class-actions that have individual issues. As a starting point, he suggested examining the case law on issues-classes under Rule 23(c)(4). A wide variety of cases, he said, can be adjudicated very effectively on a class basis. But many of the most important – those where group adjudication will confer the most social benefit – will likely have individual issues as well as common issues. He also suggested developing a rule that is flexible enough to accommodate a lower bar for certification of classes for settlement purposes.

Settlement classes

Another panelist's choice was for a distinct settlement-class rule. It might be similar to the advisory committee's proposed amendments to Rule 23(b)(4) in the 1990s. Regardless of the details of the rule, though, it should contain a specific provision that creates a clear basis for a district court to approve and supervise mass-tort settlements under Rule 23.

NEXT MEETING

The committee will hold its next meeting on Monday and Tuesday, June 11 and 12, 2012, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 1B

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JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
March 13, 2012

****

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.

****

At its March 13, 2012 session, the Judicial Conference of the United States —

Elected to the Board of the Federal Judicial Center for a term of four years: Judge Michael J. Melloy, United States Court of Appeals for the Eighth Circuit, and Judge Catherine C. Blake, United States District Court for the District of Maryland, to succeed Judge Susan H. Black, United States Court of Appeals for the Eleventh Circuit, and Chief Judge Loretta A. Preska, United States District Court for the Southern District of New York.

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by Judge John Walker, Jr., Chair of the Committee on Judicial Conduct and Disability, whose term of service ended January 26, 2012.

COMMITTEE ON THE BUDGET

Approved a 4.0 percent annual budget cap, in lieu of the current 7.5 percent budget cap, for the Defender Services account from fiscal year 2014 through fiscal year 2018, while maintaining the exception for increases in panel attorney rates above inflation.

Approved a 5.2 percent annual budget cap, in lieu of the current 6.6 percent budget cap, for the Court Security account from fiscal year 2014 through fiscal year 2018.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Raised the exemplification fee, item number three under the district court fee schedule, from $18 to $21, and raised the record search fee, item number eight under the Court of Federal Claims fee schedule, from $26 to $30.

Approved a revised schedule for the disposition of records of the Judicial Panel on Multidistrict Litigation.

Approved a revised schedule for the disposition of records of the Court of Federal Claims.

Approved a revision of the schedule for the disposition of criminal case file records in the district courts to permit the disposal of electronic sound recordings (produced in lieu of transcript) of arraignments, pleas, and proceedings with the imposition of sentence when the connected recordings are 20 years old.

Approved a revised schedule for the disposition of case file records in the appellate courts.

Agreed to request that 28 U.S.C. § 105(a) be amended to transfer Ste. Genevieve and Iron Counties from the Eastern Division to the Southeastern Division within the Eastern District of Missouri.

COMMITTEE ON CRIMINAL LAW

Agreed to seek legislation to:

a. Amend 18 U.S.C. § 3142(c) to allow a court to waive the electronic monitoring condition if the court orders a more restrictive condition of pretrial services release;

b. Amend 18 U.S.C. § 3154(1) to allow a court to waive the preparation of the bail report in all cases where the report would have little or no bearing on the court's release decision;

c. Amend 18 U.S.C. § 3155 to eliminate the requirement that the chief probation or pretrial services officer submit an annual report to the Director of the Administrative Office of the U.S. Courts;

d. Amend 18 U.S.C. § 3602 to allow a probation officer appointed in one district to perform services for another district with the consent of the appointing court;

e. Amend 18 U.S.C. § 3664(d)(2) to waive the requirement that a probation officer provide notice to a victim of an offense if a representative of an executive branch agency has already provided such notice; and

f. Amend 18 U.S.C. § 3561(a)(3) to clarify a judge's authority to impose a combined sentence of probation and imprisonment for the same or multiple charges in petty offense cases.

With regard to the use-of-force and other safety-related policies:

a. Amended the use-of-force policy to:

   i. Extend its applicability to probation and pretrial services officer assistants, and

   ii. Authorize officers and officer assistants to use restraints when the use of force has been authorized;

b. Revised the oleoresin capsicum (OC) policy to extend its applicability to probation and pretrial services officer assistants; and

c. Authorized the Director of the Administrative Office to develop a national curriculum of safety and defensive tactics training for probation and pretrial services officer assistants, which will incorporate training on the proper use of OC products and restraints in the performance of official duties.

Authorized revisions to Monograph 111, *The Supervision of Federal Defendants*, and Monograph 112, *Pretrial Services Investigation and Report*, to include guidance on pretrial diversion.

COMMITTEE ON INFORMATION TECHNOLOGY

Adopted a policy that no national funds will be provided to local court units to acquire new telephone systems other than the national internet protocol (IP) telephone system unless the local court unit first submits a detailed justification to its circuit judicial council as to why the national system would be an inadequate solution for that court unit and receives prior approval from the circuit judicial council.

COMMITTEE ON THE JUDICIAL BRANCH

Approved an amendment to section 260.10 of the Travel Regulations for United States Justices and Judges, *Guide to Judiciary Policy*, Vol. 19, Ch. 2, to clarify that a judge can approve his or her own claim for reimbursement of travel expenses, and to state that a court certifying officer must confirm that the judge's travel was for official business, that the mathematical calculations on the voucher are correct, and that the judge's claims for reimbursement are necessary and proper to the travel involved, consistent with the travel regulations, and supported with the receipts and approvals as necessary.

Approved amendments to the Relocation Allowances for United States Justices and Judges, *Guide to Judiciary Policy*, Vol. 19, Ch. 3, to bring them into conformity with changes to the General Services Administration relocation regulations (41 C.F.R. Ch. 302) that took effect in August 2011.

COMMITTEE ON JUDICIAL RESOURCES

Modified its policy on promotion to Judiciary Salary Plan (JSP) grade 12 of the principal secretary to a chief circuit judge to state that the promotion is temporary and that the grade of that secretary will revert to JSP grade 11 at the expiration of the judge's tenure as chief judge or when the secretary leaves that position. This policy also applies to the principal secretary to the chief judge of the Court of International Trade. Any JSP grade 12 secretary who has attained the JSP grade 12 as principal secretary to a chief circuit judge or a chief judge of the Court of International Trade prior to the date of this policy change (March 13, 2012) is not affected by this change.

Approved, for each court or federal public defender organization employee on a regularly scheduled bi-weekly tour of duty of less than or equal to 64 hours, payment of the judiciary's contribution to the employee's Federal Employee Health Benefits premium on a simple prorated basis based on the proportion of the employee's standard tour of duty to that of a full-time, 80-hours-per-pay-period employee, effective the first full pay period of January 2013.

Approved a formula to allocate staff for alternative dispute resolution programs in the district courts, starting in fiscal year 2013, based on 2.46 hours per alternative dispute resolution case and a constant value of 394.09 hours for all alternative dispute resolution programs.

Approved a staffing formula to allocate death penalty law clerks in the district courts, starting in fiscal year 2013, based on a per pending case credit of 77.4 hours for cases that are not stayed as of the end of a statistical year, regardless of age, and a constant value of 691.2 hours provided to each district court meeting a three-case minimum.

Declined to rescind its September 1992 policy that allows for an increase in the grade of the district court clerk in those instances where the grade of the district court clerk would otherwise be lower than the grade of the bankruptcy clerk, the chief probation officer, or the chief pretrial services officer in the same district.

Approved a one-year stabilization period for increases or decreases in court unit executive target grades based on the approved executive grading process.

Approved the discontinuation of non-foreign post differential payments to current and prospective eligible court employees.

Modified its March 1997 policy regarding over-strength official court reporter positions to state the following:

> In the event a judge changes the election of the method of recording court proceedings from official court reporters to electronic sound recording systems, funding for the court reporter will be discontinued 90 days from the date of election to electronic sound recording systems. One additional period of up to 120 days beyond the original 90-day period will be allowed upon certification by the chief judge of the affected court to the circuit judicial council that additional staff resources are necessary.

COMMITTEE ON JUDICIAL SECURITY

Approved the following concerning membership of court security committees –

> A court security committee shall consist of the members set forth below. The chief judge (as chair) may designate a judge to serve as his or her designee, and may adjust the membership as deemed appropriate. The district U.S. marshal (as the principal coordinator) and other members may, with the concurrence of the chair, have a designee attend in their place.
>
> Membership:
>
> (1) chair: chief district judge;
> (2) principal coordinator: district U.S. marshal;
> (3) the chief bankruptcy judge;
> (4) a magistrate judge;
> (5) a court of appeals judge when there is a court of appeals or the chambers of a circuit judge within the district;
> (6) the United States attorney;
> (7) the federal public defender;
> (8) the district clerk of court;
> (9) the bankruptcy clerk of court;
> (10) the chief probation officer;
> (11) the chief pretrial services officer;
> (12) the circuit executive if physically located within the district;
> (13) the bankruptcy administrator or U.S. trustee;
> (14) a representative of the General Services Administration, where appropriate; and
> (15) a government-employee representative of the Federal Protective Service.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Approved recommendations regarding specific magistrate judge positions to (a) increase the salary of a part-time magistrate judge position in the Middle District of Pennsylvania;

and (b) discontinue a part-time magistrate judge position and decrease the salaries of three part-time magistrate judge positions in the District of Wyoming.

Agreed to seek legislation to amend 18 U.S.C. § 3401 to give magistrate judges authority to act on all post-conviction motions in misdemeanor cases where a magistrate judge has imposed a sentence.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved a proposed amendment to Criminal Rule 16, and agreed to transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

COMMITTEE ON SPACE AND FACILITIES

Agreed to amend the *U.S. Courts Design Guide* to eliminate raised access flooring as a mandatory requirement for wire management in all areas of the courthouse, except the courtroom well, where frequent changes to wire management make it cost-effective.

TAB 1C

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Oral Report by the Administrative Office

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

MEMORANDUM

To: Honorable Mark R. Kravitz, Chair, Standing Committee on Rules of Practice and Procedure

From: Honorable David G. Campbell, Chair, Advisory Committee on Federal Rules of Civil Procedure

Date: May 8, 2012

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the University of Michigan Law School in Ann Arbor on March 22 and 23, 2012. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part I of this Report presents for action a proposal to amend Civil Rule 45. The proposal was published in August, 2011. Some modest changes are recommended in light of the public comments and further Subcommittee and Committee deliberations. It is recommended that the revised Rule 45 be recommended to the Judicial Conference for transmission to the Supreme Court for adoption.

Part II presents several matters on the Committee agenda for information and possible discussion. In order, they include preservation of information to respond to future discovery requests, a topic discussed at the January meeting of the Standing Committee; the work of the Subcommittee that is pursuing activities prompted by the conference held at Duke University School of Law in May, 2010; pleading standards; Civil Rule 84 forms; class-action issues; and the gradual accumulation of issues arising from the Style Project as well as similar issues.

I. Rules 45 & 37: Action to Recommend Adoption of Revised Rules 45 & 37

ACTION ITEM: RULE 45

A preliminary draft of proposed amendments to Rule 45 was published for comment in August, 2011. Three public hearings were scheduled, but all were eventually cancelled. Nobody indicated an interest in testifying at either the first or the second, and the two who indicated an interest in testifying at the last hearing decided to submit written comments instead. The Advisory Committee received 25 written comments; a summary of those comments is attached.

After the public comments were in, the Discovery Subcommittee of the Advisory Committee met by conference call to consider them, and based on that discussion suggested some modifications to the proposed amendments. At the Advisory Committee's Spring meeting, those modifications were reviewed, and a few topics were identified for additional consideration. After the Advisory Committee's meeting and review by the Subcommittee, a revised Rule 45 package was circulated to the full Advisory Committee and received unanimous support from the Advisory Committee. The changes recommended to the Rule 45 package since publication are very minor, and will be summarized below. The modified version of the amendment package also includes style changes recommended by the Standing Committee's Style Consultant.

The proposed amendments to Rule 45 result from a multi-year study conducted by the Advisory Committee that began with a literature search and an effort to canvass bar groups to identify issues possibly warranting amendments to the rule. That activity initially produced a list of some 17 specific possible amendments that was winnowed to a much shorter list. Meanwhile, overall concerns about the length and complexity of Rule 45 produced a variety of ideas about ways to simplify the rule, in addition to amendments targeting specific concerns. After much work had been done on these various matters, the Subcommittee convened a mini-conference attended by about two dozen experienced lawyers to review and evaluate the various amendment ideas. Building on that foundation (and with further input from some bar groups), the Advisory Committee eventually decided to adopt the most modest form of rule simplification it had considered and to adopt some but not all of the specific rule amendments that were proposed during its study of the rule. Four specific changes will be made by the proposed amendments.

Simplification: Current Rule 45 creates what the Advisory Committee came to call a "three-ring circus" of challenges for the lawyer seeking to use a subpoena. First, the lawyer would have to choose the right "issuing court," then she would have to ensure that the subpoena was served within that district, or outside of the district but within 100 miles of where performance was required, or within the state if state law allowed, and then she would have to determine where compliance could be required, a project made challenging in part by the scattered provisions bearing on place of compliance found in different provisions of the rule.

The amendment package sought to eliminate this three-ring circus by making the court where the action is pending the issuing court, permitting service throughout the United States (as is currently authorized under Fed. R. Crim. P. 17(e)), and combining all provisions on place of compliance in a new Rule 45(c). New Rule 45(c) preserves the various place-of-compliance provisions of the current rule (except that the reference to state law is eliminated and the "*Vioxx*" issue is addressed as discussed below).

The simplification proposals received broad support in the public commentary, and only one change has been proposed to those amendments. The published proposal permitted the place of compliance for document subpoenas under Rule 45(c)(2)(A) to be any place "reasonably convenient for the person who is commanded to produce." The premise of this provision was that,

particularly with electronically stored information, place of production should not be a problem and should be handled flexibly. But it was noted that Rule 45(d)(2)(B)(i) directs the party that served the subpoena to file a motion to compel compliance in "the district where compliance is required." That could lead to mischief, if the lawyer serving the subpoena designates her office as the place for production and a distant nonparty served with the subpoena objects on some ground. The objecting nonparty should not have to *litigate* in the lawyer's home jurisdiction just because *production* there would be "reasonably convenient," as it might well be. Accordingly, Rule 45(c)(2)(A) was changed to call for production "within 100 miles of where the person [subject to the subpoena] resides, is employed, or regularly transacts business in person." This change should ensure -- as Rule 45(c) is generally designed to ensure -- that if litigation about the subpoena is necessary it will occur at a location convenient for the nonparty.

At the same time, agreement on place of production is a desirable thing, and the Committee Note is therefore modified to recognize that the rule amendments do not limit the ability of parties to make such agreements. We expect that the current practice of parties agreeing to produce electronically stored information by email or by simply sending a CD will continue.

A clarifying amendment to the Committee Note on Rule 45(c) addresses concerns expressed in the comments. One is the risk some would read the amended rule to require a subpoena for all depositions -- even of parties or party officers, directors, or managing agents. The Note has been clarified to remind readers that no subpoena is required for depositions of such witnesses, and that the geographical limitations that apply to subpoenas do not apply when such depositions are simply noticed. Another Committee Note clarification confirms that, when the issuing court has made an order for remote testimony under Rule 43(a), a subpoena may be used to command the distant witness to attend and testify within the geographical limits of Rule 45(c).

Transfer of subpoena-related motions: New Rule 45(c) essentially retains the existing rule requirement that motions to quash or enforce a subpoena should be made in the district where compliance with the subpoena is required, with the result that the "enforcement court" may often be different from the "issuing court."

Existing authority has recognized that some matters are better decided by the issuing court. Rule 26(c)(1), for example, permits a nonparty from whom discovery is sought to seek relief in the court where the action is pending. The Committee Note to the 1970 amendment adding subdivision (c) to Rule 26 also recognized that "[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."

This amendment package adds Rule 45(f), which explicitly authorizes transfer of subpoena-related motions from the enforcement court to the issuing court, including not only motions for a protective order but also motions to enforce the subpoena.

The published draft permitted transfer only upon consent of the nonparty and the parties, or in "exceptional circumstances." After public comment, the Advisory Committee concluded that party consent should not be required; if the person subject to the subpoena consents to transfer then the enforcement court may transfer. The Committee felt that the person whose convenience should be of primary concern is the person subject to the subpoena, and that transfer of a dispute to the court presiding over the action should be authorized whenever that person agrees. The Committee also felt that parties to an action can never justifiably complain when they are required to litigate an issue before the judge presiding over the action, and that requiring their consent to a transfer might in some cases encourage parties to refuse to consent in the hope of getting a different judge to rule on the dispute -- a kind of mid-case forum shopping.

Whether the "exceptional circumstances" standard should be retained when the nonparty witness does not consent was the focus of considerable public comment. Some urged that a more flexible standard be adopted. Others argued that the protection of the nonparty subject to the subpoena should be paramount, and therefore that the "exceptional circumstances" standard should remain when the nonparty does not consent. Eventually the Advisory Committee decided to retain the "exceptional circumstances" standard. The Committee is concerned that a lower standard could result in too-frequent transfers that force nonparties to litigate in distant fora to protect their interests.

The Committee Note has been revised to clarify that the prime concern should be avoiding undue burdens on the local nonparty, and also to identify considerations that might warrant transfer nonetheless, emphasizing that such concerns warrant transfer only if they outweigh the interests of the local nonparty in local resolution of the motion. It also suggests that the judge in the compliance court might consult with the judge in the issuing court, and encourages use of telecommunications methods to minimize the burden on the nonparty when transfer does occur.

Trial subpoenas for distant parties and party officers: There is a distinct split in existing authority about whether a subpoena may command a distant party or party officer to testify at trial. One view is that the geographical limits that apply to other witnesses do not apply to such witnesses. 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 within Louisiana under Rule 45(b)(2)). The alternative view is that the rule sets forth the same geographical limits for all trial witnesses. See *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in Fair Labor Standards Act action could not be compelled to travel long distances from outside the state to attend trial because they were not served with subpoenas within the state as required by Rule 45(b)(2)).

The division of authority resulted from differing interpretations of the 1991 amendments to Rule 45. The Advisory Committee concluded that those amendments were not intended to create the expanded subpoena power recognized in *Vioxx* and its progeny, and decided to restore the original meaning of the rule. The Committee was concerned also that such expanded power could invite tactical use of a subpoena to apply inappropriate pressure to the adverse party. Party officers subject to such subpoenas might often be able to secure protective orders, but the motions would burden the courts and the parties and there might be some *in terrorem* value despite the protective-order route to relief. Moreover, with large organizations it will often be true that the best witnesses are not officers but other employees. To the extent testimony of such party witnesses is important there are alternatives to attending trial. See, e.g., Rule 30(b)(3) (authorizing audiovisual recording of deposition testimony) and 43(a) (permitting the court to order testimony by contemporaneous transmission).

The amendments therefore provide in Rule 45(c)(1) that a subpoena can command any person to testify only within the limits that apply to all witnesses. As noted above, Committee Note language was added to recognize that this provision does not affect existing law on the location for a deposition of a party or party's officer, director, or managing agent, for which a subpoena is not needed.

For purposes of inviting public comment, the Rule 45 publication package included an Appendix adding authority for the court to order testimony at trial by parties or party officers in specified circumstances. The published draft made clear that the Advisory Committee did not propose the addition of such authority. The public comment on this proposal was mixed, and the Advisory Committee did not change its view that this authority should not be added to the rule. The Appendix is therefore not included in this package.

Notice of service of "documents only" subpoena: The 1991 amendments introduced the "documents only" subpoena. The deposition notice requirements of Rule 30 did not apply to such subpoenas. Rule 45(b)(1) was therefore added to require that notice be given of service of such subpoenas. In the restyling of 2007, the rule provision was clarified to direct that notice be provided before service of the subpoena.

As it examined Rule 45 issues, the Committee was repeatedly informed that this notice provision is frequently not obeyed. Parties often obtain documents by subpoena without notifying other parties that the subpoena has been served. The result can be that there are serious problems at or before trial when "surprise" documents emerge and arguments may be made that they should not be admissible or that further discovery is warranted.

The amendment package attempts to solve these problems by moving the existing provision to become a new Rule 45(a)(4) with a heading that calls attention to the requirement -- "Notice to Other Parties Before Service." The relocated provision also slightly modifies the existing provision by directing that a copy of the subpoena be provided along with the notice. That should assist the other parties in knowing what is being sought and determining whether they have objections to production of any of the materials sought or wish to subpoena additional materials.

The effort to call attention to the notice requirement was supported during the public comment period. The Department of Justice raised a concern, however, about the proposal to remove the phrase "before trial" from the current rule. It noted that removal of that phrase could complicate its efforts (and the efforts of other judgment creditors) to locate assets subject to seizure pursuant to judgments. For the Department, those judgments include restitution in favor of crime victims. Giving advance notice in such situations could frustrate enforcement of judgments or make it considerably more cumbersome.

At the same time, it appeared that the value of notice of trial subpoenas (the concern that led to the proposal for removal of the phrase in the first place) was limited or nonexistent because usually any such documents would be listed in the Rule 26(a)(3) disclosures or otherwise identified during pretrial preparations. Indeed, the parties may often cooperate to subpoena needed exhibits for trial.

After considering alternatives, the solution adopted was to restore the phrase "before trial" to the rule, with the clarifying addition of "pretrial" before "inspection of premises" to make clear that the rule does not intrude on the court's authority to order such an inspection during trial without regard to such notice. The Committee Note explanation for removal of "before trial" has been removed.

Another issue that has been raised repeatedly since early in the Advisory Committee's consideration of Rule 45 has been that additional notices should be required as subpoenaed materials are produced, and perhaps also when subpoenas are modified. There have also been suggestions that the rule should require that access be provided to materials produced in response to a subpoena. In particular, it has been noted (and repeated in the public comment period) that a number of states direct that the party serving the subpoena give notice upon receipt of produced materials, and that some states also require access to the materials.

Both the Subcommittee and the Advisory Committee have repeatedly discussed these proposals for additional notice provisions. All agree that cooperation and transparency in relation to subpoenas are desirable. All expect that judges would insist on such behavior in cases in which the parties did not do so without court intervention. But the Subcommittee and the full Committee have repeatedly concluded that adding notice requirements or an access requirement to the rule would not, overall, produce desirable effects.

A staring point is to recognize the reason for relocation of the existing notice requirement -- the frequent failure of lawyers to obey it. The requirement has been in the rule for over 20 years; the amendment is based on the optimistic expectation that relocation and addition of a heading will prompt much broader compliance. It also expands the requirement slightly, by insisting that the notice include the subpoena itself.

The Committee believes that this change will result in all parties being made aware when a subpoena is served -- a marked change from actual current practice -- and that this awareness will enable parties adequately to protect their interests. The Committee is concerned that requiring notice of receipt of documents could create new complications. Production of documents in response to a subpoena often occurs on a "rolling" basis, with documents being produced over time as they are found. Requiring a new notice every time additional documents are received could be burdensome, especially in large document cases, and failure to give notice on one or more occasions of a rolling production would likely spawn satellite litigation on the effect of the missed notice, with parties asking that documents not noticed be excluded from use in the litigation. As one member of the Advisory Committee noted during the Committee's Spring meeting: "Less compliance with more rules breeds satellite litigation." The "gotcha" possibilities of additional requirements can be considerable. Because we believe that clarifying the notice requirement will resolve most of the notice problems presently occurring under Rule 45, we have concluded that additional notice requirements, with their potential problems, should not be included.

The Committee has repeatedly been told that, having received the notice called for by the existing rule, lawyers can take action to guard themselves. They can be persistent in pursuit of information about the fruits of the subpoena. They can seek assistance from the court if needed. The Committee Note recognizes that lawyers can follow up in these manners. In response to these concerns, it has been expanded to note that parties can seek the assistance of the court, either in the scheduling order or otherwise, to obtain access.

Having reconsidered these issues yet again after the public comment period, the Discovery Subcommittee decided not to expand what is in the rule at present. The full Advisory Committee concurred. Accordingly, although the Committee Note has been amplified on these points, the rule provision itself has not been changed from what is currently in Rule 45(b)(1).

"Dirty" Version of Rule 45

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 Before Service.*** If the subpoena commands the production before trial of documents, electronically stored information, or tangible things or the pretrial inspection of premises, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party ~~before the subpoena is served on the person to whom it is directed.~~

(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 the person

(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, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person ~~reasonably convenient for the person who is commanded to produce~~; and

(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 to comply beyond the geographical limits specified in Rule 45(c); ~~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

(iv) 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 Protection.***

(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 under seal 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) **Transferring a Subpoena-Related Motion.** When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if ~~the parties and~~ the person subject to the subpoena consents 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)~~ — and also, after a motion is transferred, 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 it. ~~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

Rule 45 was extensively amended in 1991. The goal of the present amendments is to clarify and simplify the rule. 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 a court's authority to compel 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~~ on consent ~~by agreement~~ of ~~the parties and~~ the person subject to the subpoena or in exceptional circumstances.

Subdivision (a). This subdivision is amended to provide that a subpoena issues from the court where ~~in which~~ the action is pending. Subdivision (a)(3) specifies that an attorney authorized to practice in that court 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 requirement first included in the rule in 1991. Under the 1991 amendments, Rule 45(b)(1) required prior notice of the service of a "documents only" subpoena 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. The amendment moves the notice requirement to a new provision in Rule 45(a) and requires that the notice include a copy of the subpoena. The amendments are intended 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 it or the person served to obtain such access. The rule does not limit the court's authority to order notice of receipt of produced materials or access to them, and the parties may ask that such directions be included in the scheduling order. The party serving the subpoena should in any event 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, removing the complexities prescribed in prior versions.

Subdivision (c). Subdivision (c) is new. It collects the various provisions on where compliance can be required and simplifies 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 Rule 45(c).

Rule 45(c)(1) addresses a subpoena to testify at a trial, hearing, or deposition. Rule 45(c)(1)(A) provides that compliance may be 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, Rule 45(c)(1)(B)(i) provides that compliance may be required anywhere in the state where the person resides, is employed, or regularly conducts business in person. When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1).

Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required to travel more than 100 miles within the state where they reside, are employed, or regularly transact ~~conduct~~ business in person only if they would not, as a result, incur "substantial expense." When travel over 100 miles could impose substantial expense on the witness, the party that served the subpoena may pay that expense and the court can ~~could~~ condition enforcement of the subpoena on such payment.

Because Rule 45(c) directs that compliance may be commanded only as it provides, these amendments resolve a split in interpreting Rule 45's provisions for subpoenaing 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. 213 (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 unless the party or party officer resides, is employed, or regularly transacts ~~conducts~~ business in person in the state.

Depositions of parties, and officers, directors, and managing agents of parties need not involve use of a subpoena. Under Rule 37(d)(1)(A)(i), failure of such a witness whose deposition was properly noticed to appear for the deposition can lead to Rule 37(b) sanctions (including dismissal or default but not contempt) without regard to service of a subpoena and without regard to the geographical limitations on compliance with a subpoena. These amendments do not change that existing law; the courts retain their authority to control the place of party depositions and impose sanctions for failure to appear under Rule 37(b).

For other discovery, Rule 45(c)(2) directs that inspection of premises occur at those premises, and that production of documents, tangible things, and electronically stored information may be commanded to occur at a place within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person ~~reasonably convenient for the person commanded to produce~~. Under the current rule, parties often agree that production, particularly of electronically stored information, be transmitted by electronic means. Such arrangements facilitate discovery, and nothing in these amendments limits the ability of parties to make such arrangements ~~the place of production has not presented difficulties. The provisions on the reasonable place for production are intended to be applied with flexibility, 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~~.

Rule 45(d)(3)(A)(ii) directs the court to quash any subpoena that purports to compel compliance beyond the geographical limits specified in Rule 45(c).

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.

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 that court 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).

But transfer to the court where the action is pending is sometimes warranted. If ~~the parties and~~ the person subject to the subpoena consents to transfer, Rule 45(f) provides that the court where compliance is required may do so.

In the absence of consent, the court may transfer in exceptional circumstances. The rule contemplates that s~~S~~uch circumstances will be truly rare, and the proponent of transfer bears the burden of showing that they are presented. The prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions. In some circumstances, however, transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts. Transfer is appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion. Judges in compliance districts may find it helpful to consult with the judge in the issuing court presiding over the underlying case while addressing subpoena-related motions.

~~A precise definition of "exceptional circumstances" authorizing transfer is not feasible. Generally, if the dispute about the subpoena is focused on issues involved in the underlying action — for example, if these issues have already been presented to the issuing court or bear 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. If, on the other hand, the dispute is focused on the burden or expense on the local nonparty, transfer should not occur. The rule contemplates that transfers will be truly rare events.~~

If the motion is transferred, judges are encouraged to permit telecommunications methods to ~~can~~ minimize the burden a transfer imposes on nonparties, if it is 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 ~~it~~ is required, the rule provides authority for retransfer for enforcement. Although changed circumstances may prompt a modification of such an order, it is not expected that the compliance court will reexamine the resolution of the underlying motion.

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 the issuing court to transfer its order 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.

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) providing 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.

"Clean" Version of Rule 45

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 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) and (e).

(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 to permit inspection, copying, testing, or sampling of the materials.

(2) ***Issuing Court.*** A subpoena must issue from the court where the action is pending.

(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.

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

(b) Service.

(1) ***By Whom and How; Tendering Fees.*** 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.

(2) ***Service in the United States.*** A subpoena may be served at any place within the United States.

(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 the person
(i) is a party or a party's officer; or
(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:
(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
(B) inspection of premises at the premises to be inspected.

(d) 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 court for the district where compliance is required 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 court for the district where compliance is required 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 court for the district where compliance is required must quash or modify a subpoena that:
(i) fails to allow a reasonable time to comply;
(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
(iv) subjects a person to undue burden.
(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required 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.

(C) *Specifying Conditions as an Alternative*. In the circumstances described in Rule 45(d)(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) 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 Protection.***

(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 under seal to the court for the district where compliance is required for a determination of

the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Transferring a Subpoena-Related Motion. When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents 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.

(g) Contempt. The court for the district where compliance is required — and also, after a motion is transferred, 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 it.

Committee Note

Rule 45 was extensively amended in 1991. The goal of the present amendments is to clarify and simplify the rule. 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 a court's authority to compel 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 on consent of the person subject to the subpoena or in exceptional circumstances.

Subdivision (a). This subdivision is amended to provide that a subpoena issues from the court where the action is pending. Subdivision (a)(3) specifies that an attorney authorized to practice in that court 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 requirement first included in the rule in 1991. Under the 1991 amendments, Rule 45(b)(1) required prior notice of the service of a "documents only" subpoena 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. The amendment moves the notice requirement to a new provision in Rule 45(a) and requires that the notice include a copy of the subpoena. The amendments are intended to achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials.

Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving it or the person served to obtain such access. The rule does not limit the court's authority to order notice of receipt of produced materials or access to them, and the parties may ask that such directions be included in the scheduling order. The party serving the subpoena should in any event 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, removing the complexities prescribed in prior versions.

Subdivision (c). Subdivision (c) is new. It collects the various provisions on where compliance can be required and simplifies 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 Rule 45(c).

Rule 45(c)(1) addresses a subpoena to testify at a trial, hearing, or deposition. Rule 45(c)(1)(A) provides that compliance may be 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, Rule 45(c)(1)(B)(i) provides that compliance may be required anywhere in the state where the person resides, is employed, or regularly conducts business in person. When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1).

Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required to travel more than 100 miles within the state where they reside, are employed, or regularly transact business in person only if they would not, as a result, incur "substantial expense." When travel over 100 miles could impose substantial expense on the witness, the party that served the subpoena may pay that expense and the court can condition enforcement of the subpoena on such payment.

Because Rule 45(c) directs that compliance may be commanded only as it provides, these amendments resolve a split in interpreting Rule 45's provisions for subpoenaing 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. 213 (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 unless the party or party officer resides, is employed, or regularly transacts business in person in the state.

Depositions of parties, and officers, directors, and managing agents of parties need not involve use of a subpoena. Under Rule 37(d)(1)(A)(i), failure of such a witness whose deposition was properly noticed to appear for the deposition can lead to Rule 37(b) sanctions (including dismissal or default but not contempt) without regard to service of a subpoena and without regard to the geographical limitations on compliance with a subpoena. These amendments do not change that existing law; the courts retain their authority to control the place of party depositions and impose sanctions for failure to appear under Rule 37(b).

For other discovery, Rule 45(c)(2) directs that inspection of premises occur at those premises, and that production of documents, tangible things, and electronically stored information may be commanded to occur at a place within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. Under the current rule, parties often agree that production, particularly of electronically stored information, be transmitted by electronic means. Such arrangements facilitate discovery, and nothing in these amendments limits the ability of parties to make such arrangements.

Rule 45(d)(3)(A)(ii) directs the court to quash any subpoena that purports to compel compliance beyond the geographical limits specified in Rule 45(c).

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.

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 that court 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). But transfer to the court where the action is pending is sometimes warranted. If the person subject to the subpoena consents to transfer, Rule 45(f) provides that the court where compliance is required may do so.

In the absence of consent, the court may transfer in exceptional circumstances. The rule contemplates that such circumstances will be truly rare, and the proponent of transfer bears the burden of showing that they are presented. The prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions. In some circumstances, however, transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts. Transfer is appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion. Judges in compliance districts may find it helpful to consult with the judge in the issuing court presiding over the underlying case while addressing subpoena-related motions.

If the motion is transferred, judges are encouraged to permit telecommunications methods to minimize the burden a transfer imposes on nonparties, if it is 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. Although changed circumstances may prompt a modification of such an order, it is not expected that the compliance court will reexamine the resolution of the underlying motion.

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 the issuing court to transfer its order 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.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

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(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) providing 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.

GAP REPORT

As described in the Report, the published preliminary draft was modified in several ways after the public comment period. The words "before trial"

were restored to the notice provision that was moved to new Rule 45(a)(4). The place of compliance in new Rule 45(c)(2)(A) was changed to a place "within 100 miles of where the person resides, is employed, or regularly conducts business." In new Rule 45(f), the party consent feature was removed, meaning consent of the person subject to the subpoena is sufficient to permit transfer to the issuing court. In addition, style changes were made after consultation with the Standing Committee's Style Consultant. In the Committee Note, clarifications were made in response to points raised during the public comment period.

Summary of comments on Rule 45 amendments, 2011-12

Overall simplification

[Note that the Invitation for Public Comment specifically requested comments "on whether the efforts at simplification are successful, and whether further simplification of the rule might properly be considered."]

Jody Smith, Tyler Laughinghouse, Jon Burtard, Sabina Thaler (11-CV-001) (these commenters prepared their comments as part of a Federal Civil Litigation course at Washington & Lee Law School, seemingly before the actual publication of the preliminary draft of proposed amendments): The decision not to rely on cross-references to provisions in Rules 26-37 is wise, as is the decision not to remove details from Rule 45 and rely instead on judicial discretion. Removing the "three-ring circus" elements of the current rule is desirable to take out a source of complexity and confusion. But it may be that no change is really needed at all. Attorneys with experience using Rule 45 do not seem to have encountered difficulty employing it. Because nonlawyers served with a subpoena are likely to enlist the services of an attorney, making the rule understandable to the lay reader is a low priority. In particular, the removal of the mandatory quash directive in current Rule 45(c)(3)(ii) would not be desirable.

Michael A. Roddy (11-CV-006) (Executive Officer of the Superior Court of California, County of San Diego): The amendment to Rule 45 changing the "issuing court" from the court located where the nonparty witness is found to the court where the action is pending could impose substantial costs on the California judicial branch. The Superior Court receives hundreds of subpoenas every year. It cannot afford the attorney fees to hire lawyers around the country to address these subpoenas. This court therefore requests that the rule be modified to exempt state courts expressly, based on principles of sovereign immunity, comity, and a court's inherent power to control its own records. [Note: This amendment was meant not to alter the place where any litigation about the enforcement of a subpoena should occur. See proposed Rule 45(c).]

N.Y. State Bar Ass'n Commercial & Fed. Litigation Section (11-CV-010): We applaud the simplification of the rule. Consolidating all aspects of the duty to comply in one place -- new Rule 45(c) -- is a welcome change. We also support the change to make the court where the underlying action is pending the "issuing court." "Many lawyers do not believe it makes intuitive sense for the Federal Rules to require a subpoena to be issued by the court in the jurisdiction in which compliance will occur." The amendment eliminates this confusion.

Robert L. Byman (11-CV-013) (submitting copy of article from National Law Journal): "The proposed amendments are excellent. They greatly eliminate confusion and simplify issues on the issuance, service and compliance with subpoenas."

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): "The proposed amendment's great attribute is its simplicity. The drafters have done a wonderful job of simplifying Rule 45's confusing language and converting its impenetrable structure into something that can now be readily understood."

Litigation Section, L.A. County Bar Ass'n (11-CV-016): Although we applaud the effort to simplify the rule, we think that making the "issuing court" the court in which the action is pending is a mistake for jurisdictional reasons. A subpoena is an exercise of the jurisdiction of the issuing court. Particularly in diversity cases, there may be a question about whether that court can exercise jurisdiction over a witness who does not have minimum contacts with the state in which the court sits. As a consequence,

the enforcing court might have to quash the subpoena on the ground the issuing court did not have jurisdiction to summon this witness to testify, even though the testimony will be near the witness's home. The benefits of having all subpoenas issue from the court presiding over the underlying action are minimal, and the potential jurisdictional issues make that change unwarranted.

Federal Magistrate Judges Association (11-CV-018): The Association generally endorses the simplification. But it is concerned that the amended rule uses similar but not identical terms in a number of places, and that these terms should either be replaced by a single term if they are meant to be identical or defined with clarity if they are not meant to be identical. Thus, proposed Rule 45(c)(1)(B)(ii) speaks of "substantial expense," but proposed 45(d)(3)(A)(iv) refers to "undue burden." Rule 45(d)(1), meanwhile, speaks of "undue burden or expense," and 45(d)(2)(B)(ii) protects a nonparty from "significant expense." We are uncertain what the difference is supposed to be between "substantial" and "significant" expense. More generally, the use of different terms in different places may invite disputes about whether they are really different standards. If they are different, the Note should explain how they are to be differentiated. If they are not different, the same term should be used throughout. [Note: Most of these terms are holdovers from the current rule. Thus, current 45(c)(1) refers to "undue burden or expense," 45(c)(2)(B)(ii) refers to "significant expense," 45(c)(3)(A)(iv) refers to "undue burden," and 45(c)(3)(B)(iii) refers to "substantial expense." No submissions have indicated that this divergence in terminology has caused problems in the past.]

More important, the rule does not say who bears the burden of establishing whether "substantial expense" has been established. The rule suggests that the issuing party must make the showing, but the subpoena target would be better positioned to do so. [Note: Current 45(c)(3)(B)(iii) permits the court to quash the subpoena if it requires "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." Proposed 45(c)(1)(B)(ii) permits a subpoenas to require a person to attend trial within the state where he resides, is employed, or regularly transacts business in person if "the person * * * would not incur substantial expense." Proposed 45(d)(3) then requires that the subpoena be quashed if it requires a person "to comply beyond the geographical limits specified in Rule 45(c)."]

U.S. Equal Opportunity Commission (11-CV-020): EEOC believes the amended rule is better organized and easier to understand than the current rule.

U.S. Department of Justice (11-CV-021): We support amending the rule to make the forum court the "issuing court" for subpoenas and providing nationwide service of subpoenas from that court. We believe that the amendment provides sufficient protections for nonparty witnesses.

Managing Attorneys' and Clerks' Association (11-CV-022): Proposed Rule 45(c)(2)'s "reasonably convenient" standard for where a subpoena can compel production of documents would afford undue discretion to the party serving the subpoena. It could lead to forum shopping because it would determine which court would hear disputes about the subpoena. In a significant number of cases, issuing parties and subpoenaed persons would differ as to where it is reasonably convenient to produce documents or data. We have not found that the current rule produces problems, and we therefore urge that proposed (c)(2) be dropped and (c)(1) be used for place of production. In addition, Rule 45 should allow litigants the same flexibility in selecting where a motion to quash or modify is heard like the flexibility permitted by Rule 30(d)(3)(A), which permits a motion in the court where the underlying action is pending or in the court where the deposition is being taken.

Defense Research Institute (11-CV-023): DRI supports the clarification that the court issuing subpoenas is the court where the action is pending regardless of the location of compliance with the subpoena. We also agree

that disputes relating to subpoenas should be resolved by the court where the compliance is sought.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025: "We applaud the changes reflected in the proposed amendments." The group does, however, have some uneasiness about a number of specifics.

Notice of service of subpoena

[Note that the Invitation for Public Comment specifically requested comments on "whether additional notices should be required beyond the one specified in Rule 45(a)(4)."]

Jody Smith, Tyler Laughinghouse, Jon Burtard, Sabina Thaler (11-CV-001) (these commenters prepared their comments as part of a Federal Civil Litigation course at Washington & Lee Law School, seemingly before the actual publication of the preliminary draft of proposed amendments): We agree that notice is important because it provides for greater transparency in the justice system, but are concerned that moving the existing provision will do little to cure notice problems. It is not clear that failures to give required notice in the past resulted from ignorance of the notice requirement; moving the provision will only solve the problem if it was a problem of awareness. The revised provision also lacks sanctions for failure to give the required notice; without sanctions the change may not be effective. The actual reason for noncompliance with the current rule's notice requirement should be determined before a solution is adopted.

Kenneth A. Lazarus (11-CV-005) (on behalf of American Medical Ass'n and several related physician associations): We recognize that the proposed notice provision -- limited to "documents only" subpoenas -- reflects current law, but feel that it should not. When a subpoena is served on a doctor, the physician-patient privilege and patient privacy rights belong to the patient. Those rights apply with equal force to document productions and deposition testimony. Normally, the patient or the attending physician or hospital is a party to the litigation, and their interests are fairly met only if they are put on notice of a possible threat to their rights due to the subpoena. [Note that Rule 30 appears to require notice to all parties for a deposition, whether or not attendance of the witness is obtained by subpoena, and whether or not the witness is directed to bring along documents. Nonparty document discovery -- first authorized in the absence of a deposition subpoena by the 1991 amendments to Rule 45 -- did not have a parallel notice requirement.]

Wayne E. Uhl (11-CV-007): The requirement that notice be given to other parties "before" the subpoena is served is vague. It could be read to mean one day before, or less. As service is complete upon mailing, the rule can be complied with by mailing a copy to the other parties, and then serving the nonparty witness the same day, or the following day. If the purpose of the notice is to give the other parties a meaningful opportunity to object, then a specific period of time should be built in, plus the opportunity for the other parties to waive that period. I have not read the cases that triggered the 2007 amendment from "prior" to "before," but I can tell you that this vagueness is already causing problems in practice. In Indiana, the state-court rules have long required a 15-day notice period before service of a nonparty subpoena. This time period is waivable, and in most cases is waived. The Indiana rule also requires the requesting party to produce copies of all the documents to the other parties. Although this provision has its benefits, it may not be appropriate for the federal rule.

Hon. Michael M. Baylson (11-CV-008) (This comment is in the form of a skit that was presented at the Univ. of Penn. Inn of Court): Under Pennsylvania state-court practice, before serving a nonparty subpoena a party must give 20 days' notice to the other parties, who have an opportunity to object. The proposed amendment is silent on how much advance notice must be given. Under the Pennsylvania rule, a party is required to give notice to the other parties that it has received documents, and offer to make them copies at their expense. Under the amended rule, could a party that serves a subpoena request that the nonparty recipient refuse to provide the same documents to the other parties unless they also serve subpoenas?

Lawyers for Civil Justice (11-CV-009): LCJ agrees with the addition of new Rule 45(a)(4). This relocation will achieve the Committee's goal of providing other parties with the opportunity to object to a subpoena. No

further notices should be required beyond the one specified in proposed Rule 45(a)(4).

N.Y. State Bar Ass'n Commercial & Fed. Litigation Section (11-CV-010): We support the inclusion in the notice provision of a requirement to provide a copy of the subpoena. That is not burdensome, and would keep the parties apprised of what is being sought. The current rule and proposed amendment call for notice "before" a subpoena is served. We think this should be changed to require notice "simultaneous" with service. The parties would then have the same opportunity to challenge the subpoena, but this change would limit the ability of a party to facilitate evasion of service by the person subpoenaed. The rule should also be enhanced to require that the party issuing the subpoena notify the other parties if it negotiates a modification of the subpoena.

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): The ABA Section of Litigation proposed that the amendment require additionally that the party serving the subpoena give notice of any modification of the subpoena and make available the documents or other material produced in response to the subpoena. We agree that these additional requirements should be included. At least the requirement of making the produced materials available should be included in the rule; presently that concept is only in the Committee Note. The burden of providing that notice of the production should be placed on the party that obtained the documents. Of the 35 states that authorize document subpoenas, 17 have a requirement along the lines suggested, and 18 do not require a notice beyond what is in current Rule 45(b)(1) and in the new 45(a)(4).

Steven M. Puiszis (11-CV-015): The clarification about the notice requirement is a welcome improvement of the existing rule. It will enhance a party's ability to object to a subpoena or to seek additional information from the subpoenaed person. But the amendment would allow a party to issue a subpoena immediately after issuing the required notice. The Committee should consider a minimum time requirement between issuance of the notice to all parties and when the subpoena may be served on the person directed to comply. This timing requirement would enable the parties to determine whether to challenge the subpoena before it is served. The Committee should also consider requiring additional notices in two circumstances -- when an objection is made and when an agreement is made to modify the subpoena. Although good practice should lead lawyers to do this anyway, experience shows that it does not always work that way. Requiring such notice is not burdensome. Giving the notice will enable the other parties to join in the objection or in efforts to resolve the objection prior to the need to apply to the court for relief. Similarly, giving notice of modifications of the subpoena would provide other interested parties the opportunity to determine if they will accept the revised scope of the subpoena or seek additional documents without the need for issuing an additional subpoena.

Litigation Section, L.A. County Bar Ass'n (11-CV-016): Additional notices should be required. The failure to inform other parties that production has occurred is a common source of disagreement, and the failure of the issuing party to share the fruits of the subpoena often gives rise to unnecessary discovery disputes. The rules should clearly specify that the party who issues a subpoena should be required to notify the other parties when a production has been made and to make available copies of the material produced. The issuing party should also be required to notify the other parties of any agreement to narrow the subpoena or otherwise alter its scope.

U.S. Equal Opportunity Commission (11-CV-020): EEOC believes the revised notice provision in 45(a)(4) should also require notice of modifications to the subpoena and notice of initial receipt of any materials produced. Contrary to the concerns reflected in the minutes of the Advisory Committee's April, 2011, meeting, we view these as very slight burdens on the party serving the subpoena, particularly when compared to the burdens on the other parties of making repeated requests for such information. Requiring

notice of only the initial production eliminates any concern over how to apply the requirement to "rolling production," while alerting other parties to the fact that production is occurring. The statement in the Committee Note about giving access to produced materials will do little,in our view, to alleviate what we believe will be the major problem faced by the nonserving parties -- the failure of the serving party to respond to inquiries regarding whether production has occurred. There is no apparent remedy for such nonresponsiveness, but a requirement in the rule that notice of initial production be provided could easily be enforced. We suggest that the requirement could be that notice be given "__ calendar days from first receipt of production [modification of the subpoena]."

U.S. Department of Justice (11-CV-021): We generally support the amendment to make the notice requirement more prominent. We are troubled, however, by the removal of the words "before trial" that appear in the current rule. The removal of those words seems to be designed to make the notice provision apply to trial subpoenas. But we are concerned that the removal of "before trial" could interfere with using a subpoena for post-judgment discovery under Rule 69(a)(2). We don't doubt that there is a value to giving notice of trial subpoenas. But in the post-judgment context any such concerns would be outweighed by the potential for dissipation of assets by the judgment debtor who receives notice of the discovery. Accordingly, we suggest that the words "before judgment" should be inserted into the revised rule, and a brief explanation should be provided in the Committee Note to confirm that prior notice need not be given for post-judgment subpoenas. The Department has considered whether there should be a further notice requirement -- for modification of the subpoena's terms or other matters. The Department is not convinced that a need has been shown for any such requirements.

Managing Attorneys' and Clerks' Association (11-CV-022): The timing of the notice should be changed so notice need not be given until after service of the subpoena. We suggest that it be within three days after service, or at least one day prior to the date of production. In addition, the issuing party should be required to give a second notice within five days after records are produced. Notice before service of the subpoena is not necessary, and can be a problem when time is of the essence for service of the subpoena. There is, also, the risk that a friendly party will give the person to be subpoenaed a tip and cause service to become difficult. That problem should be avoided. Another problem is that the other parties have difficulties gaining access to documents after production. Several years ago New York Civil Practice & Rules § 3120(3) was adopted, requiring that the subpoenaing party to notify the other parties within five days of compliance that the subpoenaed records are available for inspection and copying. This has produced cost savings and dispelled much confusion.

Defense Research Institute (11-CV-023): DRI supports that amendment to the rule to provide for notice to other parties, which will allow an opportunity to object to the subpoena.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025: Before publication, the ABA Section of Litigation leadership urged that additional notices and a rule provision requiring access to produced materials be included. We continue to believe that such provisions would improve the rule. This is our main concern about the proposed amendments. We have four basic concerns:

> Notice before service: We think that there should be a minimum period of seven days' notice before service, because saying only that the notice must be "before" service does not allow a meaningful amount of time to seek protection. And there are litigants who use subpoenas to harass customers or suppliers of adverse parties. Because there could be circumstances in which there is a "demonstrable" risk that the subpoena recipient will evade service or destroy documents, we also propose that in "exceptional circumstances" a party be allowed to serve a subpoena before giving notice. The initiating party would not have to

seek a court ruling in advance of such expedited service, but it would have to be prepared to prove later that truly "exceptional circumstances" existed to justify lack of notice.

Notice of objections and modifications: In practice, parties notified that another party has served a subpoena do not burden the nonparties with identical or similar subpoenas. But that behavior can be frustrated when the party that issued the subpoena, perhaps in response to objections by the nonparty, changes the scope, return date or other terms of the subpoena without telling the other parties. We proposed that the issuing party be required to send an email notification of all such changes.

Notice of receipt and opportunity to inspect: The Committee Note properly says that best practice is to allow inspection, but our experience is that a significant portion of the bar does not always adhere to this best practice. One of us recently confronted an opponent who challenged our member to show where in Rule 45 there was a requirement to provide access to the produced materials. Many states (such as Pennsylvania and New Jersey) require explicitly that such access be granted. The federal rule should also. We note that the S.D.N.Y. has recently adopted a provision for complex cases saying that "the party responsible for issuing and serving the subpoena shall promptly produce [materials so obtained] to, or make them available for inspection and copying by, all parties to the action." We do not see how spelling out these requirements in the rule will cause more problems.

Use of e-filing: Because e-filing is now the rule rather than the exception, we suggest that it can be used to achieve several of the goals mentioned above. All notices could be delivered by e-filing, and the parties would thereby be put on an even playing field.

Overall: If our proposals were accepted, they would result in a revised rule provision somewhat as follows:

If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises:

(A) a copy of the subpoena must be served on each party seven days before the subpoena is served on the person to whom it is directed, except in exceptional circumstances;

(B) reasonable notice must be given to each party of any modifications of the subpoena, including any new date and time of inspection or production; and

(C) reasonable notice must be given to each party of the receipt of documents, electronically stored information, or tangible things,and such material must be made available to each party for inspection and copying in a timely manner.

Transfer

[Note that the Invitation for Public Comment specifically requested comments on whether the proposed standard for transfer ("exceptional circumstances") is too confining, and also whether party consent should be required, or only the consent of the person subject to the subpoena.]

Jody Smith, Tyler Laughinghouse, Jon Burtard, Sabina Thaler (11-CV-001) (these commenters prepared their comments as part of a Federal Civil Litigation course at Washington & Lee Law School, seemingly before the actual publication of the preliminary draft of proposed amendments): Although the Committee should research further the question of pro hac vice admission and potential jurisdictional issues, the transfer proposal strikes an appropriate balance between safeguarding burdensome discovery requests and ensuring efficient and just resolution of the merits of the underlying suit. Protection of the interests of nonparties served with subpoenas is important, but courts should be able to guard against overburdening them.

Hon. Bernard Zimmerman (N.D. Cal.) (11-CV-004): Judge Zimmerman has transferred subpoena-enforcement motions to the court presiding over the underlying action on a number of occasions. From his experience, transfer is a valuable tool. The requirement of "exceptional circumstances" to justify such a transfer may not provide the enforcement judge with sufficient flexibility. Objections to subpoenas usually fall into one of two broad categories. One category is objections that come principally from the witness. These issues are best handled in the compliance district because it would generally be inconvenient and expensive for the witness to address these issues in the litigation district. Another category is objections which come from one of the parties, not from the witness. One common objection is lack of relevance. Another is that the subpoena is inconsistent with, or even violates, an order issued by the litigation court. "In my judgment, such objections should be, for the most part, transferred to the litigation court. While it is true that the compliance court can make its own determination of what is relevant or whether the subpoena violates the litigation court's rulings, those determinations can more expeditiously be made by the litigation court. And the possibility of inconsistent rulings would be eliminated. * * * Since in my experience appropriate enforcement motions should be regularly transferred to the litigation district, I believe that a good cause standard would work better than an 'exceptional circumstances' standard."

Kenneth A. Lazarus (11-CV-005) (on behalf of American Medical Ass'n and several related physician associations): We see no need to alter Rule 45's current provisions regarding the "issuing court." We urge the Committee to give even greater deference to the needs of nonparty witnesses. In the majority of cases, physicians in receipt of a subpoena would much prefer to protect their interests and the interests of others whom they are duty-bound to protect in the district in which they reside and practice. Therefore, the preference of the nonparty subject to the subpoena should be respected; transfer should only occur when that person consents. If transfer is permitted without the consent of the nonparty recipient, the rule should provide that it may occur only in exceptional circumstances and where transfer will not result in any substantial inconvenience to the nonparty recipient.

Hon. Michael M. Baylson (11-CV-008): Judge Baylson is concerned that proposed Rule 45(f) allows "transfer" of an "order," and is concerned that this is a very novel concept that may need more discussion.

Lawyers for Civil Justice (11-CV-009): LCJ supports the "exceptional circumstances" standard for transfer. It agrees that in certain extraordinary situations Rule 45 should allow a subpoena dispute to be transferred, such as when the decision of to enforce the subpoena would go to the merits of the case or would be case dispositive. But such transfers should be rare.

N.Y. State Bar Ass'n Commercial & Fed. Litigation Section (11-CV-010): We support the addition of authority to transfer, but would change the standard because the "exceptional circumstances" standard is too strict. The examples mentioned in the Committee Note ("if these issues have already been presented to the issuing court or bear 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") are not exceptional. A better standard would be "good cause," and we recommend modifying the standard to "good cause." In addition, and in keeping with concern for the interests of the person subject to the subpoena, we recommend that transfer be permitted on request of that person, provided that notice is given to all parties prior to transfer.

George A. Davidson, Esq. (11-CV-011): It would be a serious mistake to limit transfer to "exceptional circumstances" (as the proposed rule provision says) or to ensure that transfers are "truly rare" (as the Committee Note says). Transfer should be frequent. The court in which the action is pending is in much the better position to determine the merits of a compliance motion. Even if the focus of the subpoena-related motion is on the burdens the proposed discovery would impose on the nonparty, that judgment would best be made by the judge presiding over the underlying action. Burden is always relative; the judge presiding over the underlying case is best situated to determine whether the information sought has value to the case sufficient to justify that burden. The burden on the nonparty witness of resolution of the subpoena-related motion in the issuing court should not be great due to the ease of electronic communications. Accordingly, the standard should be that transfer should be allowed if it would promote efficiency and not unduly prejudice the witness, not only in exceptional circumstances.

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): We believe that consent of the nonparty subject to the subpoena should suffice to support transfer and that, absent such consent, transfer should occur only in "exceptional circumstances," as provided in proposed Rule 45(f). The nonparty is the one most affected by enforcement of the subpoena. If that nonparty consents to transfer, the compliance district court should have broad discretion to make the transfer. The "exceptional circumstances" language should remain for situations in which the nonparty does not consent to the transfer; in those circumstances, the nonparty's interests should be respected unless there are exceptional circumstances that nevertheless support a transfer.

Steven M. Puiszis (11-CV-015): The proposed standard sets the appropriate threshold in light of the goal of reducing the burdens of Rule 45 on nonparties. It should be a rare case in which a subpoena-related motion is transferred over the objection of the party subject to the subpoena. The exceptional circumstances standard is not overly restrictive and the examples provided by the Committee in the Note are illustrative of how the standard should be applied in practice.

Litigation Section, L.A. County Bar Ass'n (11-CV-016): The transfer standard should be changed to make transfer easier. Specifically, the consent of the parties should not be required; so long as the person subject to the subpoena consents to transfer, that should suffice. In addition, the "exceptional circumstances" standard in the absence of such consent to transfer is too limiting; we believe "good cause" should be used. There are many common circumstances in which the court handling the underlying case will be in the best position to rule on a subpoena-related motion, and the judge in the enforcement forum will often prefer to have the judge familiar with the case make the ruling. This may even be true if there is objection that the subpoena is unduly burdensome, for that requires that court to weigh the burden against the likely importance of the information sought to the case. The "exceptional circumstances" standard would prevent transfer in these common circumstances, and that is too narrow.

Federal Magistrate Judges Association (11-CV-018): The Association believes strongly that the decision whether to transfer should not be hobbled by the "exceptional circumstances" standard. "In fact, the FMJA believes that transfer of such disputes should be the preferred practice." The requirement of party consent to permit a transfer is not appropriate. Neither party should have a veto power on this subject. Having that power will lead to forum shopping by a party unhappy with the previous rulings of the issuing court. Indeed, the Association would not even give the person subject to the subpoena a veto power, although that person's concerns clearly deserve substantial respect. In most cases, a transfer will significantly advance the just and efficient resolution of the dispute. Accordingly, the transfer standard should invoke the court's discretion and direct attention to the interests of the person subpoenaed and the interests of justice. The Note can then elaborate on the importance of guarding against imposition on the person subject to the subpoena, but also recognize that electronic communications are likely to minimize the burdens resulting from a transfer.

State Bar of California Committee on Federal Courts (11-CV-019): We agree with the Committee Note's conclusion that "exceptional circumstances" cannot be defined precisely. But we believe that it would benefit from further elucidation in the Note. In particular, we believe a nonparty's close relationship with a party should be identified in the Note as a factor supporting transfer. For example, if a nonparty is a consultant or employee of a party, this relationship should favor transfer. In contrast, the absence of a relationship between the nonparty and any party should weigh against transfer.

We are also concerned that although proposed Rule 45(f) says that an attorney authorized to practice in the compliance court may file papers and appear in the issuing court after transfer, nothing says that the attorney who served the subpoena can appear in the compliance court for purpose of a subpoena-related motion. Our committee takes no position on this issue, but believes that it may warrant further study. [Note: Although current Rule 45(a)(3) says an attorney may issue and sign a subpoena as an officer of the court for the district where the discovery is to be done, it does not speak directly to the question whether that attorney is authorized to appear and argue subpoena-related motions in that court. Proposed 45(a)(3) says that an attorney may issue and sign a subpoena if authorized to practice in the issuing court. It does not say that the attorney does so "as an officer of" that court or another court.]

U.S. Equal Opportunity Commission (11-CV-020): We believe that the consent of the person subpoenaed should be sufficient to permit transfer without any additional showing. Although there may be situations in which a party has close connections with the district in which compliance is required, generally local interests will relate only to the person subpoenaed. And a party's connection with the area where compliance is required is a fortuitous circumstance that shouldn't be a factor in the determination of which court should decide a matter that would be decided by the court presiding over the action but for the fortuity of where the person subpoenaed is located. We believe that the "exceptional circumstances" standard should be replaced by considerations like the prior draft -- "the convenience of the person subject to the subpoena, the interest of the parties, and the interests of effective case management." The case-management factor should be the primary consideration. The parties by definition have a connection to the issuing court, and the party seeking the transfer can be required to compensate the person subpoenaed for any additional expense incurred. The EEOC often finds, for example, that the same issues arise in various districts due to subpoenas. The "exceptional circumstances" standard is too limiting if the phrase is used in the same way it is used where it appears in other rules. For example, Rule 256(b)(4)(D) says that "exceptional circumstances" must be shown to justify production of work done by a nontestifying expert, and in our experience that is almost never granted. We fear that the same will be likely to result if that phrase is used in this rule -- transfer will almost never be granted except upon consent.

U.S. Department of Justice (11-CV-021): We support the addition of new Rule 45(f) to provide greater protections to those persons or entities who might be subject to burdensome subpoenas. We believe that the transfer standard should look to consent of the nonparty subject to the subpoena or "exceptional circumstances." But the consent of the parties should not be required to permit transfer if the nonparty consents. Permitting any one of the parties to "veto" what would otherwise be a consensual transfer could cause delay and frustrate the purpose of the amendment. The Department also endorses the provision authorizing the attorney for the person subject to the subpoena to appear in the issuing court after transfer. We suggest that either the rule or the Committee Note specifically explain that this provision supersedes any contrary local rules of a district court.

Managing Attorneys' and Clerks' Association (11-CV-022): The proposed amendments do not address the existing problem of forcing subpoenaed persons who are commanded to respond in a jurisdiction other than where they live or work to retain unfamiliar counsel to represent them. A person subpoenaed to respond out of state, which can happen within the 100-mile rule fairly frequently, must retain a lawyer in an unfamiliar legal market within a tight time frame. This is an unfair burden on uninvolved nonparties served with subpoenas. Although Rule 45(f) touches in this issue, and the rule therefore defaults to the ordinary rule that one be admitted in the district where the motion is to be filed. That may mean that even the lawyer who served the subpoena cannot file a motion to compel in that court. This weakness in federal subpoena practice could be eliminated with the simple provision that the issuing lawyer may litigate subpoena-related disputes in any federal district court without formally being admitted in that court. A similar provision already exists in Rule 2.1(c) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

Defense Research Institute (11-CV-023): DRI agrees that the parties and the person responding to the subpoenas should be required to consent before transfer, and that the subpoena-related motion otherwise cannot be transferred absent extraordinary circumstances. We do not believe that is too demanding a standard for transfer in the absence of consent.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025: We applaud the selection of the "exceptional circumstances" standard for transfer when the person served with the subpoena does not consent to transfer. It is not necessary to require consent also of the parties; consent of the person subject to the subpoena should suffice. But when that person does not consent, a lesser standard for transfer -- such as "good cause" or the "interests of justice" would not give sufficient weight to protecting nonparties from undue burden or expense. Such a lower standard could quickly make transfer the rule, as judges might be inclined to assume that the issuing court supervising the litigation would usually be best suited to resolve all issues raised by compliance with its subpoena.

Authority to Compel Attendance at Trial
of Parties and Party Officers

[Note that the Invitation for Public Comment specifically requested comments on whether allowing courts authority would be desirable, and if so whether language included in an Appendix to the preliminary draft would be appropriate.]

Jody Smith, Tyler Laughinghouse, Jon Burtard, Sabina Thaler (11-CV-001) (these commenters prepared their comments as part of a Federal Civil Litigation course at Washington & Lee Law School, seemingly before the actual publication of the preliminary draft of proposed amendments): The *Vioxx* court's reading of existing Rule 45 is not correct, but its criticism of the 100-mile limit has force in the 21st century. The best solution would be to increase the mileage limitation from 100 to 500 miles, but also to require a court order when the witness is required to travel more than 100 miles and assure that the witness will be reimbursed for travel costs in this situation.

Matthew J. Walko (11-CV-003): The Rule 45 proposals "further undermine the fundamental purpose of the Seventh Amendment's guarantee of trial by jury, in favor of trial by deposition." If the court has personal jurisdiction over the parties, then either side should be able to require his opponent to stand before the jury at trial and be judged. Under Rule 16(a), the court can require "unrepresented parties" to appear before it for a pretrial conference, and Rule 16(c)(1) permits the court to command even represented parties to appear before the court to discuss settlement. The handling of nonparties, such as party officers, should be treated as a separate concern. But as to corporate parties, they should be required (as under Rule 30(b)(6)) to designate a live person to testify at trial, just as they have to designate a person to testify by deposition. [Note: Several years ago the Committee looked carefully at possible amendments to Rule 30(b)(6) and concluded that its balancing of various considerations did not call for adjustment.]

Kenneth A. Lazarus (11-CV-005) (on behalf of American Medical Ass'n and several related physician associations): We take no position on whether corporate party officers should be made to travel more than 100 miles to testify, but strongly support the Committee's retention of the 100-mile rule for nonparty witnesses. Nonparty physicians have no stake whatsoever in the litigation and should not be required to travel long distances for purposes of either deposition or trial.

Lawyers for Civil Justice (11-CV-009): LCJ supports the decision not to compel nationwide subpoena power for parties and party officers. The traditional justifications for the 100 mile rule -- protecting witnesses from harassment and minimizing litigation costs -- remain viable today. Alternatives to live testimony, such as videotaped depositions, provide the necessary tools for finding the truth. Accordingly, LCJ opposes the alternative included in the Appendix.

N.Y. State Bar Ass'n Commercial & Fed. Litigation Section (11-CV-010): The revised rule has the beneficial effect of describing the jurisdictional boundaries of a subpoena in a single provision, new Rule 45(c). It also resolves the divergence in case law on whether the court can compel an out-of-state party or party's officer to travel more than 100 miles to testify. We have some concern that this change still leaves such witnesses subject to extensive and costly intra-state travel, but believe proposed Rule 45(d)(1) should adequately protect against such problems. We support the addition of Rule 45(c)(3) as set forth in the Appendix. It would be helpful for the court to have the power to order an out-of-state party or party officer to testify at trial. We think that Rule 45(c)(3) should also caution the courts to consider not only whether an audio deposition or testimony by contemporaneous transmission could suffice, but also to weigh those considerations against other factors, such as whether the trial is a jury or court trial, the expected length of the testimony, and the extent to which the testimony will be contested. We think the standard for ordering such testimony should be

"good cause." Any attempt at drafting more precise language is likely to cause problems.

Robert L. Byman (11-CV-013) (submitting copy of article from National Law Journal): The rule should say that the issuing court can compel attendance by parties -- at least by plaintiffs -- in the forum for deposition or trial. "All we need is a provision in Rule 45 (or in Rule 30 or anywhere else) that says, 'A Party's attendance at deposition or trial may be compelled by notice without any requirement for a subpoena.'"

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): A majority of our Committee opposes authorizing national subpoena power as provided in the Appendix, but there was a wide difference of opinion among our members and substantial support for the proposal in the Appendix. The proposed amendment clearly shows that the rule does not, without the addition of the provision in the Appendix, authorize trial subpoenas for parties or party officers beyond the "100 mile rule." The possibility of using trial subpoenas for strategic advantage is substantial. Although there are strong arguments on the other side of the issue, on balance a majority of our Committee prefers the proposal recommended by the Advisory Committee without the addition of the provision in the Appendix.

Steven M. Puiszis (11-CV-015): The amendment confirming that parties and party officers are protected by the 100-mile limit is a welcome clarification of the existing rule. Even though modern modes of transportation have reduced travel time, they have not eliminated the inconvenience of travel; the time that senior officers spend travelling to testify at trial imposes an opportunity cost on the company that is one of the hidden costs of litigation. The amendment protects against that drain, and guards against the potential for harassment unfettered subpoena power would otherwise create. Due to the availability of videotaped depositions, the amendment will not negatively impact a jury's truth-seeking function.

Litigation Section, L.A. County Bar Ass'n (11-CV-016): We agree that the existing rule and should be clarified, but we favor including the power to order a party or party officer to attend and testify at trial. We therefore favor including the provision in the Appendix, although we would remove one feature of that proposal. It is not appropriate to apply the geographic limits of Rule 45 to parties, for parties have a great interest in the outcome of a case. In addition, other parties and the court have a strong interest in live testimony at trial to make an accurate decision. To deny the court the power to order a party to testify at trial undermines the jurisdiction of the courts. By the time this issue arises, the court has already obtained jurisdiction over the parties, and for this reason no subpoena should even be needed to compel attendance at trial. The court can order a party to appear for a settlement conference or a deposition without any new process; why should a subpoena be necessary to obtain live testimony at trial? Although the court does not automatically obtain jurisdiction over corporate officers just because it has jurisdiction over the company, corporations subject to the jurisdiction of a court are often required to produce officers or managing agents for depositions in the forum. A court's power to order a party to produce officers at trial should be at least as great as its power to order such a person to appear in the forum for a deposition. The risk of harassment cited as a reason for declining such authority is not distinctive; such a risk exists with every procedural tool. That risk does not justify a blanket refusal to authorize orders to testify at trial. The provision in the Appendix should therefore be included. But it should not require the court to consider the alternatives of a videotaped deposition or remote transmission of live testimony. Those are simply two of a multitude of considerations that court should consider,including as well the importance of the witness's testimony, the burden on the witness to travel to the forum, the witness's contacts with the forum, the extent of the witness's involvement in the litigation, and the length and complexity of the witness's testimony. The references to videotaped testimony and remote transmission should be removed; highlighting those factors would not be appropriate.

State Bar of Michigan U.S. Courts Committee (11-CV-017): The Committee considered a variety of topics, but concluded that it wanted to submit a comment on only one -- whether to grant the court authority to order that a party or party officer appear at trial to testify without regard to the geographical limits that apply generally at subpoenas. The Committee favors including such authority, because otherwise the rules would unduly restrict the ability of trial judges to exercise discretion. Our members envision a variety of situations in which testimony from such witnesses would be sufficiently important to the fair disposition of a matter so that compelling live testimony would be justified. Examples include circumstances in which the credibility of the testimony of a party or party's officer is critical and thus is more fully and fairly judged live, and document-intensive examinations where necessary shuffling back and forth between multiple complex documents and exhibits can lead to confusion and misidentification. The Committee therefore unanimously concluded that the language of proposed (c)(3) in the Appendix should be included in the amended rule.

U.S. Equal Opportunity Commission (11-CV-020): We believe the Appendix Rule 45(c)(3) provision should be included in the rule. The "good cause" standard in proposed 45(c)(3) should obviate any concern that such authority will be abused. The Committee Note seems to assume that there is a significant risk that parties will subpoena a party's officers for improper reasons, but we do not see a reason to make that assumption. We note that the proposed rule directs the court to consider the alternative of remote testimony pursuant to Rule 43(a). We think that requiring that in the rule may be unwise; it is important to give appropriate weight to the reasons stated in the Committee Note to the 1996 amendments to Rule 43 (particularly in the third paragraph of that Note) regarding the importance of in-person testimony at trial. Our experience is that plaintiffs often want to call adverse parties or their officers as witnesses a trial, sometimes as the very first witnesses. This is an appropriate decision for the party with the burden of proof, but it cannot be used unless those witnesses are in the courtroom.

U.S. Department of Justice (11-CV-021): The Department has evaluated the proposed 45(c)(3) in the Appendix, and has ultimately decided to remain neutral on this issue.

Defense Research Institute (11-CV-023): DRI wholeheartedly agrees with the amendment to clarify that the issuing court cannot issue nationwide trial subpoenas. We also agree with providing that a party or party's officer may be subpoenaed within 100 miles of his residence or within the state where he personally transacts business. This amendment, as well as the amendment which requires that disputes relating to subpoenas be resolved in the compliance court, combine to focus on the inconvenience that they can cause to party officers and to nonparties.

Steven Susser (11-CV-024): I would not require parties or party officers to travel more than 100 miles to appear for trial. These individuals can be deposed by video or de bene esse deposition can be arranged.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025: We strongly support the decision to reverse the so-called *Vioxx* rule. We believe that permitting subpoenas to compel testimony at trial from distant parties or party officers would invite abuse. Courts already have sufficient tools available to obtain the testimony of such persons, by video deposition or otherwise, when their testimony is truly relevant.

Other matters

Lawyers for Civil Justice (11-CV-002): (This comment is entitled "A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action." It seems mainly concerned with more general matters and not Rule 45.) The explosion of discovery of electronically stored information has markedly increased the cost, waste, and delay that attend the discovery process. Modest amendments to the discovery rules have done little to solve these problems. A number of measures should now be taken: (1) Rule 26 should be amended to narrow the scope of discovery; (2) Rule 26(b)(2)(B) should be amended to identify categories of electronically stored information that are presumptively excluded from discovery; (3) Rule 26(b)(2)(C) should be amended to explicitly include its requirements to limit the scope of discovery; (4) Rule 34 should be amended to limit the number of requests absent stipulation of the parties or court order. Instead, Daniel Girard, a former member of the Advisory Committee, has proposed changes that will further fuel the development of a "sanctions tort" premised on "gotcha" behavior during discovery. These proposals do not promise to solve problems, but to create additional problems.

Lawyers for Civil Justice (11-CV-009): (The submission included a Nov. 5, 2010, letter to the Judge Campbell that included the following point, not repeated in the submission in response to the invitation for public comment.) Rule 45 should be amended to allow 30 days to object to subpoenas. As currently written, the rule could lead a party to waive its objections accidentally by relying on the 30-day return date. The deadline to object and the return date should be the same to avoid confusion.

George A. Davidson, Esq. (11-CV-011): This rule change will make things somewhat better regarding use of subpoenas for arbitration, but will not solve other problems. I have served as an arbitrator in both domestic and international arbitrations. Section 7 of the Federal Arbitration Act authorizes arbitrators to "summon" any person to attend before them as a witness. It says that such summons "shall be served in the same manner as subpoenas to testify before the court," and authorizes the court to enforce the order and compel the attendance of the person involved. The problem of witnesses located more than 100 miles from the seat of the arbitration has arisen under current Rule 45. The problem arises when the witness is located too far from the location where the arbitration is proceeding. Unlike a civil case, there is no option in an arbitration to take the deposition of the witness and use that as evidence. Both the Second and Third Circuits have held that arbitrators may not subpoena witnesses for depositions. Some arbitration panels have responded to the problem by travelling to the witness to obtain the desired testimony; the threat to do that sometimes prompts the witness to be willing to travel to the place of arbitration. It is unclear whether the arbitral panel could count on a local court to enforce such a subpoena; arguably the drafters of the Arbitration Act were not contemplating a peripatetic tribunal, and had in mind only the court in the tribunal's usual seat. But that court is still without power to summon the distant witness to attend in this district. There is accordingly a gap -- there may be no court capable of enforcing a validly issued subpoena. Unless (a) the court where the arbitrators "are sitting" under Section 7 is construed to be the court in which they are seeking to sit for purposes of hearing the subpoenaed witness, or (b) Rule 45 is drafted to make the court in the arbitration tribunal's seat the enforcement court of a compliance motion, this gap will persist even after the amendments.

In addition, I note that Rule 43(a) could be utilized much more often. Presently it provides only "grudgingly" for live testimony transmitted from a remote location. At least it should be clear that a subpoena could be used to summon a witness to appear for such live testimony within 100 miles of his residence. It would be helpful for the Committee Note to say so. Sometime soon, Rule 43(a) could be liberalized to permit much broader use of telecommunications for testimony. Until then, at least this method should be endorsed.

Paul Alston (11-CV-012): I urge that Rule 45 be amended to allow subpoenas to be issued for the taking of testimony by video conference from a witness outside the jurisdiction of the trial court. I practice in Hawaii, and the problem of absent witnesses is particularly acute here because many cases involve people who have only a transient presence here. With improved video conference capabilities now available throughout the country, it is possible to have distant witnesses appear at little cost and with high-quality video and audio fidelity that was unimaginable when the current rules were drafted. Taking testimony in this manner eliminates both the prejudice suffered by the party who would otherwise have to read a deposition excerpt into the record or show choppy fragments of a discovery deposition. It would also eliminate the gamesmanship that can occur when one party keeps witnesses "offshore." The trial court is in the best position to decide when or whether video testimony should be taken, and any such arrangements would have to be made with the trial court's approval. But when the court determines that is desirable, use of a subpoena to accomplish it should be available. I had an experience in which that proved impossible under current Rule 45. In a multi-million dollar securities fraud case in Hawaii, I sought (with the blessing of the trial court here) to subpoena a witness in the SDNY for video testimony, but the SDNY quashed the subpoena on the ground this is not allowed. It should be allowed under Rule 45.

Robert L. Byman (11-CV-013) (submitting copy of article from National Law Journal): Although the amendments are excellent as far as they go, they do not clear up something that should be cleared up, and could even become worse under the amended rule. It should be clear that no subpoena is necessary to compel a party to attend a deposition or trial in the forum, now the "issuing court." Presently, a plaintiff's deposition can be set in the district in which the case he filed is pending, and no subpoena is necessary to compel that attendance. But a subpoena seemingly could not, under the amended rule (or the current rule) compel such attendance if plaintiff were located out of state and had to travel more than 100 miles for the deposition. And Rule 45 at present clearly does contemplate subpoenas on party witnesses, so there is at least an argument that the power to compel attendance by party witnesses is limited to the scope of the subpoena power. At least one judge found the pre-1991 rule unclear on these issues. See Howell v. Morven Area Medical Center, Inc., 138 F.R.D. 70, 71 (W.D.N.C. 1991).

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): Although comment was not invited on this subject, we are concerned that the revision of Rule 45 may produce an unintended change in practice on the location of party depositions. Currently, it is widely recognized that Rule 30 requires a party to appear for deposition at the location selected by the opposing party, and does not require a subpoena to require the party's attendance. Thus, Rule 30(g) provides that the noticing party may be sanctioned for failure to subpoena a non-party deponent, and case law recognizes that ordinarily the plaintiff's deposition may be noticed in the forum, and that the plaintiff must appear there, since plaintiff chose the forum, unless that would produce unreasonable hardship. Similarly, Rule 37(d)(1)(A)(i) permits imposition of Rule 37(b) sanctions on a party who fails to appear at a deposition after proper notice; no motion to compel is required, much less a subpoena. Proposed Rule 45(c)(1), however, includes commanding a person to attend a deposition. And it clearly includes subpoenas on parties, since proposed Rule 45(c)(1)(B)(i) refers to a person who is "a party or a party's officer." This provision might be read to supersede the existing rule provisions regarding the place of taking a party's deposition. Actually, Rule 45 has long provided for deposition subpoenas on party witnesses, but it seems few have realized that, perhaps due to "the impenetrable structure of current Rule 45 as a whole." The simplicity of the revised rule could cause problems because proposed Rule 45(c)(1) is easy to understand. There is a risk that Rule 45 might be read to repeal the provisions of Rule 30 by implication, but the court might ask itself "Why would the * * * new rule so clearly provide for subpoenas on party deponents if the drafters intended to retain existing Rule 30 jurisprudence?" The

solution, we believe, is to revise Rule 45 to remove parties entirely from proposed Rule 45(c)(1), and add a new provision as follows:

> (3) ***Subpoena of a Party.*** The place of compliance for the deposition of a party is governed by Rule 30. A party may be commanded to appear at trial only if the party is served with a subpoena that complies with the provisions of subparagraph (1).

Federal Magistrate Judges Association (11-CV-018): The Association offers an unsolicited suggestion to establish a presumptive time for the target of a subpoena to comply with a subpoena. Proposed 45(d)(3)(A)(i) authorizes quashing a subpoena if it "fails to allow a reasonable time to comply." It would be better for the rule to specify a time for compliance, rather than leaving the decision to a judicial officer's assessment of a "reasonable time." Many district have invoked presumptive time periods to lend some consistency to the handling of this question. We suggest setting one time to govern nationwide, such as fourteen days.

Also, while we endorse the purpose behind the amendment of Rule 37(b)(1), we suggest that it should be worded differently so it conforms to the terminology of Rule 45. The following language could be used:

> If a motion is transferred pursuant to Rule 45(f), and the deponent fails to obey an order by the issuing court to be sworn or to answer a question, the failure may be treated as contempt of either the issuing court or the court where the motion was brought.

U.S. Department of Justice (11-CV-021): The Department is concerned that the proposed amendment to Rule 45(g) and 37(b) may be interpreted to permit simultaneous contempt jurisdiction in both the forum court and the compliance court. Proposed 45(g) says that "the court for the district where compliance is required under Rule 45(c) -- and also, after a motion is transferred, the issuing court" may hold a person in contempt. The words "and also" create that ambiguity, which we assume the Committee did not intend, possibly because it contemplates the re-transfer of the dispute. To alleviate due process concerns, the Committee should state more explicitly in the Note that it understands that the forum court and the compliance court will exercise their enforcement and contempt powers consistently with due process considerations and with due regard for the interests of nonparty witnesses.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025: We believe that the time to object to a subpoena should be extended to 30 days, the time allowed for a party to respond to a Rule 34 request for documents. The corporate world has become more complex in the 20 years since Rule 45 was last reviewed. Corporate counsel tell us that a subpoena might not even arrive in the correct corporate office for almost 14 days, and making a determination whether to object on grounds of privilege or burden is difficult to do in this time frame. If the time to object is not extended, at least failure to object within that time should not work a forfeiture of rights.

We are also concerned that the "reasonably convenient" place for production will be subject to abuse. The current rule links compliance to a rule-dictated place of service and subjects it to a geographic limit. The nonparty served with the subpoena can seek the aid of the local court there. Although focusing on a convenient place for production seems sensible in an age when so much document discovery is conducted electronically, we think that this is subject to abuse. Under the proposed rule, a Seattle lawyer may think that production in his office in Seattle is "reasonably convenient" when a subpoena is directed to a witness in Miami, and it seems that the Miami witness will then have to apply for relief in Seattle, since that is the court where compliance is required under proposed Rule 45(c). That is an undue burden for the Miami nonparty. We propose instead that production occur "at a place *within the district where the subpoena was served* and reasonably convenient for the person commanded to produce." If this were thought unduly

restrictive, the rule could provide that a protective order motion or enforcement motion must be made in the district where service was made.

Finally, think that switching the "issuing court" to the court where the action is pending calls for an added explanation in the standard form of subpoena. We note that businesses often generate documents that look a lot like "official" documents, and there is a risk that nonparties will so regard subpoenas. A subpoena from a distant court is likely to cause people to conclude it is a fake. We propose that Rule 45(a)(1)(A)(iv) (which already requires that the subpoena include the text of Rules 45(d) and (e)) also require the addition of something like the following:

> NOTE: Rule 45 authorizes nationwide service of subpoenas. If this subpoena was issued by a court in a federal district other than the one in which you reside or were served, you mist still must comply with the subpoena, as described above. Your compliance with the subpoena must be at a location reasonably convenient for you. If you have objections to this subpoena, they should be filed in the United States District Court for the district [where you were served] {where compliance is called for}.

II. Information and Discussion Items

A. Preservation for Discovery; Spoliation

The Advisory Committee's Discovery Subcommittee has been intensely studying issues relating to preservation of electronically stored information and sanctions for failure to preserve such material since the E-Discovery Panel at the 2010 Duke Conference recommended further rulemaking to deal with pressing challenges resulting from preservation problems.

Despite this two-year effort, the project remains in a process of evolution. This evolution is a result of the difficulty of the legal issues involved, the changing nature of the technological issues involved, consideration of suggestions and studies provided by numerous groups and individuals, and the evolving reality of the caselaw. As a result, this report provides only an interim view of a very active and ongoing process.

During this two-year period, the Subcommittee has held numerous conference calls and some meetings, and the full Advisory Committee has discussed the resulting issues in four meetings, most recently in Ann Arbor in March, 2012. At the Advisory Committee's request, the Federal Judicial Center did research on the frequency and nature of sanctions litigation. The results of this research were presented to the Standing Committee during its January, 2011, meeting, which also included a panel on preservation and sanctions. In September, 2011, the Subcommittee had a well-attended and very informative mini-conference about these issues with approximately two dozen judges, practicing lawyers, technical experts, and academics. Many papers and suggestions were submitted to the Committee in connection with this event. Together with the notes reflecting comments during the event itself, these submissions can be found at a website maintained by the A.O.:

www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011/aspx

Some participants continue regularly to submit papers and suggestions to the Committee.

As described below, this work has identified some possible amendment efforts as more promising than others. But it has also revealed intense disagreement about whether any rule amendments are warranted, and almost as much disagreement about what those amendments should be if they are pursued.

At the same time, others have been studying aspects of these problems. Even before the Duke Conference, the RAND Corporation's Institute for Civil Justice began a study of the costs of E-Discovery. That effort produced a substantial report published in April, 2012. See Nicholas M. Pace & Laura Zakaras, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery (April, 2012). In May, 2012, the Seventh Circuit Electronic Discovery Pilot Program Final Report on Phase Two (May 2010 - May 2012) was published. Additionally, a Working Group of the Sedona Conference has for the past six months been engaged in trying to reach consensus on possible rule-amendment ideas to address these issues. During Fall 2011, Chief Judge Rader of the Federal Circuit also announced a model order for email discovery in patent cases which can be found at:

www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf

Finally, on December 13, 2011, the Subcommittee on the Constitution of the House Judiciary Committee held a hearing regarding "The Costs and Burdens of Civil Discovery" that included much discussion of E-Discovery issues. The papers submitted and a video version of the testimony can be found at:

http://judiciary.house.gov/hearings/hear_12132011_2.html

In short, much has been happening that bears generally on this topic. Over time, the Discovery Subcommittee's work has evolved. It focused initially on three alternative formulations of rule responses to these concerns. The first two directly addressed preservation obligations. One proposed a new Rule 26.1 that attempted to provide highly specific directives on what events would trigger a duty to preserve and what would have to be preserved when such a duty is triggered, including exclusions from that obligation to preserve, duration of the duty to preserve, and other specifics. A second approach proposed a new Rule 26.1 containing general directions to behave reasonably about preservation but not the sorts of specifics included in the first category. In each instance, a companion amendment to Rule 37 would permit sanctions only for violation of the preservation prescriptions, and would also provide additional directions about the proper handling of sanctions.

Although some favor the development of a detailed rule similar to the Committee's first proposed approach, both approaches to preservation rules prompted strong opposition on the merits from those who thought they would either worsen preservation problems instead of solving them or would permit the destruction of relevant information that should be preserved for litigation. Both also prompted some concerns about whether a rule addressing pre-litigation preservation activity would exceed the limits of Rules Enabling Act authority.

The third approach the Subcommittee developed focused only on Rule 37, and sought to ensure uniformity and constraint in the imposition of sanctions for failure to preserve. The current draft has many areas for further development, so any description is tentative. Nonetheless, the broad outlines have emerged:

(1) The draft would address a party's failure to preserve information "that reasonably should be preserved," which focuses the inquiry on whether the party in question took reasonable measures under the circumstances.

(2) When a party fails to take reasonable preservation measures, the draft would recognize that the court may respond to that failure with appropriate "remedial" or "curative" measures.

(3) The draft would preclude the court from imposing Rule 37(b) sanctions or an adverse inference instruction unless the failure to preserve was willful or in bad faith and caused prejudice. It also proposes a variety of factors to be considered in deciding whether the party failed to take reasonable preservation measures and whether failure to preserve was willful or in bad faith.

(4) Like Rule 37(e), the draft would permit imposition of sanctions in the absence of willfulness or bad faith in "exceptional circumstances."

This approach is designed to do several things while avoiding several problems. The things it is designed to do include (a) providing a uniform standard for imposition of sanctions; (b) ensuring that the court may take failure to preserve into account in supervising discovery and making decisions such as whether to order restoration of backup tapes whether or not bad faith is proven; (c) instructing the court to consider various factors that would bear on the finding of bad faith and, therefore, guide those subject to a duty to preserve in complying with their responsibilities; and (d) leave open the possibility that in exceptional circumstances -- such as when the failure to preserve completely deprives the other side of the ability to prepare its case -- the court could take serious merits-related measures even in the absence of bad faith.

This approach is designed to avoid some problems that might haunt an effort to promulgate a preservation rule directly, such as (a) attempting directly to regulate behavior before any lawsuit is filed; (b) devising

precise criteria -- for matters such as trigger, scope of preservation, and the exact duration of preservation -- that can apply to the wide variety of cases filed in federal court; (c) including "proportionality" considerations in such precise directives; (d) attempting to change the existing common law on when the duty to preserve attaches (as some have urged); and (e) reinforcing arguments that no judicial response at all is permitted if a party has complied with specific rule directives.

An Appendix to this report sets out the current draft of this third approach, along with the multiple footnoted questions that have yet to be resolved.

In reaching this point, the Subcommittee has encountered one basic question that has yet to be answered with confidence -- should any amendment effort be focused solely on electronically stored information or apply to all discoverable information? The full Advisory Committee discussed this question during its Ann Arbor meeting and the question has not been finally resolved.

One view is that preservation of electronically stored information is the source of the current anguish and therefore should also be the focus of rulemaking activity. In that sense, it builds on existing Rule 37(e), which limits sanctions under the rules for loss of electronically stored information if it was lost due to the good faith routine operation of an electronic information system. The Committee Note to that rule recognized that when litigation becomes reasonably likely a potential party should impose a "litigation hold." The litigation hold process is the focus of much of the current concern about overbroad preservation obligations. From this view, the right approach to the current problem would be to amplify current Rule 37(e)'s provisions for electronically stored information. Preservation of hard-copy information has not presented similar difficulties, and special provisions are not needed to deal with it. Indeed, as time goes by hard-copy material is likely to be less and less important because electronically stored information is likely to be the more important (and sometimes the only) evidence.

One way of reinforcing this view is to note that a significant feature of the difficulty produced by preservation of electronically stored information has been the exploding use of hand-held and other remote devices, each of which is capable of holding a large volume of electronically stored information. In the paper world, a litigation hold was not that difficult to implement because the "file room" was the focus of the effort. Now it could be that every employee is the possessor of multiple "file room" equivalents; gathering and storing all this information (and de-duplicating the mass of digital data) presents a difficulty that did not exist before. Both in terms of volume and complexity, this difficulty may warrant a special provision in the rules.

Another way of reinforcing this view is to consider the relative importance of electronically stored information and "real" evidence. The question of permitting severe sanctions in "exceptional circumstances" illustrates the point. Dispensing with proof of bad faith to justify serious sanctions in exceptional circumstances seems appropriate if the key evidence was lost. The example often used is Silvestri v. General Motors, 271 F.3d 581 (4th Cir. 2001), in which plaintiff claimed that the air bag did not properly deploy, causing him great injury. The court affirmed dismissal of plaintiff's suit because he had not arranged to preserve the air bag so G.M. could examine it, even though experts hired by his first lawyer did examine it and would testify that it was defective. But it is very difficult to say that plaintiff's failure to preserve was culpable. He was still in the hospital when the air bag was inspected, the car belonged to his landlady, and he did not proceed with the lawyer his parents first hired and instead filed suit much later using a different lawyer. One could argue that failure to preserve deprived G.M. of any meaningful opportunity to defend, and that a rule like the one under discussion would therefore be overbroad if it deprived the court of the power to take strong action in such circumstances.

How often would loss of electronically stored information present similar "exceptional circumstances"? One answer is that such circumstances are likely limited to "real" evidence because the abundance of electronically stored information and its frequent duplication will mean that the loss of a single piece of that information rarely will be case-dispositive. But given the growing centrality of electronically stored information as the only record of important events like medical treatment, is that really true? And if we are to draw a line between electronically stored information and other discoverable information, how easily can that line be applied? If somebody prints off an email, is that still "electronically stored information," or has it become something else? Should the answer depend on whether there remains an electronic version? Does the fact it was printed off affect duties to retain the electronic version?

In recent years, rulemaking has focused solely on electronically stored information on occasion and lumped it together with other discoverable information on other occasions. Like Rule 37(e), most of the 2006 amendments to the discovery rules were limited to electronically stored information, providing a precedent for limiting the current effort in the same way. Indeed, a major consideration for some time in regard to what became the 2006 amendments was the question whether a new technology warranted new rules tailored to the new technology. For example, the photocopier had a very large impact on document discovery under Rule 34, but nobody suggested revising the rule because of this technological development.

Eventually, the Advisory Committee was persuaded that the digital age was sufficiently different to warrant special rules to deal with those differences. The idea of specifying a form for production did not really bear on Rule 34 practice until electronically stored information came along; the most that might be in issue was whether the inspecting party got to look at originals or contented itself with copies. The question of whether Rule 34's reference to "documents" was adequate to capture the various forms of electronically stored information raised serious difficulties if one considered a relational database that was constantly being updated and created "documents" only when queried. So there is by now a considerable basis for rulemaking limited to electronically stored information. Indeed, law schools are increasingly offering a course in E-Discovery.

But on the topic of preservation (unlike sanctions) the rules do not generally distinguish between electronically stored information and other discoverable information. Thus, Rule 26(f) directs the parties at their initial conference to prepare a discovery plan for submission to the court and to "discuss any issues about preserving discoverable information." The FJC research described above indicated that, at least presently, sanctions motions for failure to preserve involve electronically stored information only about half the time, and failure to preserve conventional evidence is the focus of motions more often than electronically stored information (since some motions allege both types of failures). Some even suggest that singling out electronically stored information might seem to dilute protections against loss of other sorts of evidence, although that should not follow given that the basic thrust of the proposal is to limit (or at least to channel) courts' sanctions where a new rule would apply; no such limits would be placed on sanctions where the rule would not apply.

As noted above, the question whether to limit any rulemaking to electronically stored information or attempt to draft a rule that applies to all discoverable information remains open. Without necessarily resolving that question, the Discovery Subcommittee is likely to attempt instead to resolve drafting questions with its ongoing draft sanctions rule as indicated in the Appendix. Not only is this activity necessary, but it also may provide insights about resolution of the question whether to try to include all discoverable information within any rule proposal.

Technological development has continued during the time the Subcommittee worked on preservation, and at least one development should be mentioned. The

enormous growth of digital information subject to review has magnified the cost of responding to discovery, but recently "predictive coding" has emerged as a possible improvement in the handling of that problem. It is not possible to say that predictive coding has one fixed meaning, but the idea is to "train" a computer program to make responsiveness determinations by feeding it documents that are relevant and relying on it to discern which documents are or are not similar to the "seed set" pre-selected as relevant. In this sense, it operates somewhat like a spam filter, which does the reverse job and segregates those incoming items that should be excluded.

Predictive coding has gotten a lot of attention recently. The recent RAND report mentioned above, for example, reported that 73% of the cost of responding to E-Discovery results from the cost of reviewing collected digital data, and forecast that the only way to reduce that cost significantly is some version of predictive coding. Courts and lawyers have been cautious about embracing this substitute for laborious individual review of materials by human beings. Magistrate Judge Peck has approved use of predictive coding in da Silva Moore v. Publicis Groupe, 11 Civ. 1279 (ALC) (AJP), 2012 WL 607412 (S.D.N.Y., Feb. 22, 2012), but the matter has been appealed to the district court. Meanwhile, some other courts have reportedly followed Judge Peck's lead. The eventual outcome in the courts remains uncertain.

Whether predictive coding bears directly on preservation is uncertain. It might point toward improving methods for identifying what must be preserved. But it also might suggest that preservation of huge quantities of digital information is more acceptable because predictive coding makes it more digestible if it must later be reviewed for possible production in discovery.

Two further rulemaking developments also deserve mention. The first is an idea partly modeled on the Federal Circuit's model order for email discovery in patent cases. An abiding difficulty in discussing preservation of electronically stored information has been a suggestion that the preservation obligation should be narrower than the very broad scope of discovery. That would not fit with the existing directive in Rule 26(f) that the parties discuss any issues regarding preservation of discoverable information. But it would respond to the rapid growth in the magnitude of digital data, which threatens to make the idea of seeking all information about any topic unrealistic.

A possible response would be to devise a new approach to the scope of discovery for electronically stored information that would take account of the impossibility of producing it all. The Federal Circuit model rule offers a possible model for that, by limiting discovery to a specified number of custodians and a specified number of search terms. Inspired by that effort, the Subcommittee has begun very tentative consideration of a revision of Rule 26(b)(1) to specify limits for the scope of discovery of electronically stored information. This effort is tentative not only because it has yet to receive substantial attention, but also because any modification of the scope of discovery is a very delicate matter. Beyond that, the viability of limits along the lines discussed is quite uncertain. It may be, for example, that use of search terms will be eclipsed by something like predictive coding, so enshrining search terms in a rule could produce problems but not advantages.

The other development worth noting is that another subcommittee of the Advisory Committee (the Duke Subcommittee) is presently considering possible rule changes that might bear on the preservation questions discussed here. One set of changes would address preservation more directly through Rule 26(f) and 16(b). Another would address cost bearing in ways that might have implications for the costs of preservation as well as discovery.

In sum, there is very active ongoing work reflected in the draft in the Appendix to this report, but some uncertainty about where that work will ultimately lead.

APPENDIX

The following is the current draft the Discovery Subcommittee has discussed and presented for discussion at its mini-conference on preservation. Many drafting choices remain to be made, and questions noted below remain to be answered. It is hoped that much of this work will be done in the coming months. The draft Committee Note below has not yet been discussed at all by the Subcommittee. Nonetheless, this ongoing draft may be informative about the kinds of issues presently under consideration.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(g) FAILURE TO PRESERVE DISCOVERABLE [ELECTRONICALLY STORED] INFORMATION; REMEDIES

(1) If a party fails to preserve discoverable [electronically stored][1] information that reasonably should be preserved[2] in the anticipation or conduct of litigation, the court may:

(A) permit additional discovery;

(B) order the party to undertake curative [other remedial][3] measures; or

(C) require the party to pay the reasonable expenses, including attorney's fees,[4] caused by the failure.

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[1] This could be added if we wanted to limit this rule to electronically stored information.

[2] Note that the phrase "discoverable information that reasonably should be preserved" has an inherent premise about trigger and scope that provide a basis for Committee Note discussion of those topics.

[3] 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.

[4] 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 ("caused by the failure"), and not something that would happen in the ordinary course. But will there be many instances in which that is not clear? The notion is that it should justify imposing on the spoliator the costs of discovery and other litigation activity made necessary by the spoliation. For a recent example, see E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc., 803 F.Supp.2d 469 (E.D. Va. 2011), in which the court imposed on defendant the costs of plaintiff's discovery efforts that led to some five days of evidentiary hearings about spoliation. The judge explained (id. at 509-10):

> DuPont was thus forced by the spoliation to incur attorneys' fees, investigative expense, and the expense of a hearing and briefing. That was made necessary by Kolon's violation of its obligation not to spoliate evidence. It is proper to afford DuPont recompense for the consequences of that violation in the form of an award of expenses, costs and attorney's fees.

(2) Absent exceptional circumstances [irreparable prejudice],[5] the court may not impose any of the sanctions listed in Rule 37(b)(2) or give an adverse-inference jury instruction[6] unless [the court finds] {the party seeking sanctions proves}[7] that the other party's failure to preserve discoverable information was willful or in bad faith and caused [substantial] prejudice in the litigation. [A court that imposes a sanction must [should][8]

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[5] 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 precluded effective litigation by the innocent party. One question is whether such instances are truly exceptional. If they happen with some frequency, this may be the wrong phrase.

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 evidence is so central to the case that no cure can be found.

[6] 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? Perhaps that's different from an "instruction" on what the jury should do, but many might think that the judge's comment is pretty close to an instruction. (In some states, judges have on occasion been forbidden to comment on the evidence because such comments were thought to intrude into the jury's function.) 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?

[7] Presently the rule does not seem to allocate burdens of proof. The draft Committee Note presumes that the party seeking sanctions has the burden of showing both bad faith (or willfulness) and prejudice. If that is correct, should it be in the rule? The bracketed language is one way to do that. Perhaps this should be revised to take account of the possibility that the court is acting on its own; does it bear a burden of proof?

[8] Using "should" here may make "ordinarily" unnecessary, and also avoid the question whether certain sanctions are less severe than others as a matter of law. That question is likely in some cases to be a close call. But the softer the directive, the greater the possibility that the court will decide to go beyond what is needed to cure the demonstrated prejudice. Remember that in National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), the Court held that "general deterrence" was a valid ground for dismissing plaintiff's case for being three days late in serving some supplemental interrogatory answers. The Third Circuit had reversed the dismissal on the ground the penalty did not fit the crime, and the Court said it overstepped its appellate authority in doing so.

The draft Committee Note attempts to introduce the notion that courts should calibrate the sanction to the harm, but that may not suffice. On the other hand, is this a desirable limitation? Perhaps in some instances the general deterrence attitude of the Supreme Court in 1976 is appropriate. Consider the party that acts in extreme bad faith (using Evidence Eliminator at 3:00 a.m. the day before inspection of his system) but bungles the effort.

{ordinarily} use the least severe sanction necessary to cure the demonstrated prejudice.]

(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,[9] the court may [must] {should}[10] 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;[11]

(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;[12]

(C) whether the party received a request that information be preserved, the clarity and reasonableness[13] 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;[14]

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[9] 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.

[10] It may be that "must" or "should" is more appropriate than "may" here. Since the rule only talks about "considering" factors, the difference may not matter, but the idea seems to be to press the judge to consider at least the listed factors.

[11] Is this treatment sufficient to substitute for provisions about trigger? The draft Committee Note attempts to add detail.

[12] The use of "scope" is designed to permit consideration of a variety of factors. The draft Committee Note attempts to elaborate.

[13] Does this mean that an unreasonable request imposes a narrower duty than a reasonable request? Should clarity be the test here, since reasonableness of preservation efforts is already addressed in (B)? On the other hand, the overall thrust is toward encouraging reasonable behavior, so stressing that objective here may be desirable.

[14] 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"?

(E) the proportionality[15] of the preservation efforts to any[16] anticipated or ongoing litigation; and

(F) whether the party sought timely guidance from the court[17] regarding any unresolved disputes concerning the preservation of discoverable information.

DRAFT COMMITTEE NOTE

In 2006, Rule 37(e) was added to address issues peculiar to the operation of electronic information systems, which may appropriately be configured to alter or delete information as a feature of their routine operation. That rule forbids imposition of sanctions when such routine operation prevents discovery of such lost information, provided the system was operated in good faith. One issue bearing on good faith operation is whether the party took action to alter its routine operation upon learning of possible litigation, commonly called a "litigation hold."

Since 2006, there has been much concern about the scope and burden of litigation holds, and the possibility that sanctions would be imposed for failure to impose them, or failure to impose a sufficiently broad hold. The Committee has been informed that some potential litigants have adopted extremely expensive practices that overpreserve electronically stored information without providing significant improvements in access to needed evidence. In part, this activity has resulted from the remarkable growth of digital data, and the increasing use of a variety of handheld and other devices that did not exist at the time Rule 37(e) was drafted. In addition, social media -- which were not used by a significant number of people when Rule 37(e) was drafted -- have attracted an enormous following and are now used to create a very large volume of electronically stored information. Taken together, these developments have presented preservation challenges that can produce excessive expense.

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[15] This unadorned invocation of "proportionality" might be a source of mischief. Is the directive to consider and apply Rule 26(b)(2)(C)? Is that rule really about the same things that proportionality addresses here? The question there is the cost of responding to discovery. The question here is the cost and burden of preserving. Although all seem to agree that proportionality concepts should loom over the judgment about the adequacy of preservation, there are abiding questions about how to say that and how to do it.

[16] 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.

[17] 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), and then invoke that court's guidance when addressing other courts? Is this a reasonable concern? Shouldn't following a court's directions count for something? Can others later accuse the party that followed the court's direction of failing to acquaint the judge with all the needed facts, such as the pendency of 99 other similar cases?

Rule 37(g) addresses these concerns. It is designed to ensure that potential litigants who make reasonable efforts to satisfy their litigation hold responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts. It does not provide "bright line" preservation directives because such bright lines seem unsuited to a set of problems that is intensely context-specific. It does seek to assure that the court retains authority to manage litigation appropriately in light of loss of information that should have been retained, and to guard potential litigants against serious sanctions unless it is established that they acted willfully or in bad faith. Rather than prescribe a set of "bright line" preservation directives, the rule focuses on a variety of considerations that the court may [must] {should} consider in determining its response once it is established that information that should have been retained was not.

Subdivision (g)(1). Rule 37(g) applies to discoverable information "that reasonably should be preserved in the anticipation or conduct of litigation." This preservation obligation arises from the common law, and may in some cases be implemented by a court order in the case. [It is ultimately a duty owed to the court.[18]] Such a duty may be triggered by a variety of occurrences that indicate that the party is likely to become a party to litigation.[19] Examples of such triggering events include service of a pleading or other document asserting a claim; receipt of a notice of claim indicating an intention to assert a claim; service of a subpoena or similar demand for information; retention of counsel or of an expert witness or taking similar action in anticipation of litigation; or receipt of a notice or demand to preserve discoverable information in anticipation of litigation.[20] This rule provision is not intended to alter the longstanding and evolving common law regarding the duty to preserve in anticipation of litigation.[21]

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[18] Do we want to say this? Embracing the duty as one owed to the court may be at odds with encouraging parties to reach agreement on preservation specifics, but perhaps the pertinent difference is between the general duty to the court and the precise specifics by which it is applied in a given case. Particularly in light of the possibility that a given defendant may foresee multiple claims, that defendant's duty to the court is not entirely excused because the first plaintiff's lawyer does not appreciate the importance of preservation. Moreover, if we consider the presuit situation, it may seem that the duty then runs to <u>all</u> courts. Is that right?

[19] This paragraph is an effort in the Note to provide guidance on what triggers the duty to preserve. It could be made more precise or more general.

[20] This listing is derived from the listing in our Category 1 for the Dallas mini-conference. It does not include one example that was included there -- 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. The reason for omitting this trigger is that it seems too broad and that it might deter adoption of appropriately broad preservation policies. Regulatory preservation requirements may exist for a great variety of reasons having nothing to do with prospective litigation; making all of them sufficient to trigger a preservation duty as meant here is debatable. Regarding party-designed preservation policies, it may be that including them would seem a "tax" on those who have broad policies. On the other hand, either such example might be urged even though not listed because the listed example are just that.

[21] This sentence seems useful to show that it is not our goal to make substantial changes in existing precedent. Assuming that's desirable, does it undermine the effort of the paragraph to provide at least examples of what might often trigger the duty to preserve? To the extent that the description

The rule applies to situations in which, after such a triggering event, information that should be preserved is not. The question what information should be preserved depends on the circumstances of each case; the goal of the rule is that the litigation hold[22] be reasonable in the circumstances. The determination whether a party failed to preserve information as it should must be made under Rule 37(g)(3).

When the court concludes that a party failed to preserve information it should have preserved, it has available a number of remedies that are not sanctions. One is to permit additional discovery that would not have been allowed had the party preserved information as it should have. A party's failure to preserve information that should have been preserved may affect the judgment whether certain discovery should be allowed. For example, discovery might be ordered from sources of electronically stored information that might otherwise not be reasonably accessible under Rule 26(b)(2)(B). More generally, the fact that a party has failed to preserve information may affect the determination of the appropriate scope of discovery under Rule 26(b)(2)(C).

Of course, the court always has authority to permit additional discovery within the scope of Rule 26(b)(1). The fact that a party has properly preserved evidence does not constitute an argument for a narrowed scope of discovery. This rule does not confine the court's latitude to order discovery from a party that has properly preserved evidence, providing that such discovery comports with Rule 26(b)(2)(C).

Another remedy may be to order the party that failed to preserve information to take curative [other remedial] measures to restore or obtain the lost information, or to develop substitute information that the court would not have ordered the party to create but for the failure to preserve.

The court may also require the party that failed to preserve information to pay another party's reasonable expenses, including attorney's fees, caused by the failure to preserve. Such expenses might include, for example, discovery efforts made necessary by the failure to preserve information. In making such orders, the court may consider whether the discovery sought would have been done without regard to the failure to preserve; if so, the expense may not have been caused by the failure to preserve. This rule is not intended to provide broad cost-shifting sanction against parties that have failed to preserve; the costs addressed are those caused by the failure to preserve.

Subdivision (g)(2). This provision provides protection for a party that has behaved reasonably in relation to preserving information that may be relevant to pending or impending litigation. Despite reasonable efforts to preserve, it may happen that some information that should have been preserved was not, and some parties may not have taken sufficient measures to preserve information. In those circumstances, the court may address the failure to preserve under Rule 37(g)(1). But the court may impose an adverse-inference

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reflects what can be found in the cases, it seems consistent with the cases, and not to supersede them.

[22] Does this use of the term "litigation hold" go beyond what is usually meant by the term?

jury instruction or a sanction listed in Rule 37(b)(2) only in circumstances that satisfy Rule 37(g)(2).

A threshold matter is that [the court must find] {a party seeking to justify a sanction under Rule 37(b)(2) or an adverse-inference instruction for failure to preserve information must show} that the information should have been preserved.[23] In addition, this party must make two further showings required by Rule 37(g)(2):

First, it must be established that party that failed to preserve did so willfully or in bad faith. This determination should be made with reference to the factors identified in Rule 37(g)(3), which emphasize both reasonableness and proportionality. Under Rule 37(e), a party is protected against sanctions under these rules for loss of information due to the good faith routine operation of its information system. But good faith may call for efforts to avoid loss of electronically stored information, and similar efforts should be made for other discoverable information. Reasonable efforts ordinarily would not require that a party "keep everything forever." And under some circumstances -- perhaps often with potential litigants not familiar with the demands of litigation -- failure to make immediate efforts to preserve potentially discoverable information would not show bad faith or willfulness. Each case must be judged on its own facts under the factors in Rule 37(g)(3).

Second, [the court must also find] {the party seeking sanctions must also show} that the loss of information caused [substantial] prejudice in the litigation. One of the consequences of the growth of digital data is that there is now a much greater volume of information than was available in the past. Much of that data duplicates other data, and substitute evidence is often available. Although it is impossible to demonstrate with certainty what lost information would prove, the party seeking sanctions must show that it has been prejudiced by the loss. Among other things, the court may consider the measures identified in Rule 37(g)(1) in making this determination; if curative measures can cure the problem, sanctions would ordinarily be inappropriate.[24]

The rule does provide, however, that the showing of willfulness or bad faith need not be made in "exceptional circumstances" [when "irreparable prejudice" results from the loss of the information]. This exception builds on the concept of prejudice in the litigation; in some circumstances the loss of the information may cripple another party's ability to present its case. Although such a result may occur due to loss of electronically stored information in some exceptional instances, it is more likely in situations in

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[23] This is an effort to introduce a burden of proof concept. Is it appropriate? Should there be an effort to incorporate that into the rule itself?

[24] The word "ordinarily" recognizes that in some cases of outrageously bad-faith actions sanctions may be justified even if the bad-faith actor was unsuccessful in deleting the information. Should we explain this qualification in the Note? One reaction is that this disinters the notion that the duty is owed to the court, and perhaps all courts (in the presuit stage). Another is to recall that the Supreme Court said in the National Hockey League case in 1976 that "general deterrence" is a sufficient justification for case-ending sanctions. Flagrant disregard of duty may be just the situation that is suitable for general deterrence.

which tangible or "real" evidence -- such as an injury-producing agent -- is lost before some parties are able to examine it.[25] It is expected that such cases will be very rare. But when such crippling prejudice is shown, a court may impose sanctions on a party that did not act willfully or in bad faith.

In any given case in which imposition of a sanction has been properly supported under this rule, the expectation is that the court will limit itself to the least severe sanction needed to repair the prejudice resulting from loss of the information. The various sanctions listed in Rule 37(b)(2) -- and adverse inferences -- can often be arranged in a hierarchy from least to most severe. The thrust of this rule is that the court should incline toward the least severe sanction that will substantially cure the proven prejudice resulting from the failure to preserve. Because a categorical listing of sanctions by "severity" cannot reliably determine which would actually be more or less so in a given case, the rule does not attempt to do that. Courts can make commonsense determinations in the cases before them.

Subdivision (g)(3). These factors guide the court when asked to adopt measures under Rule 37(g)(1) due to loss of information or to impose sanctions consistent with Rule 37(g)(2). These factors may inform the decision whether a party failed to preserve information that reasonably should have been preserved, and also whether that failure was willful or in bad faith. The listing of factors is not meant to be exhaustive; other considerations may bear on these decisions.

The first factor is the extent to which the party was on notice that litigation was likely and that the information lost would be discoverable in that litigation. As noted above, a variety of events may alert a party to the prospect of litigation. But often these events provide only limited information about the nature or contours of claims or defenses in that prospective litigation. As a consequence, it may be that the scope of discoverable information will not be apparent for some time after the prospect of litigation itself has become reasonably clear. Depending on the circumstances, the scope of preservation will need to be expanded as the scope of the litigation becomes clearer; on some occasions, it may become apparent that the scope of preservation can be reduced.

The second factor focuses on what the party did to preserve information after the prospect of litigation arose. One factor that is often important is whether the party used a litigation hold, although it cannot be said that any particular litigation hold, or method of implementing one, is invariably required.[26] More generally, the scope of the overall preservation efforts

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[25] Is this assertion really true, and will it remain true even if it is now? If one is talking about "real" evidence, like the airbag in the Silvestri case, it seems that electronically stored information is less likely to be as important. But consider medical records or design records for a car. Those are likely to be electronic, and the complete loss of them could be crippling to a case. Perhaps one idea would be that there is greater chance by forensic means to find substitute electronically stored information than a substitute airbag. But that really seems to talk more to curative measures than the question of whether sanctions should be imposed if those measures don't cure the problem.

[26] This sentence in part addresses the notion that a written litigation hold is always required. Beyond doubt, a written litigation hold will often be a good idea to ensure that there is no dispute about what the hold said.

made by the party should be scrutinized. One consideration may be what it knew, or should have known, about the likelihood of loss of information if it did not take measures to preserve the information. Another may be the extent to which it could appreciate that certain types of information might be discoverable in the litigation. With regard to all these matters, the court's focus should be on reasonableness. The fact that some information was lost does not itself prove that the efforts to preserve were not reasonable.

The third factor looks to whether the party received a request to preserve information. Such a request should often bring home to a prospective litigant the need to preserve information, and it may provide useful guidance on what types of information would be relevant to that litigation. But this factor is not meant to compel compliance with all such demands. To the contrary, the focus is on reasonable behavior in light of known circumstances. Thus, an unreasonably broad preservation demand may be self-defeating, for the party presented with it can make its own determination what is appropriate preservation in relation to the likely claims.

One important matter may be whether the person making the preservation demand was willing to engage in good faith consultation about the scope of the desired preservation. After litigation commences, such discussion is required under Rule 26(f). As noted above, the dimensions of unfiled litigation may be difficult to discern in advance. Even after litigation commences, there may be considerable uncertainty. Particularly given the importance of the fifth factor -- proportionality -- parties must be flexible about their preservation demands and efforts. At the same time, it may happen that a party demanding preservation omits from the list of things to be preserved some items that the recipient of the demand does or should recognize as important; in those circumstances, the absence of those items from the request to preserve does not excuse preservation if otherwise reasonably required.

The fourth factor looks to the party's resources and sophistication in relation to litigation. Prospective litigants may have very different levels of sophistication regarding what litigation entails, and about their electronic information systems and what electronically stored information they have created. Ignorance alone does not excuse a party that fails to preserve important information, but this sophistication may bear on whether failure to do so was either willful or in bad faith.[27] A possibly related consideration

[27] This language is particularly concerned with preservation claims regarding plaintiffs. It does seem that defendants are waking up to the reality that preservation arguments can be directed to plaintiffs. For example, in "Plaintiffs Have Their Own Duty to Preserve," Nat. L.J., Dec. 19, 2011, Paul Weiner of the management firm Littler Mendelson emphasizes that "e-discovery is a two-way street, and obligations apply just as forcefully to plaintiffs -- who often anticipate litigation well in advance of any defendant." Weiner urges that plaintiffs should be required not only to retain email, but also social media activity, cellphone records, text messages, and tweets. He recommends that defense counsel inquire into a wide variety of sources of information during Rule 26(f) conferences: home or other email accounts; any device used for sending or receiving text messages; blogs or other online discussion forums; accounts with Google+, MySpace, Facebook, Twitter and equivalent services; LinkedIn, Monster.com, Career-Builder.com or similar accounts; and cloud-based services to store documents or data. He concludes: "It is no longer acceptable to give short shrift to plaintiffs' e-discovery obligations -- they are well established."

may be whether the party has a realistic ability to control or preserve some electronically stored information.[28]

The fifth factor emphasizes a central concern -- proportionality. Because there is so much electronically stored information, and because the amount is growing rapidly, the effort involved in trying to preserve all of it can be very great. The volume of such information also means that there may often be limited need to attempt to preserve "all" information on a subject. Instead, the focus should be on the information needs of the litigation at hand. That may be only a single case, or multiple cases. Rule 26(b)(2)(C) provides guidance particularly applicable to calibrating a reasonable preservation regime. Rule 37(g)(3)(E) explains that this calculation should be made with regard to "any anticipated or ongoing litigation." Prospective litigants who call for preservation efforts by others (the third factor) should keep those proportionality principles in mind. Parties complying with their obligation under Rule 26(f) to discuss preservation of discoverable information should similarly keep proportionality in mind.

Making a proportionality determination often depends in part on specifics about various types of information involved, and the costs of various forms of preservation. A party may act reasonably by choosing the least costly form of information preservation, providing that it is substantially similar to more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

Finally, the sixth factor looks to whether the party alleged to have failed to preserve as required sought guidance from the court if agreement could not be reached with the other parties. Until litigation commences, reference to the court is not possible. In any event, this is not meant to encourage premature resort to the court; Rule 26(f) directs the parties to discuss and to attempt to resolve issues concerning preservation before presenting them to the court. Ordinarily the parties' arrangements are to be preferred to those imposed by the court.[29] But if the parties cannot reach agreement, they should not forgo available opportunities to obtain prompt resolution of the differences from the court. Although judicial resolution of differences is obviously important to the party attempting to design an appropriate preservation regime for itself, it must be remembered that the other parties can also seek guidance from the court. An unresolved disagreement about preservation could lead to loss of information that judicial resolution could have avoided; if it becomes apparent that agreement cannot be reached, a party desiring broader preservation ought not unduly delay applying to the court for guidance.

In sum, the goal of Rule 37(g) is to provide a framework for realistic preservation arrangements to be made in given cases. Because one size does not fit all, it cannot prescribe a precise regime for most or all cases. But

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[28] The idea here is to suggest that -- particularly as to information in the cloud or on Facebook or other sources -- the party may not be able to exercise complete control over the preservation of the information.

[29] This point speaks to the notion that the duty to preserve is owed to the court.

it does attempt to guide the parties and the court as they address these important matters.[30]

[30] This concluding paragraph probably does not add significantly to the guidance already provided in the Note, but it may be useful to stress the overall theme.

B. Duke Conference Subcommittee

The Duke Conference Subcommittee was formed to respond to the welter of ideas produced at the Duke Conference sponsored by the Civil Rules Committee in May, 2010. The report for the Standing Committee meeting last January described ongoing efforts to advance the lessons provided by the Conference through judicial education and materials such as the new benchbook for judges; encouragement of empirical research, including pilot projects framed in ways that will facilitate evaluation by the Federal Judicial Center; and a protocol devised to accelerate discovery in employment cases. These efforts continue apace.

The Subcommittee has also been considering a package of potential rules amendments that might reduce cost and delay in civil litigation. The aim is to develop a set of coordinated provisions that, taken together, will achieve a whole greater than the sum of the parts. All provisions fit within the core principles of the present rules. Several participants in the Duke Conference observed that present rules provide adequate tools to constrain the excessive costs and delay that are encountered in some litigation. The challenge is to develop changes that will facilitate more consistent realization of the goals that can be reached within the current framework.

The package of draft rules amendments is meant to be neutral between plaintiffs and defendants. It illustrates suggestions from all sides of the bar, from the bench, and from Congress. And it remains open. New topics may be added, matters once considered and dropped may be restored, and some drafts carried forward for further consideration may be abandoned. The next step is to refine the concepts, express them clearly in draft rule text, and develop Committee Notes. Much of the focus is on advancing cooperation, proportionality, and active case management.

It is too early to request advice on the details of the initial drafts. The Subcommittee has significant work to do in improving initial models that at many points are designed more to identify issues that must be resolved than to offer even tentative resolutions. What follows is a sketch of the basic framework.

Delay often occurs early in the life of an action. One set of proposals considers shortening the time allowed to serve a summons and complaint under Rule 4(m) and accelerating the time to issue a Rule 16(b) scheduling order. These proposals also emphasize the value an actual scheduling-order conference in person or by telephone. In addition, they would establish a uniform set of exemptions from the scheduling-order requirement by substituting the initial disclosure exemptions in Rule 26(a)(1)(B) for the local rule exemptions now authorized by Rule 16(b)(1).

Discovery questions always loom large in any discussion of cost and delay. The Discovery Subcommittee is responsible for many of these issues, most notably the problems of preservation and spoliation that have been brought to the fore by the explosion of electronically stored information. Other discovery-related issues, however, can be fit within the focus of the present package. Ongoing responsibility for particular issues may shift between the Subcommittees as drafts are developed.

The Rule 26(d) discovery moratorium raises one question. The quality of the discussion at a Rule 26(f) conference can be enhanced by having specific discovery requests to focus on. A draft would permit requests to be served at some point after the action is commenced but before the Rule 26(f) conference. Responses would be due at a time agreed upon, set by the scheduling order, or geared to issuance of the scheduling order.

Discovery motion practice may be improved by an informal conference with the court before a motion is filed. Many judges already require such conferences. One draft sketches a mild version that would add to Rule 16(b)(3) encouragement for a pre-motion conference provision in the scheduling order. A more aggressive version, not currently favored, would direct that a

movant request a pre-motion conference; the motion could be filed only if the request is denied or the conference fails to resolve the problem.

Continuing concerns about the need for proportionality in discovery underlie a number of alternative drafts. The more modest sketches incorporate present Rule 26(b)(2)(C)'s limits — essentially proportionality without the name — in the Rule 26(b)(1) definition of the scope of discovery. Others, including one favored by the Subcommittee, would expressly refer to "proportionality," but present the risks that attend adoption of a new term, particularly in an area as fraught with contentiousness as discovery.

Proportionality also is approached by a different and familiar method. The present numerical limits on the numbers of Rule 30 and 31 depositions, and the presumptive "1 day of 7 hours" duration, could be reduced. The Rule 33 limit on the number of interrogatories also could be reduced. Numerical limits could be added for Rule 34 requests for production or inspection, and for Rule 36 requests for admissions. The Committee Notes would emphasize that the limits are merely presumptive, geared to the mine-run of cases but subject to modification when appropriate, ideally by agreement of the parties.

The value of interrogatories and requests to admit addressing the parties' contentions was questioned by some of the participants in the Duke Conference. Draft revisions would encourage postponing contention discovery to a point following the completion of fact discovery.

Discovery problems are not confined to excessive demands. There is room to be dissatisfied with obstructionist and evasive responses. Draft provisions address these concerns. Perhaps the simplest would require a party who states an objection under Rule 34 to state the objection "with specificity," the language of present Rule 33(b)(4), and also to state whether materials are being withheld under the objection.

One more discovery issue, cost-sharing, is being carried forward for the purpose of stimulating discussion by observers outside the Advisory Committee, but without any present recommendation. The most sweeping proposal that has been advanced by an outside group is that the presumption should be that the party requesting discovery should bear the cost of responding. More modest proposals would add rule text emphasizing the authority courts now have to condition discovery in particular cases on shifting part or all of response costs. The Subcommittee is not persuaded that the time has come to address practices so deeply embedded in the balance between the parties struck by current civil practice. Still, the issue warrants further inquiry.

The value of the initial disclosures required by Rule 26(a)(1)(A) also is carried forward on the Subcommittee agenda, but without even sketches of new rule text. Both at the Duke Conference and elsewhere, mixed views have been expressed about the current rule. Some think it useless. Others think it helpful. Still others think it could be made useful by reverting to the more expansive disclosures required by the initial 1993 version, only to be diluted for tangential reasons by the 2000 amendments.

Yet another possible discovery issue has been considered and put aside. Concern about the difficulty of pleading with the level of fact specificity that may be required by still developing pleading practice, particularly in cases of asymmetrical information, leads to disputes whether discovery should be stayed pending decision on a motion to dismiss for failure to state a claim. The Subcommittee believes that courts are generally exercising sound judgment in determining whether to stay discovery.

The great value of cooperation among the parties is frequently lauded in discussions of discovery, but it extends to all phases of litigation. There may be real value in adopting an aspirational rule expressing an obligation to cooperate. Present drafts focus on Rule 1, adding a direction that the parties cooperate to achieve the just, speedy, and inexpensive determination of the action. The question is whether a rule can be crafted that will do some good without encouraging collateral disputes about perceived failures to satisfy this elusive goal.

These ideas were presented to the full Committee in March, and received a very favorable response. After the drafts are refined, the Subcommittee hopes to convene a miniconference to elicit the views of judges, experienced lawyers, and academics. A small beginning was made on this project by holding a Subcommittee meeting over breakfast on the second day of the March Committee meeting — observers attended the Subcommittee meeting and offered useful suggestions.

The current Subcommittee draft is attached as an appendix at the end of this report.

C. Pleading

The Committee continues to pay close attention to evolving pleading practices. The development of pleading practices over the first five years following the decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) continues along paths that do not suggest an urgent need for response. Much remains to be learned about what pleading standards will be when practices are better settled.

Ongoing empirical work provides additional reason for caution. The Federal Judicial Center is extending its already invaluable work with a project that will seek to measure experience with all forms of pretrial adjudication, including not only Rule 12 motions but also summary judgment. It also is helping the Committee to digest the increasing number of empirical studies undertaken by independent scholars. All of this work will provide valuable lessons. At the same time, there are events — and most especially non-events — that cannot be counted through an empirical study. Opponents of elevated pleading standards regularly observe that it is difficult to develop rigorous information about the numbers of would-be plaintiffs who, facing the expense of resisting a motion to dismiss and the fear of dismissal, choose not to bring an action.

As important as the empirical work is, in the end it can inform, but cannot direct, the critical value judgments that must be made. There are indications that changed pleading practices have indeed led to an increase in the number of actions that are dismissed on the pleadings. To many observers, these are data enough to demonstrate the need to back away from higher pleading standards. Others, however, are not so sure.

The Committee has before it many drafts that illustrate the number of choices that might be made and the difficulty of choosing which, if any, may prove desirable. Some focus directly on the Rule 8(a)(2) standard. Others explore the prospects of identifying specific categories of claims for heightened pleading in a regime that generally relies on "notice" pleading, or for relaxed pleading in a regime that generally relies on heightened pleading. Some address the question whether defendants should be required to plead with greater specificity, at least when advancing affirmative defenses. Others approach the task indirectly, by modifying the purposes of a Rule 12(e) motion for a more definite statement. Yet others explore a variety of means of integrating heightened pleading standards with discovery in aid of pleading. Foundations are available to support prompt development when the time comes to decide whether to move toward revised rules or to accept the wisdom generated by the common-law process of responding to the Supreme Court's prompting in thousands, even tens of thousands, of cases.

D. Rule 84 Forms

Rule 84: "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."

Rule 84 has been thrust into the spotlight by the seeming incongruity between many of the illustrative pleading forms and current pleading standards, never mind that a footnote in the *Twombly* opinion seems to approve the form motor vehicle negligence complaint. This set of problems, if problems they be, could be addressed by deleting the pleading forms and retaining the other forms as they are. Or the pleading forms could be painstakingly evaluated and, almost certainly, thoroughly revised, perhaps with selective deletions or additions. But even that prospect focuses attention on the means of adopting the forms and maintaining them over time. In turn, the process questions raise broader questions about the role of all the forms.

The first step beyond that point is familiar. A subcommittee of representatives from the advisory committees, chaired by Judge Gene E.K. Pratter, was formed to consider the approaches taken to official forms by the different sets of rules and advisory committees. Two central points emerged. First, different advisory committees have taken different approaches to adopting forms. The Civil Rules and Appellate Rules Committees have put forms through the full Enabling Act process. The Bankruptcy Rules Committee process concludes with adoption of forms by the Judicial Conference. And the Criminal Rules Committee does not actively engage in the forms process, choosing instead to offer advice to the Administrative Office as the Office develops forms. Second, the forms play quite different roles in practice under the different sets of rules.

The upshot of that subcommittee process was that there is no apparent reason to establish uniform approaches across the different advisory committees. Each should remain free to approach official forms as best suits the areas of practice governed by a particular rules set. The benefits of mutual consultation can be achieved as proposals are presented to the Standing Committee.

A new Rule 84 Civil Rules Subcommittee has been created to carry forward consideration of the Rule 84 forms. All possible approaches remain open and will be considered.

An initial task will be to seek information about actual use of the Rule 84 Forms. Lawyers rely on many sources in seeking forms. Many of these sources provide very good forms, in far greater variety and scope than ever could be managed in the Enabling Act process. Whether most of the Rule 84 forms are of any real use is an open and important question.

A different practical concern looms even larger. Propounding official forms that "suffice under these rules" carries with it responsibility to develop good forms and to include them within the continuing responsibilities of the rules committees. The present set of Rule 84 forms is far from comprehensive, but ongoing responsibility even for this set would require a heavy commitment of committee resources, particularly at the advisory committee level. It is fair to ask whether the advisory committee has actually devoted as much of its energies to the forms as should be if they actually are an important part of the rules.

The questions that remain open within this framework are legion.

One approach, no doubt the simplest, would be to abrogate Rule 84, or retain it as a shrunken presence that simply reminds bench and bar that the rules place a high value on simplicity and brevity. This approach need not eliminate all official forms. A perfect illustration is provided by Rule 4(d)(1)(D), which directs that a notice and request to waive service of process use the text prescribed in Form 5. If there are to be no other forms

required by Rule, or only a few, it would be possible to attach them to the relevant rule, although probably not as part of rule text.

The most complicated approach lies at the other end of the spectrum. The full Enabling Act process could be deployed to study all of the Forms, revising them as appropriate, and adding new forms to address matters not now represented. There is little enthusiasm for this approach.

Intermediate approaches abound. A relatively small number of forms could be carried forward under Rule 84. The most likely reasons to maintain some forms would be a special need to fulfill the purposes of the related rule — Rule 4(d)(1)(D) and Form 5 provide a clear example — or a special need for uniformity.

Whatever the value of "official" forms, it remains important to settle on the best means of generating them. The Administrative Office bears the primary burden of developing forms for use in criminal cases. It also has generated forms for use in civil actions, some of them overlapping subjects covered by Rule 84 forms. Preliminary inspection of some of the AO's civil forms suggests that they are quite good. Although the rules committees likely should not delegate primary responsibility for developing forms that are to be put through the Enabling Act process to become sufficient under the rules, the matter stands quite differently if the forms are to be demoted from official status. The Administrative Office, consulting periodically with the advisory committee, may be a good resource for developing good forms that will win their way in practice in measure of their quality.

The Rule 84 Subcommittee will consider these issues initially, looking toward Advisory Committee deliberations next fall.

E. Rule 23 Subcommittee

The Committee appointed a Rule 23 Subcommittee last November to begin studying current trends in class-action practice. Their work has been advanced by the panel discussion at the January meeting of the Standing Committee. The project begins with the question whether Rule 23 should be taken up for present consideration. Any revisions of Rule 23 will require hard work over a long period. Any proposal is likely to spark controversy. And in the life cycle of class action work, the 2003 amendments are relatively recent. Yet there are good reasons to ask whether a new Rule 23 project should be launched.

The Class Action Fairness Act has been in effect for seven years. It has brought more class actions into the federal courts; the influx may have affected the ways in which Rule 23 is administered. The Supreme Court has recently decided several class-action cases in ways that may have important consequences. And lower courts have continued to develop their approaches to questions that, in one form or another, have occupied the core of class-action practice. In all, these developments prompt a careful survey of the field to decide whether to go forward with concrete rules proposals.

No more than a brief summary of the initial lines of inquiry seems warranted in light of the preliminary stage of the Rule 23 project. The following list of potential topics is not ranked by importance or difficulty. Nor does it reflect a closed set of subjects for inquiry. To the contrary, it remains important to identify all significant candidates for study. Only then can a decision be made whether to proceed at all, and only then can choices be made for any revision project in light of importance and feasibility.

The new and uncertain emphasis on Rule 23(a)(2) "commonality" stemming from the *Wal-Mart* decision is an obvious topic for study, in part because it flows directly from interpreting the present rule. It overlaps other questions, particularly the relationship of "issues classes" with commonality and the predominance requirement of Rule 23(b)(3). Some observers have expressed concern that serious inroads are being made, or will be made, on the once common practice of using class actions to resolve common questions of liability, to be followed by a claims procedure for resolving disputes about individual relief for class members. Similar questions arise from concern that some courts are insisting on class definitions that verge on limiting the class to members who have claims that will prevail on the merits, at times invoking concepts of standing. All of these questions warrant close study.

Another major group of issues arises from administration of the "predominance" requirement in Rule 23(b)(3). The 2003 Committee Note observed that courts may properly insist at the certification stage on a trial plan that shows that questions of law or fact common to class members actually will predominate at trial. The Supreme Court has recognized that assessment of the role to be played by common questions warrants inquiry into the merits of class claims. Practice seems to be evolving in directions that exact ever greater preliminary scrutiny of the merits at the certification stage. Exploration of the merits in turn leads to discovery on the merits, and attempts to bifurcate discovery between certification issues and trial issues have become increasingly difficult. Discovery of electronically stored information may present especially difficult challenges because available search techniques may not support practicable distinctions between certification and merits discovery. Similar issues arise from expert testimony. It is increasingly common to rely on expert witnesses to establish theories that enable common treatment at trial, and in turn to insist that the court qualify experts on all sides under *Daubert* standards as part of the certification process. Some observers believe there has been a sea change in certification practices.

Long-ago efforts to generate specific rules provisions for settlement classes were put aside on the eve of the *Amchem* decision and, after a few years, shelved indefinitely. There is renewed interest in exploring adoption

of express rules provisions providing directions for certifying settlement classes. One quite specific suggestion is that the rule might incorporate the cy pres provisions of the ALI Principles of Aggregate Litigation, provisions that already have been adopted by some courts. More generally, there is interest in reconsidering earlier efforts to add specific criteria to the Rule 23(e) provisions for reviewing proposed class settlements.

The role of Rule 23(b)(2) mandatory classes for injunctive or declaratory relief also has been advanced as a subject for renewed consideration after the *Wal-Mart* decision. At least one focus is on the opportunity to opt out — either under the aegis of Rule 23(b)(2) or by a combination of certifications under (b)(2) and (b)(3), class members might be afforded the right to opt out as to individual relief but not as to the underlying issues of liability. Or some clarification could be provided as to the extent of claims to "incidental" relief that might be resolved on a mandatory basis.

The dimensions of Rule 23(b)(2) class relief relate to notice of the class action. One purpose served by notice is to facilitate exercise of the right to opt out. But other purposes also are important — members of a potential class may wish, among other things, to oppose any certification, to propose certification of a differently defined class, to participate in identifying class representatives and class counsel, to monitor or participate in the proceedings, and to object to proposed settlements. The 2003 amendments modified the notice provisions to some extent, but it may be useful to reconsider the compromises reached at that time.

The role of objectors remains a nagging problem. Objections to proposed settlements can be vitally important to protect class interests. They also can be infernally self-serving and contrary to class interests. There may be some room to consider objectors further.

The next important step will be to sort through these and perhaps other potential topics. The books must remain open, at least for a while. But it is not likely that every worthy topic can be embraced all at once. Choices likely will be necessary. And it will be important to make the choices, perhaps mostly at the outset, but at any rate progressively so that the process of gathering information can be focused on a manageable set of proposals.

F. Other Matters

(1) Rule 55(c)

The Committee will recommend for publication a minor amendment of Rule 55(c) to read: "The court * * * may set aside a final default judgment under Rule 60(b)." The purpose is to state more clearly what the rule means now. Before entry of a final judgment, either under Rule 54(b) as to the default judgment or as to the entire action, Rule 60(b) does not apply. Courts have worked their way through to this conclusion, but with some difficulty.

The Committee believes that this proposal should be held for publication when there is a suitable package of proposals. It does not seem urgent enough to be published as a solo recommendation. For that reason the Committee is not now asking approval for publication. The proposal will be presented, with more elaborate justification, at a later meeting of the Standing Committee.

(2) Style Project Misadventures

Only a gratifyingly small number of questions have been raised as to possible misadventures in the Style Project. Some of them have been resolved by concluding that the restyled rule in fact does what it was intended to do, and does so with sufficient clarity. A few remain to be resolved.

Rule 6(d) was discussed last June. The style version adds 3 days "when a party may or must act within a specified time after service" and service is made by various described means. The snag arises from rules that specify times for acting after making service. The rule could easily be read to enable a party to, for example, extend the time available to amend a pleading as a matter of course by choosing to make service by one of the means that provides 3 added days. The fix is easy: "within a specified time after ~~service~~ being served * * *." The question is not whether to make the change, but when. Rule 6(d) remains open to reconsideration, at least with respect to adding 3 days after being served by e-mail. That has afforded a reason for withholding immediate action, in part because there is no indication that any mischief has occurred in practice.

Two other possible style glitches are on the current agenda. One involves Rule 15(a)(3) — it sets the time for "any required response to an amended pleading," but does not say when an amended pleading requires a response. That may or may not call for any revision. The other presents a knotty question whether something has been changed by the Rule 4(f)(2) provision for making service in a foreign country "if there is no internationally agreed means, or if an international agreement allows *but does not specify* other means * * *."

Other possible glitches may yet appear. In some ways it will be surprising to find no more. None of those that have appeared seem to call for urgent action. Perhaps as a matter of coincidence, those that may prove suitable occasions for correction have emerged from the academy as abstract propositions, not from courts or lawyers confronting real problems. Absent further direction, the Committee will treat these matters in the same way as other agenda items that are worthy of further consideration when that can be fit into the press of more complex projects.

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APPENDIX: DUKE SUBCOMMITTEE RULES SKETCHES

The most prominent themes developed at the 2010 Duke Conference are frequently summarized in two words and a phrase: cooperation, proportionality, and "early, hands-on case management." Most participants felt that these goals can be pursued effectively within the basic framework of the Civil Rules as they stand. There was little call for drastic revision, and it was recognized that the rules can be made to work better by renewing efforts to educate lawyers and judges in the opportunities already available. It also was recognized that many possible rules reforms should be guided by empirical work, both in the form done by the Federal Judicial Center and other investigators and also in the form of pilot projects. Many initiatives have been launched in those directions. Rules amendments remain for consideration. Some of them are being developed independently. The Discovery Subcommittee has come a long way in considering preservation of information for discovery and possible sanctions. Pleading standards are the subject of continual study. Other rules, however, can profitably be considered for revision. The sketches set out here reflect work by the Duke Conference Subcommittee after the Conference concluded. The early stages generated a large number of possible changes, both from direct suggestions at the Conference and from further consideration of the broad themes. More recently the Subcommittee has started to narrow the list, discarding possible changes that, for one reason or another, do not seem ripe for present consideration.

The proposals presently being considered are grouped in three roughly defined sets. They involve several rules and different parts of some of those rules. Standing alone, some may seem relatively inconsequential. But they have been developed as part of an integrated package, with the thought that in combination they may encourage significant reductions in cost and delay. The package can survive without all of the parts — indeed, choices must eventually be made among a number of alternatives included for purposes of further discussion.

The first topics look directly to the early stages of establishing case management. These changes would shorten the time for making service after filing an action; reduce the time for issuing a scheduling order; emphasize the value of holding an actual conference of court and parties before issuing a scheduling order; and establish a nationally uniform set of exceptions from the requirements for issuing a scheduling order, making initial disclosures, holding a Rule 26(f) conference, and observing the discovery moratorium. They also would look toward encouraging an informal conference with the court before making a discovery motion. The last item in this set would modify the Rule 26(d) discovery moratorium by allowing discovery requests to be served at some interval after the action is begun, but deferring the time to answer for an interval after the scheduling order issues.

The next set of changes look more directly to the reach of discovery. They begin with alternative means of emphasizing the principles of proportionality already built into the rules. More specific means of encouraging proportionality are illustrated by models that reduce the presumptive number of depositions and interrogatories, and for the first time incorporate presumptive limitations on the number of requests to produce and requests for admissions. Another approach is a set of provisions to improve the quality of discovery objections and the clarity of responses. Other approaches do not rank as important parts of the overall package and are set out more tentatively. They can survive or fall away based on individual merit. These include emphasizing the value of deferring contention discovery to the end of the discovery period; reexamining the role of initial disclosures; a more express recognition of cost-shifting as a condition of discovery; and adding preservation to the provisions of Rules 16(b)(B)(3)(iii) and 26(f)(3)(C) that refer to electronically stored information.

The last proposal is really one item — a reflection on the possibility of establishing cooperation among the parties as one of the aspirational goals identified in Rule 1.

These proposals are illustrated by sketches of possible rules text. The sketches are just that, sketches. Variations are presented for several of

them, and footnotes identify some of the more obvious questions that will need to be addressed as the sketches develop into specific recommendations for adoption.

These proposals have benefited from guidance provided in discussions with the full Advisory Committee. Both Committee and Subcommittee have devoted more time to some of these proposals than to others. Some will deserve further refinement, while others will deserve to be discarded. And the books remain open for additions of new topics. Suggestions are welcome.

The Subcommittee will continue to refine these sketches. The next step is likely to involve some form of informal outreach to bar groups, perhaps including a miniconference, to gather perspectives on how the proposals are likely to play out in the trenches of adversary litigation. If all goes well, a package of proposals will be presented to the Advisory Committee with a recommendation that it seek the Standing Committee's approval for publication.

I. Scheduling Orders and Managing Discovery

A. Rules 16(b) and 4(m): Scheduling Order Timing & Conference

Two changes in Rule 16(b) scheduling-order practice can be presented together in one draft, along with a parallel change in Rule 4(m). The purpose of these changes is to reduce delay and enhance the process of managing a case.

One change is to accelerate the time when the court enters a scheduling order. The purpose is to speed the progress of a case. The change is illustrated by two provisions, one shortening the time allowed by Rule 4(m) to serve process, the other shortening the time to enter the order after service (or appearance).

The other change emphasizes the value of holding an actual conference, at least by telephone, before issuing a scheduling order. There has been some discussion of eliminating Rule 16(b)(1)(A), foreclosing entry of a scheduling order based on the parties' Rule 26(f) report without a conference. Subcommittee members believe a conference should be held in every case. "Effective management requires a conference." Even if the parties agree on a scheduling order, the court may wish to change some provisions, and it may be important to address issues not included in the report. But there are counter-arguments that the court should be free, if it finds it appropriate, to dispense with the conference. The thought is that although in most cases there are important advantages to having a conference even after the parties have presented an apparently sound discovery plan, there may be cases in which the court is satisfied that an effective management order can be crafted without a conference.[31]

Whether or not Rule 16(b)(1)(A) is carried forward, it is desirable to eliminate the (b)(1)(B) provision allowing a conference to be held by "mail, or other means." Whatever "other means" are contemplated, it is better to require an actual face-to-face or voice-to-voice conference.

Rule 4(m)

(m) ***Time Limit for Service.*** If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *.

Rule 16(b)

(b) Scheduling.

(1) *Scheduling Order.* Except in categories of actions exempted by local rule,[32] the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

[31] Peter Keisler "would be disinclined to eliminate Rule 16(b)(1)(A)." The judge may not see any need for a conference, particularly if the Rule 26(f) report is prepared by attorneys known to be reliable and seems sound. The judge might ignore a requirement that a conference be held in all cases, or might hold a pro forma conference.

[32] The question whether to adopt a uniform national set of exemptions modeled on Rule 26(a)(1)(B) is addressed in part I B.

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.[33]

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of ~~120~~ 60 days after any defendant has been served with the complaint or ~~90~~ 45 days after any defendant has appeared.

The Department of Justice has expressed concern about accelerating the times in this fashion, advancing the reasons that allow it extra time to answer under Rule 12(a)(2) and (3). Similar reasons might be urged as part of the incentives to waive service, reflected in 12(a)(1)(A)(ii). The following alternative draft is written in terms of a defendant who is allowed 60 days to answer, picking up all of these variations.[34]

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event:

(A) within the earlier of 60 days after any defendant has been served with the complaint or 45 days after any defendant has appeared; or

(B) in a case in which these rules[35] allow a defendant 60 days to answer the complaint, within 100 days after that[36] defendant has been served with the complaint or 45 days after that defendant has appeared.

Resetting the time to issue the scheduling order invites trouble when the time comes before all defendants are served. Later service on additional defendants may lead to another conference and order. Revising Rule 4(m) to shorten the presumptive time for making service reduces this risk. Shortening the Rule 4(m) time may also be desirable for independent reasons, encouraging plaintiffs to be diligent in attempting service and getting the case under

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[33] The provision that the conference may be "by telephone, mail, or other means" is deleted. The intent is to require that the conference involve direct contemporaneous communication among the parties and court. "Conference" is used to imply such communication. The Committee Note can observe that telephone, videoconferencing, Skype, or other means of direct communication are proper.

An alternative would be to adopt rule text that specifies direct contemporaneous communication. Something like: "at a scheduling conference with the court [in person] or by a means of contemporaneous communication."

[34] The 60 and 45 day periods have been adopted only for illustration. Each period has an impact on timing the Rule 26(f) conference. Rule 26(f)(1) sets the conference "as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." It seems likely that the parties should have more time to prepare for the 26(f) conference. That could be accomplished by setting the time for the conference, and for the 26(f) report, closer to the time for the scheduling order. The need to consider a longer period in cases that allow a defendant 60 days to answer is framed by the illustrative 60- and 45-day periods. If they are lengthened, there may be less reason to make specific provision for cases with a longer period to answer.

[35] This could be "in which a defendant is allowed 60 days." That might seem ambiguous because a defendant normally allowed 21 days might win an extension. The time for issuing a scheduling order might better be addressed when the extension of time to answer is granted.

[36] "that" defendant is used deliberately. Even with a reduced Rule 4(m) period, one defendant might be served on the day of filing, while the 60-days-to-answer defendant might be served on the 60th day, or even later. But there may be complications when there is more than one 60-days-to-answer defendant. Is this good enough?

way. There may be some collateral consequences — Rule 15(c)(1)(C) invokes the time provided by Rule 4(m) for determining relation back of pleading amendments that change the party against whom a claim is asserted. But that may not deter the change.

B. Uniform Exemptions: Rules 16(b), 26(a)(1)(B), 26(d), 26(f)

Rule 16(b) provides that scheduling orders are not required "in categories of actions exempted by local rule." This bow to local practices may have been important when the rule was adopted in 1983, a time when active case management was less familiar than it is today. A survey of the local rules was made in developing the 2000 amendments that, by Rule 26(a)(1)(B), added exemptions that excuse nine categories of proceedings from the initial disclosure requirements. Cases exempted from initial disclosure are further exempted from the Rule 26(f) conference and from the Rule 26(d) discovery moratorium, which is geared to the 26(f) conference. The FJC reported at the time that the exempted categories accounted for 30% of the federal docket.

It may be time to substitute a uniform set of exemptions from Rule 16(b) for the present reliance on local rules. There are obvious advantages in integrating exemption from the scheduling order requirement with the exemptions from initial disclosure, parties' planning conference, and discovery moratorium. Even if most local rules have come into close congruence with Rule 26(a)(1)(B), it could be useful to have a uniform national standard.[37] At the same time, it is not yet apparent whether any serious losses flow from whatever degree of disuniformity persists.

If a uniform set of exemptions is to be adopted, it seems sensible simply to rely on the initial disclosure exemptions now in place. No dissatisfaction with the list has appeared, although that may be in part a function of ambivalence about initial disclosure practice. The main question may be location: should the list remain where it has been for several years, relying on incorporation by cross-reference in Rule 16(b)? That may be the conservative approach. On the other hand, there is an aesthetic attraction to placing the list in Rule 16(b), so all cross-references are backward. But several counters appear. The first is familiarity — people are accustomed to the present system. Changing Rule 16(b) to adopt a cross-reference is simple, and avoids amending Rules 26(a)(1)(B), (d), and (f) to cross-refer to Rule 16(b). And little harm is done — indeed some good may come of it — if a court inadvertently enters a scheduling order where none is required. If pursued, the change would look like this:

(b) SCHEDULING.

(1) *Scheduling Order*. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) ~~categories of actions exempted by local rule~~, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order: * * *

[37] The uniform standard might be supplemented by allowing for additional exemptions by local rule to account for local variations in discovery practice. If local experience shows little discovery and little need for management in a category of cases, an additional exemption might not seem to be a threat to uniformity. It is easy to add a local-rule option to Rule 16(b). But that might add clutter to Rules 26(d) and (f) if the categories exempt from scheduling orders by local rule are also to be exempt from the discovery moratorium and the parties' conference.

C. Informal Conference With Court Before Discovery Motion

Participants at the Duke Conference repeated the running lament that some judges — too many from their perspective — fail to take an active interest in managing discovery disputes. They repeated the common observation that judges who do become involved can make the process work well. Many judges tell the parties to bring discovery disputes to the judge by telephone, without formal motions. This prompt availability to resolve disputes produces good results. There are not many calls; the parties work out most potential disputes knowing that pointless squabbles should not be taken to the judge. Legitimate disputes are taken to the judge, and ordinarily can be resolved expeditiously. Simply making the judge available to manage accomplishes effective management. A survey of local rules showed that at least a third of all districts have local rules that implement this experience by requiring that the parties hold an informal conference with the court before filing a discovery motion.

It will be useful to promote the informal pre-motion conference for discovery motions. The central question is whether to encourage it or to make it mandatory. Encouragement is not likely to encounter significant resistance. Making it mandatory, even with an escape clause, is likely to encounter substantial resistance from some judges. Both approaches are sketched here, although the mandatory approach drew little support in Subcommittee discussion. The first illustration adds the conference to the Rule 16(b)(3) list of subjects that may be included in a scheduling order. This reminder could serve as a gentle but potentially effective encouragement, particularly when supplemented by coverage in judicial education programs. The second illustration imposes on the parties an obligation to request a pre-motion conference, but leaves the court free to deny the request. This approach could be strengthened further by requiring the court to hold the conference, but it likely is not wise to mandate an informal procedure against a judge's preferred management style. The sketch places this approach in Rule 7, but it could instead be added to Rule 26, perhaps as a new subdivision (h). That choice need not be made now.

Rule 16(b)(3)(B)(v)

(3) * * *
(B) *Permitted Contents.* The scheduling order may: * * *
(v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court.
[present (v) and (vi) would be renumbered]

Rule 7(b)(3) [or 26(h)]

(3) *Conference for Discovery Motion.* Before filing a motion for an order relating to [disclosure or] discovery[38] the movant must

[38] Many rules refer to "discovery" without embellishment. It may be better to use this generic term than to attempt to refer to the discovery rules by number — e.g., "a motion under Rules 26 through 37 or 45." A Rule 27 proceeding to perpetuate testimony, for example, is commenced by a "petition." At the same time, it expressly provides for a motion to perpetuate testimony pending appeal, Rule 27(b). A catalogue of discovery rules would also have to wrestle with such matters as Rule 69(a)(2) discovery in aid of execution, which may invoke "the procedure of the state where the court is located." On the other hand, a generic reference to "discovery" might seem to invoke procedures for getting information from persons in foreign countries, or for providing discovery in aid of foreign proceedings. E.g., 28 U.S.C. §§ 1782, 1783. This might be "discovery under these rules." In a related vein, RLM asks whether these puzzles justify reconsideration of the decision in the Style Project to abandon the index section, most recently Rule 26(a)(5), that provided a list of discovery methods. That would provide an indirect

[attempt to resolve the questions raised by the motion by meeting and conferring with other parties when required by these Rules and][39] request [an informal conference with the court][a Rule 16 conference with the court]. The motion may be filed if the request is denied or if the conference fails to resolve the issues [that would be] raised by the motion.[40]

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definition, distinguishing discovery from disclosure and shortcircuiting arguments that, for example, Rule 36 requests to admit are not a "discovery" device.

RLM also asks whether this language covers submission to the court for a determination of privilege or protection as trial-preparation material after receiving the information in discovery and then receiving a Rule 26(b)(5) notice of the claimed protection. If Rule 26(b)(5) contemplates that the "determination" is itself an order, then the submission is a request for an order and, by Rule 7(b)(1), is a "motion." If the "determination" is something less than an order, then we need decide whether we want to require a pre-submission conference.

[39] RLM asks how this relates to the requirement that parties meet and confer before making a discovery motion. There is much to be said for requiring the meet-and-confer before the pre-motion conference. This presents a tricky drafting issue. The attempt in rule text is a place-keeper, no more. Some motions relating to discovery do not seem to require a pre-motion "meet and confer." In addition to Rule 26(b)(5)(B), noted above, Rule 26(b)(3)(C) provides a request to produce a witness statement and a motion to compel if the request is refused.

[40] There may be an ambiguity in "resolve." What should a "losing party who feels the need to protect the record on appeal by filing something in writing justifying its position" do? As framed, this describes a situation in which one party is dissatisfied with the disposition offered by the judge at the conference but — apart from the desire to preserve the issue for appeal — would accept it rather than risk offending the judge by pressing ahead with a motion. It may be that the losing party should be forced to the choice. It can accept its position as loser, reject the resolution, and make a motion. Or it can surrender the issue, abandoning any hope of appeal. Why allow a tactical choice to carry ahead with the litigation without a formal challenge, but planning to resurrect the issue on appeal in the event of defeat?

D. Discovery Before Parties' Conference

These changes would enable a party to launch discovery requests before the Rule 26(f) conference, but defer the obligation to respond to a time after the conference. The idea is that the conference may work better if the parties have some idea of what the actual first wave of discovery will be. In addition, there are signs that at least some lawyers simply ignore the Rule 26(d) moratorium, perhaps because of ignorance or possibly because of tacit agreement that it is unnecessary. The Subcommittee has rejected an approach that would enable a party to serve a deposition notice, interrogatories, production requests, and requests to admit with the complaint. That form might operate primarily for the advantage of plaintiffs; defendants might not have enough time to develop discovery requests, particularly if the times for the Rule 26(f) conference and Rule 16(b) conference and order are shortened. The surviving approach introduces some delay between filing — or, more likely, service or appearance by a defendant — and the first discovery requests. Drawing careful time lines will be an important part of this approach.

Rule 26(d): Waiting Period

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before [20 days after service of the summons and complaint on any defendant,]{45 days after the complaint is filed or 20 days after any defendant appears, whichever is later}[41] ~~the parties have conferred as required by Rule 26(f),~~ except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless the parties stipulate, or~~, on motion,~~[42] the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

Rule 30(a)

* * *

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than [10] [5] depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition at a time before ~~the time specified in Rule 26(d)~~ a scheduling order enters under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(b)(1)(B) or unless the party certifies in the

[41] The suggested periods are first approximations. If we set the scheduling conference at 60 days after any defendant is served, and set the Rule 26(f) conference 14 days before the scheduling conference, the window for initiating discovery requests is reduced. Some workable compromise must be found.

[42] This change was suggested during general discussion of discovery before the Rule 26(f) conference. The only purpose is to make clear the general understanding that ordinarily parties may stipulate to something the court can order.

notice, with supporting facts, that the deponent is expected to leave the United States and to be unavailable for examination in this country after that time; or * * * [43]

Rule 31(a)(2)(A)(iii)

Rule 31(a)(2)(A) would, as now, mirror Rule 30(a)(2)(A), except that, as now, Rule 31 would not include a provision for deponents departing the country. A party must obtain leave of court if:

(iii) the party seeks to ~~take the deposition before the time specified in Rule 26(d)~~ commence the process for serving additional questions under Rule 31(a)(5) before a scheduling order is entered under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(a)(1)(B);[44] or * * *

Rule 33(b)(2)

(2) ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories or within 30 days after any scheduling order is

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[43] These choices suggest several questions. Early drafts provided that "A party must obtain leave of court * * * if * * * the party seeks to take the deposition less than 14 days after a scheduling order is entered under Rule 16(b) * * *." The snag is that a notice of deposition served before the Rule 26(f) conference and before the scheduling order cannot identify a date that will be at least 14 days after the scheduling order. The current draft text seeks to circumvent that problem, bypassing any attempt to specify the means of setting the date for the deposition. The thought is that the parties should be able to work this out at the 26(f) conference, at the scheduling conference, or after the scheduling order is entered. The Committee Note could point this out.

An alternative could be a bit more direct, but also more than a bit more awkward: "if * * * before a scheduling order is entered under Rule 16(b), the party seeks to set the date for the deposition, unless * * *." This alternative says directly that court permission is required to set any specific date in an early deposition notice.

The draft does not set any specific delay after the scheduling order enters. It would be possible to set a specific period — the deposition may not be taken until [14] days after the scheduling order is entered. But this complication may not be necessary. In many circumstances the parties will prefer to defer depositions until after substantial discovery by other means, particularly Rule 34 document discovery. And depositions used to identify the subjects and sources of other discovery may be useful at an early time. (Under present practice, a notice of deposition can be served at any time after the Rule 26(f) conference, setting a reasonable time to comply if a Rule 45 subpoena is used.)

A proceeding exempted from initial disclosures by Rule 26(a)(1)(B) is exempt from the discovery moratorium in present Rule 26(d). That exemption is carried forward in the draft. Those proceedings also are exempt from the Rule 26(f) parties' conference and would be exempt from the scheduling order requirement under proposed Rule 16(b). The same exemption appears in proposed Rules 31. The current sketches propose a simpler drafting approach to Rules 33, 34, and 36, but that requires further thought.

[44] This is a first attempt to integrate the Rule 31 process for framing cross questions, redirect questions, and recross questions with early discovery requests. Focusing on the time for taking the deposition seems awkward in this context. Forcing the other parties to frame cross questions, and so on, before the 26(f) conference or the scheduling order, seems out of keeping with the general plan to permit early requests as a means of enhancing early cooperation and management without forcing premature responses.

entered under Rule 16(b), whichever is later.[45] A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 34(b)(2)(A)

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 35

There is no apparent need to revise Rule 35 for this purpose.

Rule 36(a)(3)

(3) ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

Rule 45

Earlier drafts asked whether Rule 45 should be amended in parallel with the provisions for discovery between the parties. One parallel would be to set limits on the time to respond to early discovery requests authorized by draft Rule 26(d)(1). Another would be to impose numerical limits on the number of requests, similar to those proposed for requests to produce documents. The Subcommittee has concluded that there is no apparent need to add these complications to Rule 45. Courts know how to prevent a party from resorting to Rule 45 as a means of attempting to shorten the time to respond to Rule 34 requests to produce. Rule 45 subpoenas addressed to nonparties seem to be more clearly focused than the broad or overbroad requests that sometimes characterize Rule 34 practice. And Rule 45 specifically protects a nonparty who objects against significant expense resulting from compliance.

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[45] The reference to "any" scheduling order is a questionable attempt to simplify the drafting. Present Rule 26(d) clearly exempts all modes of discovery from the discovery moratorium in cases exempt from initial disclosures. The drafts for Rule 30 and 31 explicitly adopt this exemption. The drafts of Rules 33, 34, and 36 short-circuit this formula, on the premise that if there is no scheduling order there is no reason for setting a time to respond measured by a scheduling order. But there is at least one potential complication: a court may enter a scheduling order even though not required to do so. If that happens after Rule 33, 34, or 36 requests are served — whether before or after the initial 30-day period has expired — questions could arise as to the time to respond. The scheduling order should resolve those questions. But it may not.

One alternative: "answers and objections must be served within 30 days after being served with the interrogatories or — in a proceeding not exempt from Rule 16(b)(1) — within 30 days after a scheduling order is entered, whichever is later."

II. Other Discovery Issues

A. Proportionality: Rule 26(b)(1)

Both at the Duke Conference and otherwise, laments are often heard that although discovery in most cases is conducted in reasonable proportion to the nature of the case, discovery runs out of control in an important fraction of all cases. The rules provide for this. Rule 26(b)(2) is the most explicit provision, and also the most general. Rule 26(b)(2)(C) says that "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed * * * if it determines * * * that the burden or expense outweigh the likely benefit." Rule 26(g)(1)(B)(iii) provides that signing a discovery request, response, or objection certifies that it is "neither unreasonable nor unduly burdensome or expensive," considering factors that parallel Rule 26(b)(2)(C). Rule 26(b)(1), after describing the general scope of discovery, concludes: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." This sentence was adopted as a deliberate redundancy, and preserved in the Style Project despite valiant efforts by the style consultants to delete it. Rules 30, 31, 33, and 34 expressly incorporate Rule 26(b)(2). Rule 26(c), in addition, provides for an order that protects against "undue burden or expense."

The question is whether still greater prominence should be accorded the proportionality limit, hoping that somehow one more rule behest to behave reasonably will revive a faltering principle. There is ample reason to doubt the efficacy of revising or adding to concepts that already are belabored in deliberately redundant rule text. And there is always a risk that any variation in rule language will provoke arguments — even successful arguments — that the meaning has changed. Adding an express reference to "proportionality," moreover, could easily lead to one more class of blanket objections and an increase in nonproportional arguments about proportionality. If "proportionality" is added to rule text, it will be important to state in the Committee Note that a proportionality objection must be supported by specific reasons informed by the calculus of Rule 26(b)(2)(C).

Despite these possible grounds for pessimism, the Subcommittee believes that it is important to attempt to give proportionality a more prominent role in defining the scope of discovery. The concept is important, and should be more vigorously implemented in practice.

Many approaches are possible, ranging from simple attempts to incorporate Rule 26(b)(2)(C) concepts more prominently in Rule 26(b)(1) to adding explicit references to "proportionality" in rule text. It is even possible to think about revising Rule 26(b)(2)(C) itself, although the present text seems a good expression of the factors that shape the calculus of proportionality.

The fate of earlier efforts to emphasize Rule 26(b)(2)(C), including the deliberately redundant cross-reference retained as the final sentence of Rule 26(b)(1), suggests that a relatively bold approach may be needed to accomplish much. The Subcommittee is attracted to a revision of Rule 26(b)(1) that would introduce "proportionality" as an express limit on the scope of discovery:

> (1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery<u>, proportional to the reasonable needs of the case,</u> regarding any nonprivileged matter that is relevant to any party's claim or defense * * *.

This approach courts the risks that inhere in adopting any new word in rule text. It seems likely that the new word will provoke litigation about its meaning, and litigation about discovery is seldom a good thing. But the Committee Note can note the relationship to Rule 26(b)(2)(C) concepts, drawing from the express incorporation of (b)(2)(C) at the end of (b)(1).

The mildest approaches considered by the Subcommittee would emphasize the principles of Rule 26(b)(2)(C) without seeking to add "proportionality" to rule text. The first alternative sketched below seems the mildest and may be desirable for that reason. Other sketches are preserved, however, to prompt further discussion.

The simplest strategy is to move proportionality into a more prominent place in Rule 26(b)(1). That could be done in many ways. The simple cross-reference could be moved up, perhaps to the first sentence:

> Unless otherwise limited by court order, and subject to [the limitations imposed by] Rule 26(b)(2)(C),[46] the scope of discovery is as follows:

This approach could be seen as no more than a style change. But it is more. It expressly qualifies the broad general scope of discovery. Invoking present (b)(2)(C) reduces the risk of unintended consequences. But it may stand a good chance of producing the intended consequences.

Much the same thing could be done in a slightly different style form, and with the same observations:

> * * * the scope of discovery is as follows: Parties may obtain discovery, within the limitations imposed by Rule 26(b)(2)(C), regarding any nonprivileged matter that is relevant to any party's claim or defense * * *.

This approach seems to tie (b)(2)(C) more directly to the scope of discovery. Either alternative could encourage courts to view proportionality as an essential element in defining the proper scope of discovery.

"Proportionality" also could be added to the text of Rule 26(b)(2)(C)(iii):

> The burden or expense of the proposed discovery outweighs its likely benefit and is not proportional to the reasonable needs of the case,[47] considering ~~the needs of the case,~~ the amount in controversy, * * *

If 26(b)(2)(C)(iii) were revised this way, it likely would be desirable to make a parallel change in Rule 26(g)(1)(B)(iii), so that signing a discovery request, objection, or response certifies that it is

> proportional to the reasonable needs of the case, and is neither unreasonable nor unduly burdensome or expensive, considering ~~the reasonable needs of the case,~~ prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.[48]

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[46] It might be objected that it is the judge, not Rule 26(b)(2)(C) itself, that imposes proportionality limits. More importantly, merely moving around the clause that refers generally to 'the limitations' may not seem adequate to address the problem of widespread misunderstanding.

[47] This may be no more than another way of saying what is already in the rule.

[48] Should "the parties' resources" or "and the importance of the discovery in resolving the issues" be added to complete the parallel to (b)(2)(C)(iii)?

B. Limiting the Number of Discovery Requests

The Duke Conference included observations about approaching proportionality indirectly by tightening present presumptive numerical limits on the number of discovery requests and adding new limits. These issues deserve serious consideration.

Many studies over the years, many of them by the FJC, show that most actions in the federal courts are conducted with a modest level of discovery. Only a relatively small fraction of cases involve extensive discovery, and in some of those cases extensive discovery may be reasonably proportional to the needs of the case. But the absolute number of cases with extensive discovery is high, and there are strong reasons to fear that many of them involve unreasonable discovery requests. Many reasons may account for unreasonable discovery behavior — ineptitude, fear of claims of professional incompetence, strategic imposition, profit from hourly billing, and other inglorious motives. It even is possible that the presumptive limits now built into Rules 30, 31, and 33 operate for some lawyers as a target, not a ceiling.

Various proposals have been made to tighten the presumptive limits presently established in Rules 30, 31, and 33, and to add new presumptive limits to Rule 34 document requests and Rule 36 requests to admit. The actual numbers chosen for any rule will be in part arbitrary, but they can reflect actual experience with the needs of most cases. Setting limits at a margin above the discovery actually conducted in most cases may function well, reducing unwarranted discovery but leaving appropriate discovery available by agreement of the parties or court order.

Illustration is easy for Rules 30(a)(2)(A)(i) and 30(d)(1):

(a) When a Deposition May Be Taken. * * *
(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):
(A) if the parties have not stipulated to the deposition and:
(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 or by the plaintiffs, or by the defendants, or by the third-party defendants; * * *

(d) Duration; Sanction; Motion to Terminate or Limit
(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

A parallel change would be made in Rule 31(a)(2)(A)(i) as to the number of depositions. Rule 31 does not have a provision parallel to the "one day of 7 hours" provision in Rule 30(d)(1).

Rule 33(a)(1) is even simpler:

(1) Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

(This could be made more complicated by adding a limit for multiparty cases — for example, no more than 15 addressed to any single party, and no more than 30 in all. No one seems to have suggested that. The complication is not likely to be worth the effort.)

Things are not so simple for Rule 34. It may not be as easy to apply a numerical limit on the number of requests; "including all discrete subparts," as in Rule 33, may not work. This question ties to the Rule 34(b)(1)(A) requirement that the request "must describe with reasonable particularity each

item or category of items to be inspected." Counting the number of requests could easily degenerate into a parallel fight over the reasonable particularity of a category of items. But concern may be overdrawn. Actual experience with scheduling orders that impose numerical limits on the number of Rule 34 requests suggests that parties can adjust to counting without any special difficulty. If this approach is followed, the limit might be located in the first lines of Rule 34(a):

> **(a) In General.** A party may serve on any other party ~~a~~ no more than [25] request~~s~~ within the scope of Rule 26(b): * * *
> **(3)** Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(2).

This form applies to all the various items that can be requested — documents, electronically stored information, tangible things, premises. It would be possible to draft a limit that applies only to documents and electronically stored information, the apparent subject of concern. But either way, there is a manifest problem in setting numerical limits. If a car is dismembered in an accident, is it only one request to ask to inspect all remaining parts? More importantly, what effect would numerical limits have on the ways in which requests are framed? "All documents, electronically stored information, and tangible things relevant to the claims or defenses of any party?" Or, with court permission, "relevant to the subject matter involved in this action"? Or at least "all documents and electronically stored information relating to the design of the 2008 model Huppmobile"? For that matter, suppose a party has a single integrated electronic storage system, while another has ten separate systems: does that affect the count? Still, the experience of judges who adopt such limits in scheduling orders suggests that disputes about counting seldom present real problems.

(As noted above, the Subcommittee has concluded there is no apparent need to attempt to revise Rule 45 to mirror the limits proposed for Rule 34.)

Rule 36 requests to admit could be limited by a model that conforms to Rule 33. Rule 36(a)(1) would begin:

> **(1)** *Scope.* A party may serve on any other party ~~a~~ no more than [25] request~~s~~ to admit, including all discrete subparts, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: * * *

That simple version lacks grace, and also lacks any provision to change the number by agreement or court order. Adding that wrinkle suggests that the limit might better be adopted as a new paragraph, probably (2):

> **(2)** *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit on any other party, including all discrete subparts [, and no more than 50 requests to admit in all].

An all-encompassing limit to 25 requests may go too far with respect to Rule 36(a)(1)(B) requests to admit the genuineness of any described documents. Applying a numerical limit only to Rule 36(a)(1)(A) requests to admit the truth of facts, the application of law to fact, or opinions about either, suggests different drafting approaches. One that should not be ambiguous, but may seem that way to some:

> **(1)** *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:
> **(A)** no more than 25 matters of fact~~s~~, the application of law to fact, or opinions about either; and
> **(B)** the genuineness of any described documents.

If there is a risk that hasty readers might extend the limit from (A) to (B), cross-referencing might do the job, leaving all of paragraph (1) as it is now and adding a new (2):

> **(2)** *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A)[49] on any other party, including all discrete subparts.

[49] This would be "(A) and (B)" if the more elaborate proposal to defer the time to respond described below is adopted.

C. Discovery Objections and Responses

The common laments about excessive discovery requests are occasionally met by protests that discovery responses often are incomplete, evasive, dilatory, and otherwise out of keeping with the purposes of the rules. Several proposals have been made to address these problems. The Subcommittee believes these proposals deserve serious consideration.

RULE 34: SPECIFIC OBJECTIONS

Two proposals have been advanced to improve the quality of discovery objections. The first would incorporate in Rule 34 the Rule 33 requirement that objections be stated with specificity. The second would require a statement whether information has been withheld on the basis of the objection.

Rule 33(b)(4) begins: "The grounds for objecting to an interrogatory must be stated with specificity." Two counterparts appear in Rule 34(b)(2). (B) says that the response to a request to produce must state that inspection will be permitted "or state an objection to the request, including the reasons." (C) says: "An objection to part of a request must specify the part and permit inspection of the rest." "[I]ncluding the reasons" in Rule 34(b)(2)(B) may not convey as clearly as should be a requirement that the reasons "be stated with specificity." If the objection rests on privilege, Rule 26(b)(5)(A) should control. But for other objections, it is difficult to understand why specificity is not as important for documents, tangible things, and entry on premises as it is for answering an interrogatory. Even if the objection is a lack of "possession, custody, or control," the range of possible grounds is wide.

It would be easy to draft Rule 34(b)(2)(B) to parallel Rule 33(b)(4):

> **(B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [the grounds for objecting {to the request} with specificity] [an objection to the request, including the specific reasons.]

RULE 34: STATE WHAT IS WITHHELD

Many Conference participants, both at the time of the Conference and since, have observed that responding parties often begin a response with a boilerplate list of general objections, and often repeat the same objections in responding to each individual request. At the same time, they produce documents in a way that leaves the requesting party guessing whether responsive documents have been withheld under cover of the general objections. (The model Rule 16(b) scheduling order in the materials provided by the panel on Eastern District of Virginia practices reflects a similar concern: " * * * general objections may not be asserted to discovery demands. Where specific objections are asserted to a demand, the answer or response must not be ambiguous as to what if anything is being withheld in reliance on the objection.)

This problem might be addressed by adding a new sentence to Rule 34(b)(2)(C):

> **(C)** *Objections*. An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis of} the objection.[50]

[50] Could this be simplified: "An objection must state whether anything is being withheld on the basis of the objection"?

RULES 34 AND 37: FAILURE TO PRODUCE

Rule 34 is somewhat eccentric in referring at times to stating that inspection will be permitted, and at other times to "producing" requested information. Common practice is to produce documents and electronically stored information, rather than make it available for inspection. Two amendments have been proposed to clarify the role of actual production, one in Rule 34, the other in Rule 37.

Rule 34(b)(2)(B) would be expanded by adding a new sentence:

> **(B)** *Responding to Each Item*. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.[51] If the responding party elects to produce copies of documents or electronically stored information [in lieu of]{rather than} permit inspection, the response must state that copies will be produced, and the production must be completed no later than the date for inspection stated in the request.[52]

Rule 37(a)(3)(B)(iv) would be amended to provide that a party seeking discovery may move for an order compelling an answer if:

> **(iv)** a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

RULE 26(G): EVASIVE RESPONSES

Rule 26(g) provides the counterpart of Rule 11 for discovery. Signing a discovery request, response, or objection certifies that it is consistent with the Rules. It also certifies that a request, response, or objection is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. Those strictures might seem to reach evasive responses. And it has been protested that adding an explicit prohibition of evasive responses will simply provide one more occasion to litigate about discovery practices, not about the merits. Nonetheless, it may be useful to add an explicit prohibition to 26(b)(1)(B)(i). By signing, an attorney or party certifies that the request, response, or objection is:

> **(i)** not evasive, consistent with these rules, and warranted * * *.

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[51] This sentence would be amended to include a specificity requirement under the proposal described earlier in this section.

[52] Requiring complete production by the time stated for inspection may give a slight advantage to the requesting party — work with the produced copies often will be easier than inspection. But that seems a quibble.

D. Rules 33 and 36: Contention Discovery

Discussion at the Conference and elsewhere suggests that contention discovery can be misused. Some observations doubt the value of any contention discovery. Others reflect concern with the timing of contention discovery, arguing that it should be postponed to a time when the completion of other discovery makes it feasible to frame contentions with some assurance. The proposals sketched here focus on the timing question.

Contention discovery was added to Rules 33 and 36 in 1970. What has become Rule 33(a)(2) provides:

> An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

The 1970 Committee Note elaborated on the timing question:

> Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge.

Similarly, Rule 36(a)(1)(A) provides for requests to admit the truth of "facts, the application of law to fact, or opinions about either." The Committee Note is similar to the Rule 33 Note:

> Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference.

It has been suggested that this open-ended approach to timing should be tightened up by requiring court permission to submit contention interrogatories or requests to admit until the close of all other discovery. That would preserve the opportunity for early contention discovery, but not permit it as freely as the present rules.

The question is whether early contention discovery is so often misused as to justify a change. An illustration of the potential values of early contention discovery is provided by one of the cases cited in the 1970 Committee Note to Rule 33. The FELA plaintiff in Zinsky v. New York Central R.R., 36 F.R.D. 680 (N.D. Ohio 1964), alleged that at the time of his injury his duties were in furtherance of interstate commerce. The railroad defendant denied all allegations of the complaint. The plaintiff then served an interrogatory asking whether at the time of the accident, etc. There is a very real prospect that the denial of the commerce element was pro forma. Confronted with the interrogatory, there is a reasonable chance the railroad will admit the commerce element, putting that issue out of the case. Alternative forms of discovery aimed at showing that the New York Central really is engaged in commerce, at the nature of the plaintiff's duties in relation to the defendant's commerce, and so on, would impose substantial burdens, often serving little purpose.

As the Committee recognized in generating the 1970 amendments, the other side is equally clear. There may be no point in using contention discovery to supplement the pleadings until discovery is complete as to the issues underlying the contention discovery. Developing pleading practice may have a bearing — to the extent that fact pleading increases, there may be still better reason to defer the switch from pleading to discovery as a means of framing the parties' contentions.

Practical experience and judgment are called for. If early contention discovery is misused often enough to be a problem, either because it makes too much supervisory work for the courts or because the parties suffer through the battle without court intervention, it may be time to revise the rules.

One other difficulty must be noted. The 1970 Committee Note to Rule 33 observed: "Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful * * *." The Note to Rule 36 was similar: "it is difficult as a practical matter to separate 'fact' from 'opinion' * * *." The Notes seem to assume that it is easier to separate law-application issues from fact or opinion, but that depends on clear analysis. Remember that "negligence" is treated as a question of fact to be decided by a jury, and to be reviewed for clear error when decided in a bench trial. The drafts that follow make no attempt to depart from the vocabulary adopted in 1970. They are offered without taking any position on the question whether it is better to leave the present rules unchanged, relying on specific case management to achieve proper timing in relation to the needs and opportunities presented by specific cases.

Revising Rule 33(a)(2) can be done directly, or it might be done in combination with Rule 33(b)(2) so as to avoid the need to resolve a seeming inconsistency.

Rules 33(a)(2), (b)(2) Together

(a)(2) *Scope.* * * * An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the interrogatory need not be answered until the time set under Rule 33(b)(2) ~~until designated discovery is complete, or until a pretrial conference or some other time~~.

(b)(2) *Time to Respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories, but an answer to an interrogatory asking for an opinion or contention relating to fact or the application of law to fact need not be served until [all other discovery is complete][the close of discovery on the facts related to the opinion or contention]. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 36

Rule 36 time provisions make for more difficult drafting. A temporary illustration may suffice. Rule 36(a)(1) is amended to enable cross-reference in (a)(3):

(a)(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(2) relating to:
(A) facts or opinions about fact~~,~~;
(B) the application of law to fact, or opinions about facts or the application of law to fact ~~either~~; and

(~~B~~C) the genuineness of any described documents.

(a)(3) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served — or for a request under Rule 36(a)(1)(B){within 30 days after}[all other discovery is complete][the close of discovery on the facts relevant to the request] —[53] the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(Remember the interplay of numerical limits on the number of requests to admit. One of the alternatives sketched above would set a limit of 25 requests for admissions of fact or contentions, but no limit on the number of requests to admit the genuineness of documents.)

[53] This may need more work. Expert trial witness discovery is governed by the time set for disclosure under Rule 26(a)(2), and deposition of an expert trial witness comes after the report.

E. Initial Disclosures

Conference reactions to Rule 26(a)(1) initial disclosures can be roughly described. Many participants thought the practice innocuous — it does not accomplish much, but does not impose great burdens. Some believe that any burden is too great, since so little is accomplished; given the limited nature of the disclosures, discovery is not reduced. And there is always the risk that an absent-minded failure to disclose will lead to exclusion of a witness or information. Still others believe that there is a real opportunity for good if the disclosure requirement is expanded back to resemble the form that was reflected in the rules from 1993 to 2000. They point out that the scope of initial disclosures was reduced only as a compromise to help win approval of the amendment that deleted the opportunity to opt out of initial disclosure requirements by local rule.

The starting point of any effort to reinvigorate initial disclosures likely would be the 1993 version. As to witnesses, it required disclosure "of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information." The provision for documents was similar, but limited to those within the possession, custody, or control of the party. That went far beyond the present rule, which covers only witnesses and documents "the disclosing party may use to support its claims or defenses." One hope for the 1993 version was that it would encourage particularized pleading for the purpose of forcing broader disclosures. Whether or not that function was served, developing pleading practices may lower any hopes in this direction. The broader purpose was to anticipate the first wave of inevitable discovery, simplifying and expediting the process. The list of exemptions added in 2000 could work to improve this substitute for discovery by reducing the number of cases in which disclosure is required even though the parties would have pursued less, or even no, discovery. Still, the 1993 version would provide no more than a starting point. More work would need to be done before attempting even a sketch of a new disclosure regime.

The Subcommittee has not found much reason to take up initial disclosure practice at present. But the question deserves to be carried forward for broader comment.

F. Cost Shifting (Discovery only)

Both at the Duke Conference and otherwise, suggestions continue to be made that the discovery rules should be amended to include explicit provisions requiring the requesting party to bear the costs of responding. Cost-bearing could indeed reduce the burdens imposed by discovery, in part by compensating the responding party and in part by reducing the total level of requests. But any expansion of this practice runs counter to deeply entrenched views that every party should bear the costs of sorting through and producing the discoverable information in its possession. The Subcommittee is not enthusiastic about cost-shifting, and does not propose adoption of new rules. But the topic is both prominent and important. These sketches are carried forward — and may deserve to be carried forward for some time — to elicit broader discussion.

Rule 26(c) authorizes "an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *." The list of examples does not explicitly include cost shifting. Paragraph (B) covers an order "specifying terms, including time and place, for the disclosure or discovery." "Terms" could easily include cost shifting, but may be restrained by its association with the narrow examples of time and place. More importantly, "including" does not exclude — the style convention treats examples as only illustrations of a broader power. Rule 26(b)(2)(B), indeed, covers the idea of cost shifting when the court orders discovery of electronically stored information that is not reasonably accessible by saying simply that "[t]he court may specify conditions for the discovery." The authority to protect against undue expense includes authority to deny discovery unless the requesting party pays part or all of the costs of responding.

Notwithstanding the conclusion that Rule 26(c) now authorizes cost shifting in discovery, this authority is not prominent on the face of the rules. Nor does it figure prominently in reported cases. If it is desirable to encourage greater use of cost shifting, a more explicit provision could be useful. Rule 26(b)(2)(B) recognizes cost shifting for discovery of electronically stored information that is not reasonably accessible from concern that Rule 26(c) might not be equal to the task. So it may also be desirable to supplement Rule 26(c) with a more express provision.

The suggestion that more explicit provisions would advance the use of cost shifting does not answer the question whether advance is desirable. Cost shifting will be highly controversial, given the still strong tradition that a party who has discoverable information should bear the cost of retrieving it. (Rule 45(c)(2)(B)(iii) protects a nonparty against significant expense in responding to a subpoena to produce.) Becoming accustomed to cost shifting in the realm of electronically stored information may not reduce the controversy, in part because the fear of computer-based discovery makes it easier to appreciate the risks of overreaching discovery requests.

If a cost-shifting order enters, it is important to consider the consequences if the party ordered to bear an adversary's response costs prevails on the merits. Prevailing on the merits does not of itself mean that the discovery was justified. It may be that none of the discovered information was used, or even usable. Or it may have had only marginal value. On the other hand, the fact that discovery materials were not used, whether to support motions, summary judgment, or at trial, does not mean the discovery was unjustified. The materials may have had value for many pretrial purposes, and may have been winnowed out only to focus on the most compelling materials. Or the discovered information may have led a party to abandon a position that otherwise would have been pursued further, at additional cost. The most likely outcome is discretion to excuse part or all of the costs initially shifted to the requesting party. Rather than characterize the shifted costs as "costs" for Rule 54(d), this discretion can be directly built into the cost-shifting rule. The discretion could easily defer actual payment of the

shifted costs to a time well after the discovery is provided and a bill is presented.

A conservative approach might do no more than add an express reference to cost shifting in present Rule 26(c)(1)(B):

> **(1)** *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *
> **(B)** specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

A more elaborate approach might add a new paragraph I:

> **(I)** requiring that the requesting party bear part or all of the expenses reasonably incurred in responding [to a discovery request],[54] including terms for payment and subject to reconsideration [at any time before final judgment].[55]

Still greater elaboration is possible, attempting to list factors that bear on a cost-bearing order. A relatively safe approach to that would be to build cost-bearing into Rule 26(b)(2)(C), adopting all of the factors in that rule:

> **(C)** *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule — or require the requesting party to bear all or part of the expenses reasonably incurred in responding — if it determines that: * * *

None of these sketches approach the more radical idea that has been taken up by some close observers of the rules. This idea is that the discovery rules were adopted without the slightest inkling of the expenses that would become involved as the practice evolved, and without any consideration of the effects of a default assumption that a party asked to

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[54] One reason to add the language in brackets is to avoid any confusion as to disclosure; Rule 26(c) seems haphazard in alternating between "disclosure or discovery" and simply "discovery."

[55] The bracketed phrase is a place-keeper. Reconsideration may be appropriate even as the discovery continues — the yield of important information may justify reverting to the assumption that a party who has discoverable information must bear the costs of uncovering it and providing it. And the allocation of expenses may be strongly influenced by the outcome on the merits. Perhaps the deadline should extend beyond entry of final judgment — a Rule 59(e) motion to alter or amend the judgment might be appropriate. If so, it might help to include an express cross-reference.

It may not be necessary to add a provision for reassessment after appeal. Certainly the appellate court can review the order. And a remand that does not address the issue should leave the way open for reconsideration by the trial court in light of the outcome on appeal.

RLM adds this question, by analogy to a division of opinions under Rule 11. Some courts impose sanctions for filing an action without reasonable inquiry, even though subsequent proceedings show support for the positions taken. Might a comparable approach be justified when the response to an unreasonable discovery request yields information that could properly be requested? Something may turn on an ex post diagnosis of the difficulty of reaching the responsive information by a better-focused request, including an attempt to guess whether a better-focused request could have been framed in terms that would defeat a narrowing interpretation and result in failure to produce the proper material.

provide discovery should bear the costs of responding. The proposal is that each party should bear the costs another party incurs in responding to the discovery it requests. Any change as fundamental as this one should be taken up, either by this Subcommittee or the Discovery Subcommittee, only under direction of the Advisory Committee.

G. Preservation in Rules 16(b)(3), 26(f)

Because the Conference provided many suggestions for discovery reform, many topics are suitable for the agendas of both Subcommittees. A particular illustration is the rather modest suggestion that preservation of electronically stored information be added to the topics appropriate for a scheduling order and for inclusion in the parties' Rule 26(f) discovery plan. Without yet attempting to map a plan for coordination between the Subcommittees, these drafts illustrate the relative simplicity of possible amendments. Whether there is any need to add this particular detail to the general provisions in the present rules is a fair question. It is particularly a fair question because present Rule 26(f)(2) includes "discuss any issues about preserving discoverable information * * *." The only apparent place for further reinforcement is in the (f)(3) description of the mandatory items for a discovery plan.

Rule 16(b)(3)(B)(iii)

(B) *Permitted Contents.* The scheduling order may:
(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information; * * *

Rule 26(f)(3)(C)

(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; * * *[56]

[56] Note that Rule 26(f)(2) deliberately requires discussion of issues about preserving "discoverable information"; it is not limited to electronically stored information. The (f)(3) discovery plan provisions are more detailed than the (f)(2) subjects for discussion, so the discontinuity may not be a problem.

III. Cooperation: Rule 1

The wish for reasonable proportionality in discovery overlapped with a broader theme explored at the Conference. Cooperation among the parties can go a long way toward achieving proportional discovery efforts and reducing the need for judicial management. But cooperation is important for many other purposes. Discovery is not the only arena for tactics that some litigants lament as tactics in a war of attrition. Ill-founded motions to dismiss — whether for failure to state a claim or any other Rule 12(b) ground, motions for summary judgment, or other delaying tactics are examples.

It is easy enough to draft a rule that mandates reasonable cooperation within a framework that remains appropriately adversarial. It is difficult to know whether any such rule can be more than aspirational. Rule 11 already governs unreasonable motion practice, and there is little outcry for changing the standards defined by Rule 11.[57] And there is always the risk that the ploy of adding an open-ended duty to cooperate will invite its own defeat by encouraging tactical motions, repeating the sorry history of the 1983 Rule 11 amendments.

Despite these reservations, the Subcommittee is interested in adding rule language that encourages cooperation. Initial discussion in the Advisory Committee reflects similar interest, even a measure of enthusiasm. The aspiration of the Civil Rules is articulated in Rule 1. Rule 1 now addresses the courts, but it could be amended to include the parties.

An illustration of a Rule 1 approach can be built out of the ACTL/IAALS pilot project rules:

> * * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive[58] determination of every action and proceeding[, and the parties should cooperate to achieve these ends].[59]
>
> or:
>
> * * * [These rules] should be construed and administered by the court to achieve the just, speedy, and inexpensive determination of every action and proceeding. The parties should cooperate to achieve these ends.

There is something to be said for a purely aspirational rule. But extending it to the parties — and thus to counsel — may be an invitation to

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[57] Nor is there any sense that the 1993 amendments softening the role of sanctions should be revisited, despite the continuing concern reflected in proposed legislation currently captioned as the Lawsuit Abuse Reduction Act.

[58] Here the ACTL/IAALS proposal would ratchet down the expectations of Rule 1: "~~speedy, and inexpensive~~ timely, efficient, and cost-effective determination * * *."

[59] The ACTL/IAALS version is much longer. The court and parties are directed to "assure that the process and costs are proportionate to the amount in controversy and the complexity and importance of the issue. The factors to be considered by the court * * * include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation."

RLM adds a healthy note of skepticism. Does a duty to cooperate include some obligation to sacrifice procedural opportunities that are provided by the Rules? How much sacrifice? Is the obligation to forgo available procedures deepened if an adversary forgoes many opportunities, and defeated if an adversary indulges scorched-earth tactics? Is it conceivable that an open-ended rule could be read to impose an obligation to settle on reasonable terms — that is, terms considered reasonable by the court?

sanctions, beginning with admonishments from the bench. Moving beyond that to more severe consequences should be approached with real caution.

APPENDIX

Various parts of the same rules are affected by proposals made for different purposes. This appendix lays out the full set of changes rule by rule, leaving alternative sketches to footnotes in an effort to improve clarity of illustration.

Rule 1

* * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding[, and the parties should cooperate to achieve these ends].[60]

Rule 4

(m) ***Time Limit for Service.*** If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *.

Rule 7(b)(3) [or 26(h)]

(3) *Conference for Discovery Motion.* Before filing a motion for an order relating to [disclosure or] discovery the movant must [attempt to resolve the questions raised by the motion by meeting and conferring with other parties when required by these Rules and] request [an informal conference with the court][a Rule 16 conference with the court]. The motion may be filed if the request is denied or if the conference fails to resolve the issues [that would be] raised by the motion.[61]

Rule 16

(b) SCHEDULING.

(1) *Scheduling Order.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)[62] ~~categories of actions exempted by local rule~~, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event:

(A) within the earlier of ~~120~~ 60 days after any defendant has been served with the complaint or ~~90~~ 45 days after any defendant has appeared; or

(B) in any case in which these rules allow a defendant 60 days to answer the complaint, within 100 days after that defendant has been served with the complaint or 45 days after that defendant has appeared.[63]

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[60] A simpler alternative is sketched in Part III.

[61] A simpler and milder version, clearly preferred by the Subcommittee, is set out as Rule 16(b)(3)(B)(v) below. This sketch is carried forward only for purposes of discussion.

[62] As noted above, the Rule 26(a)(1)(B) exemptions could be moved to Rule 16(b), changing later references accordingly.

[63] This is the alternative version that responds to Department of Justice concerns. The simpler version is easy to derive.

(3) * * *

(B) *Permitted Contents.* The scheduling order may: * * *

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information; * * *

(v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court.[64]

[present (v) and (vi) would be renumbered] * * *

Rule 26

(a)(1)(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must * * *

(b)(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery, proportional to the reasonable needs of the case, regarding any nonprivileged matter that is relevant to any party's claim or defense * * *.[65]

(c)(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *[66]

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before [20 days after service of the summons and complaint on any defendant,]{45 days after the complaint is filed or 20 days after any defendant appears, whichever is later} ~~the parties have conferred as required by Rule 26(f),~~ except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless the parties stipulate, or~~, on motion,~~ the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(f)(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or * * *"

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on: * * *

(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; * * *

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[64] A more complex and nearly mandatory alternative is set out as Rule 7(b)(3) above. The Rule 7(b)(3) draft is carried forward only for purposes of discussion.

[65] Several alternatives are described in Part II A.

[66] The alternatives sketched in Part II F are intriguing: One would add a new paragraph to Rule 26(c)(1), describing an order

(I) requiring that the requesting party bear part or all of the expenses reasonably incurred in responding [to a discovery request], including terms for payment and subject to reconsideration [at any time before final judgment].

The other would include cost sharing in the general proportionality provisions of Rule 26(b)(2)(C):

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule — or require the requesting party to bear all or part of the expenses reasonably incurred in responding — if it determines that: * * *

(g)(1)(B)(i) *Signature Required; Effect of Signature.* [By signing, an attorney or party certifies that a discovery request, response, or objection is:] not evasive, consistent with these rules, and warranted * * *.

Rule 30

(a)(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition at a time before ~~the time specified in Rule 26(d)~~ a scheduling order enters under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(b)(1)(B) or unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and to be unavailable for examination in this country after that time; or * * *

(d) Duration; Sanction; Motion to Terminate or Limit

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

Rule 31

(a)(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; * * * or

(iii) the party seeks to ~~take the deposition before the time specified in Rule 26(d)~~ commence the process for serving additional questions under Rule 31(a)(5) before a scheduling order is entered under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(a)(1)(B); or * * *

Rule 33

(a)(1) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

(a)(2) *Scope.* * * * An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the interrogatory need not be answered until the time set under Rule 33(b)(2) ~~until designated discovery is complete, or until a pretrial conference or some other time~~.

(b)(2) ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later, but an answer to an interrogatory asking for an opinion or contention relating to fact or the application of law to fact need not be served until [all other discovery is complete][the close of discovery on the facts related to the opinion or contention]. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 34

(a) In General. A party may serve on any other party ~~a~~ no more than [25] request**s** within the scope of Rule 26(b): * * *

(3) Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(2).

(b)(2) *Responses and Objections.*

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [the grounds for objecting {to the request} with specificity] [an objection to the request, including the specific reasons.] If the responding party elects to produce copies of documents or electronically stored information [in lieu of]{rather than} permit inspection, the response must state that copies will be produced, and the production must be completed no later than the date for inspection stated in the request.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis of} the objection.

Rule 36

(a)(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts or opinions about fact~~,~~;

(B) the application of law to fact, or opinions about facts or the application of law to fact ~~either~~; and

(~~B~~C) the genuineness of any described documents.

(2) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) and (B) on any other party, including all discrete subparts.[67] * * *

(~~3~~4) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later, — or for a request under Rule 36(a)(1)(B){within 30 days after}[all other discovery is complete][the close of discovery on the facts relevant to the request] — the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.[68]

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[67] Alternative sketches of this numerical limit are set out in Part II B. One version would set a limit of 25 contention and fact requests, but unlimited requests to admit the genuineness of documents.

[68] If all of these provisions are adopted, it may be better to depart from the order of provisions in the present rule, setting the times for responding after the provision for a written answer or objection:

> A matter is admitted unless the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later, — or for a request under Rule 36(a)(1)(B){within 30 days

Rule 37

(a)(3)(B)(iv) [A party seeking discovery may move for an order compelling an answer if:] a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

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after}[all other discovery is complete][the close of discovery on the facts relevant to the request]. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

MARCH 22-23, 2012

The Civil Rules Advisory Committee met at the University of Michigan Law School in Ann Arbor, Michigan, on March 22-23, 2012. Judge David G. Campbell, Committee Chair, attended by telephone. The Committee members who attended are John Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Steven M. Colloton; Hon. Stuart F. Delery; Judge Paul S. Diamond; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Michael W. Mosman; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Justice Randall T. Shepard; and Anton R. Valukas, Esq. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Mark R. Kravitz (by telephone), Chair, Judge Diane P. Wood, 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., the court-clerk representative, attended by telephone. Peter G. McCabe, Jonathan C. Rose, Benjamin J. Robinson, Julie Wilson, Julie Yap, and Andrea Kuperman, Chief Counsel to the Rules Committees, represented the Administrative Office. Emery Lee represented the Federal Judicial Center. Ted Hirt, Esq., and Allison Stanton, Esq., Department of Justice, were present. Observers included Alfred W. Cortese, Jr., Esq.; Ellen Messing, Esq. (National Employment Lawyers Association liaison); Kenneth Lazarus, Esq.; John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq.; Ariana J. Tadler, Esq.; William P. Butterfield, Esq.; John K. Rabiej, Esq.; Jerry Scanlon (EEOC liaison); Henry J. Kelston, Esq.; and others.

The meeting also was attended by several of the contributors to a forthcoming set of articles celebrating Professor Cooper's 20 years of service as Reporter for the Committee. They included Judge Lee H. Rosenthal (former chair of the Civil Rules and Standing Committees); Gregory Joseph, Esq., and Professors Stephen B. Burbank; Paul D. Carrington; Daniel R. Coquillette; Steven S. Gensler; Geoffrey C. Hazard, Jr.; Mary Kay Kane; Richard L. Marcus; Linda S. Mullenix; Thomas D. Rowe, Jr.; and Catherine T. Struve.

Judge Grimm opened the meeting by reporting that Judge Campbell was attending the meeting by telephone because his wife's recent and successful back surgery required that he remain at home.

Judge Grimm read the March 12 letter to Chief Justice Roberts in which Judge Kravitz stated that for reasons of health he would take leave of the Standing Committee on October 1, 2012. Judge Grimm spoke for all in recognizing the letter as "classic Mark Kravitz, the man we all admire and love."

Dean Evan Caminker welcomed the Committee to Ann Arbor, giving it credit for the glorious early summer weather. He noted that for many years now, the Law School curriculum has evolved continually toward an ever-increasing array of classroom, simulation, practicum, and clinical offerings designed to prepare students for the practice of law. At the same time, all the traditional national and international courses continue to thrive, and interdisciplinary offerings continue to grow both in the classroom and in the clinics. The rich combination of theory and practical knowledge that informs the Committee's work runs parallel to this educational mission.

Judge Grimm introduced two new Committee members. Stuart Delery is the Acting Assistant Attorney General for the Civil Division. General Delery came from private practice at Wilmer Hale to the Department of Justice in 2009, moving through several positions before taking his present position. He graduated from the University of Virginia and Yale Law School, then clerked for Judge Tjoflat and Justices White and O'Connor.

John Barkett has attended several Committee meetings as liaison from the ABA Litigation Section, and participated in the Duke Conference. He practices as a litigator in the Shook Hardy office in Miami. He devotes increasing amounts of time to serving as mediator, conciliator, and special master. He also teaches a law school course in electronic discovery.

John Grimm also noted that Judge Campbell reported the Committee's work to the Standing Committee in January. The January meeting included a panel discussion of class actions under Civil Rule 23, aiming to identify the most important problems that have emerged in practice and to advance consideration of the need to begin studying possible amendments. It was recognized that any Rule 23 project will require several years of hard and dedicated work if it is launched.

Judge Kravitz attended the Judicial Conference earlier this month. No items involving the Rules Committees were presented. There was a meeting of the mass torts group in conjunction with the Conference.

November 2011 Minutes

The draft minutes of the November 2011 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

April 9 version

Legislative Activity

Benjamin Robinson reported on legislative activity. Since the November meeting two more bills have appeared that bear attention because of possible implications for the Civil Rules. They are the Federal Consent Decree Fairness Act and the Sunshine in Regulatory Decrees Act. They may raise questions whether Civil Rule 60 is adequate to the occasional need to revise long-term institutional reform decrees, particularly when interest groups may align with agencies to secure results that they cannot obtain from a legislative body. There is a provision requiring an expeditious ruling on a motion to terminate a consent decree, and setting specific times for scheduling orders. The Judicial Conference has taken no position on these bills. The Federal-State Jurisdiction Committee is monitoring them closely.

House Bill 3487 is similar to the Lawsuit Abuse Reduction Act. It would amend Civil Rule 11 in several respects. It would require an award of reasonable expenses and attorney fees to the party who prevails on a Rule 11 motion; abolish the 21-day safe harbor; require state courts to apply Rule 11 in actions that affect commerce; and require special sanctions when an attorney accumulates three Rule 11 violations.

The Appeal Time Clarification Act has been signed. It grew out of the need to conform 28 U.S.C. § 2107 with amendments to Appellate Rule 4. It was signed one day before the effective date of the Rule 4 amendments, maintaining consistency between rule and statute.

The Federal Courts Jurisdiction and Venue Clarification Act also has been enacted. It does not appear to affect any of the Rules.

Rule 45

Proposed amendments to Rule 45 were published for comment in August 2011. The project began as an effort to simplify and clarify a rule that was difficult to navigate, particularly for those who used it infrequently. A number of significant changes also were made. The Committees invited comment on four specific topics. Is the effort to simplify successful? Should the proposal to emphasize notice requirements be expanded to require notice of events after the subpoena is served? What should be the standard that limits the newly added authority to transfer a motion related to a subpoena from the court where compliance is required to the court that issued the subpoena? Is it wise to apply to a party or

its officer the same geographic limits on the reach of subpoenas to testify at trial as apply to nonparties?

Three hearings were scheduled. Each was cancelled for want of interest. No one sought to testify at either of the first two. The two witnesses who planned to testify at the final hearing agreed to submit their comments in writing. In all, 25 written comments were received. The Discovery Subcommittee held conference calls to discuss the issues raised by the comments. The Subcommittee recommends modest changes in the published proposal on the basis of the comments. Professor Kimble, the Style Consultant, suggested several style changes. The Subcommittee adopted some of them, and Professor Kimble accepted the Subcommittee's reasons for not adopting the others.

The remaining task is to agree on the precise version of Rule 45 that should be transmitted to the Standing Committee for its recommendation for adoption.

RULE 45: SIMPLIFICATION

The simplification of Rule 45 begins by providing that all Rule 45 subpoenas issue from the court where the action is pending. The present rules that limit the place where the person served with the subpoena is required to comply are divorced from the place of service, and carried forward without other substantial change. The place to enforce the subpoena, or to seek relief from it, is the court where compliance is required.

The comments generally supported the simplification aspects of the Rule 45 proposal. It does not require further discussion.

RULE 45: NOTICE

As published, Rule 45 transfers to a new subdivision (a)(4) the requirement that notice be given to all parties before a subpoena is served on a nonparty. Many lawyers complain that the notice requirement is often ignored. The hope is that the transfer will give it a more prominent place and engender better compliance. In addition, it is made clear that a copy of the subpoena must be served with the notice. Finally, the provision in present Rule 45(b)(1) is changed by deleting "before trial," so that notice must be given before serving a subpoena to produce at trial as well as before serving a subpoena to produce in pretrial discovery.

Several questions have been raised as to notice. Some comments urged that notice should be served on the parties at a set interval — perhaps 15 or 20 days — before the subpoena is served on

the witness. Without this advance period, service on the parties could be made by means — most likely mail — that actually reach them after the subpoena is actually served on the witness, perhaps leading to production before the other parties have any opportunity to object or seek protection. Other comments urged that there should not be any advance notice to other parties, for fear of collusion that enables the nonparty witness to avoid service or otherwise thwart production. The Subcommittee does not recommend any change. The Committee accepted the Subcommittee position.

Post-judgment Enforcement Proceedings. A separate question has been raised by the Department of Justice. Their concern is that in post-judgment enforcement proceedings notice to a party before a subpoena is served will enable the party to conceal assets. These problems arise in many enforcement settings, particularly in attempting to enforce restitution in favor of a crime victim. Although the debtor typically has notice of enforcement proceedings, there is no notice of the subpoena before it is served. Remember that present Rule 45(b)(1) applies only to a subpoena to produce before trial. Generally the subpoena is directed to a financial institution. "When we find a bank account, we freeze it." If the debtor gets advance notice of the subpoena, "we have trouble."

The Department initially proposed amending the rule by limiting advance notice to subpoenas commanding production "before judgment." But if the Rule 54(a) definition of "judgment" could create ambiguities in this formulation, then some other formulation might be found. The desire to have advance notice of trial subpoenas, for example, might be accommodated by referring to subpoenas commanding production "before [trial] or at trial."

It was asked why notice that a subpoena will be served aggravates the risk of concealment. Serving the subpoena does not of itself freeze the assets; the person served can notify the judgment debtor before execution. And there are statutory devices enabling the Department to freeze assets it knows of before launching discovery for other assets. The Department explained that it serves subpoenas, often on financial institutions, to discover assets, and then acts to freeze the assets once they are found. If notice of the subpoena must be given to the judgment debtor, the debtor may well move or conceal the assets before they can be frozen. It was suggested that the Department could apply for an ex parte order suspending a Rule 45 notice requirement on showing reason to fear concealment. The Department, however, views the need to apply for an ex parte order as a burdensome extra step.

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It was suggested that perhaps the Committee Note could deal with this by observing that the notice requirement is not intended to apply in post-judgment enforcement proceedings. But that might well cross over the line into the forbidden territory of rulemaking by Note. This concern was underscored. The Committee has not focused on the departure from present judgment enforcement practice that would result from striking "before judgment" from the present rule. Providing for advance notice of trial subpoenas seemed a good idea, but it may not be so important as to disrupt the opportunity to discover assets before they can be concealed. This problem is important to all judgment creditors, not the government alone.

It was observed that advance notice of a trial subpoena might be preserved without jeopardizing post-judgment enforcement proceedings. One possibility would be to require notice of a subpoena to produce before trial or at trial. That rule text would support a Committee Note observation that the rule does not apply to post-judgment proceedings to discover assets. "It is common for a Note to say what a rule does not do."

It was agreed, with no contrary vote, that the Subcommittee would draft rule text to ensure that notice need not be given of discovery in aid of execution. The language will be reviewed by e-mail communication with the full Committee.

Later Notices: Modify Subpoena, Documents Produced. Throughout the process of developing Rule 45 amendments, suggestions have been made that notice should be required of events after the subpoena is served. The party who served the subpoena often negotiates modifications with the person served. Notice of the modifications to other parties would enable them to serve their own subpoenas for information negotiated away by the party who first served a subpoena. As materials are produced in response to the subpoena, other parties are likely to want to inspect them. But the task of asking for access can be burdensome, particularly when "rolling production" involves production in installments over an indeterminate period of time. And some lawyers refuse requests for access, taking the position that nothing in Rule 45 directs that other parties be given access to subpoenaed materials. The Subcommittee discussed these problems repeatedly and at length. It concluded that requiring notice of modifications or production would create unnecessary problems. There is an all-too-real danger of "gotcha" motions seeking to exclude evidence for failure to comply with a notice obligation. "Less compliance with more rules breeds satellite litigation." The notice changes were prompted by the complaints that many lawyers do not comply even with the simple notice requirement in present Rule 45(b)(1). Notice of production,

further, could become a substantial burden when rolling production requires multiple notices, increasing the risk of inadvertent notice failures and motions for sanctions. Even limiting the requirement to notice of the first production, alerting other parties to the need to begin monitoring for subsequent production, could be a problem. The result of these deliberations was a statement in the Committee Note that parties desiring access to subpoena materials need to follow up with the party who served the subpoena, and that the party serving it should make reasonable provision for prompt access.

Discussion of the multiple notices issue began by noting that notice of receipt of documents is useful. To be sure, there is a danger of "gotcha" disputes, and good lawyers work out access to produced materials now. "But it is inescapably clear that many lawyers do not let their adversaries know" when production occurs. It is simple to add "and also give notice of receipt" to the rule. "We should expect this in practice, but it is not happening."

The response was that these issues have been discussed several times, both in the Subcommittee and in the Committee. The Subcommittee concluded that other parties have an obligation, once they know of the subpoena, to ask for access to materials produced in compliance. If cooperation is denied, the court can order that access be allowed.

An observer commented that some states require notice of production. Omitting a notice requirement is a mistake. At the least, the Committee Note should state there is an obligation to give notice. Otherwise, as now, we have trial by ambush. Key documents appear for the first time in the pretrial order.

But it was rejoined that "lawyers should pay attention." On the other hand, lawyers are concerned about the lack of notice when documents are produced. Still, "this is complicated." Production often occurs on a rolling basis: do you have to give multiple notices, generating multiple opportunities for collateral disputes? Would it help to say in the Committee Note that other parties can ask for access, and seek a court order if access is not given? Or is this question so important that a Committee Note is not protection enough, particularly given the limit that a Note cannot make a rule?

It was agreed that the Subcommittee should prepare language for the Committee Note, again in the vein of stating what the rule text does not do. The rule does not cut off the court's power to order that a party provide access to subpoenaed materials. The Note might also quote from the Note to the 2000 amendments: "In

general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention." The Subcommittee draft will be included in the Rule 45 e-mail review by the Committee.

RULE 45: PARTY AND PARTY OFFICERS AS TRIAL WITNESSES

Present Rule 45 governs the place of compliance with a subpoena by two subdivisions. Rule 45(b) defines the places where a subpoena can be served. Rule 45(c) defines limits on the places where compliance can be required. Rule 45(c)(3)(A)(ii) directs that a court must quash or modify a subpoena that "requires a person who is neither a party nor a party's officer to travel more than 100 miles" from designated places, or to incur substantial expense to travel more than 100 miles to attend trial. The Vioxx decision described in the Committee Note found a negative implication in this provision allowing a court to require a party or a party's officer to attend as a trial witness no matter where served. The Committee agrees that this is an incorrect reading of the present rule. The proposed amendments published Rule 45 text that simply overrules the Vioxx interpretation. Recognizing that there is substantial support for something like the Vioxx result as a matter of policy, however, the publication package included an alternative that was expressly identified as not recommended. The alternative would not restore the Vioxx ruling. It would not authorize a party to subpoena another party or its officer to attend trial. Instead, it would authorize the court to order a party to appear, or to produce its officer to appear, as a trial witness. The order could issue only for good cause and after considering the alternatives of audiovisual deposition or testimony by contemporaneous transmission under Rule 43(a). The court could order reasonable compensation for expenses incurred to attend trial. And sanctions could be imposed only on the party, not on its officer.

Some of the public comments supported adoption of the "Vioxx alternative." One Subcommittee member spoke in favor. There are categories of cases that present choices in designating the place of trial. Multidistrict litigation and CAFA class actions are the prime examples. The defendants have an opportunity to argue for trial in a place that is not "home town," and that is beyond the limits on subpoenas for nonparty witnesses. Choice of the location for a "bellwether" trial can be similarly affected. Some of the comments, including those from employment lawyers, support the alternative. The "good cause" standard in the alternative does not call for exceptional circumstances, but it is likely that courts will seldom use it to order a party or its officer to attend trial from a distant place. Often the parties will agree, or the court

will decide, that some other form of testimony is a satisfactory substitute for live testimony at trial. But the option for live testimony is important to fair management of complex cases. Concerns about misuse or overuse are not warranted.

Another reaction was that all Committee members agree that Vioxx misreads the present rule. Many participants in the 2010 miniconference that preceded formulation of the published proposal agreed. The concerns expressed by those who support the alternative are understandable. But there were not many comments on the published proposal and alternative, and these comments were split. Among others, the American College of Trial Lawyers and the Lawyers for Civil Justice oppose the alternative. Before Vioxx was decided, decades of litigation were conducted without the option of compelling a party or its officer to travel beyond the Rule 45 limits for nonparties to testify at trial. No one thought trials conducted in this regime were unfair. "Vioxx changed the landscape." And experience showed that it could be used for strategic purposes, threatening to drag to trial high-level officers who in fact are not important witnesses. And video depositions, or testimony by contemporaneous transmission from a distant place, are usually as good as live testimony at trial. A party will want to produce at trial any witness whose testimony is truly important. "We should go back to the history."

Judge Kravitz noted that he had urged the Judicial Panel on Multidistrict Litigation to adopt a rule that would enable a multidistrict court to order an executive to travel to attend trial. He has done it himself twice. "Most of the travel cases are multidistrict litigation cases." Adoption of such a rule by the panel would go a long way toward meeting any need for similar and more general provision in Rule 45.

Further support was offered for the alternative. It is true that historically litigation proceeded without any distinctive power to compel trial testimony by a party or its officer. Parties decided whether to produce witnesses on calculations of self-advantage. But Vioxx is not so much a departure from history as recognition of the new realities of centralization of federal court litigation. Judges should have the discretionary power proposed by the alternative. It is not clear that the Panel has authority to adopt a rule without support in a Federal Rule of Civil Procedure. The alternative provides ample protection in focusing attention on the need to consider audiovisual depositions or contemporary transmission as satisfactory substitutes for live trial testimony. Added protection is provided in the authority to award expenses incurred to attend trial.

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The Committee voted to recommend the published rule for adoption, without the alternative proposal, with two dissents.

RULE 45: TRANSFER OF MOTIONS AND ORDERS

The separation of the place where compliance is required from the court where the action is pending is not new. But it focuses attention on a set of problems that arise in present practice. Motions directed to the subpoena may raise issues closely tied to the merits of the pending action, or significantly affecting management of the action by the court where it is pending. Or a single action may give rise to discovery subpoenas calling for compliance in several different courts. It may be that the same compliance questions arise in more than one court. The published proposal provides for transfer of subpoena-related motions from the court where compliance is required to the court where the action is pending. The standard requires "exceptional circumstances" or the consent of the parties and the person subject to the subpoena. One important issue is the standard for transfer.

A simple illustration is provided by an action pending in the Eastern District of Michigan and a discovery subpoena issued by that court to a nonparty witness in the Southern District of New York. A motion directed to the subpoena is made in the Southern District of New York. In light of suggestions in several of the public comments, the Subcommittee decided to recommend that the consent of the parties should not be required to support transfer. Consent of the nonparty served with the subpoena enables — but does not require — the court to transfer a motion to the Eastern District of Michigan. It seems appropriate to subject the parties to the jurisdiction of the court in Michigan if the nonparty consents.

Absent the nonparty's consent, the exceptional circumstances criterion generated much disagreement in the comments. Several alternatives were suggested: "good cause"; the version in the draft prepared for the April 2011 meeting, "considering the convenience of the person subject to the subpoena, the interests of the parties, and the interests of effective case management"; or "finds that the interests favoring transfer outweigh the interests of the person subject to the subpoena [or any party opposing transfer]." Support for the "exceptional circumstances" criterion focused primarily on protecting a nonparty against the burdens of contesting discovery issues in the often distant court where the action is pending. Support for a more permissive standard began with suggestions that the illustrations of "exceptional circumstances" in the Committee Note are not exceptional at all. The Magistrate Judges Association urged that transfer should be

more freely available, and another comment suggested that transfer should be virtually routine when the dispute focuses not on the circumstances of the nonparty subject to the subpoena but on the merits of the action or the relative importance of the information in relation to other discovery in the action and the merits. The Subcommittee divided on the standard, but did not recommend a change.

Discussion began with support for the exceptional circumstances test. Practical experience suggests focus on the nonparty as the person we should be concerned about. "The nonparty 'has no skin in the game.'" In determining whether exceptional circumstances warrant transfer, the court can take account of any showing that the nonparty in fact has a close relationship with a party, and even may be acting in order to increase burdens on other parties. The parties would like to litigate where it is convenient for them. The judge in the court where compliance is required also has an interest in transfer, to avoid the inconvenience of being involved with disputes arising from an action in another court. "Courts often have an interest that favors transfer." Although some comments favored a more lenient standard, there were not many of them. Remember there was so little interest in the entire proposal that the hearings were cancelled. The American Medical Association, representing doctors who are often subjected to nonparty discovery, strongly favors the exceptional circumstances test. So do other groups. "Lawyers can take care of themselves." Any lesser standard makes it too easy to transfer. "My experience is that this issue can be resolved by focusing on the interests of the nonparty. If there is a need for a ruling by the court where the action is pending, transfer will happen."

This position was tested by drawing from illustrations in the Committee Note. Is it an exceptional circumstance that the court where the action is pending has resolved a substantive dispute, and a party is asking for a different resolution of the dispute by the court where compliance is required? Or if subpoenas are served that require compliance by nonparties in fifteen different states, all presenting the same issues of compliance? The response was that multiple subpoenas are not an exceptional circumstance. And if there has been a substantive ruling by the court where the action is pending, that ruling will be taken into account by the court where compliance is required.

It was noted that the American Bar Association Litigation Section proposed the exceptional circumstances test, and continues to support it. The Department of Justice also supports it. Parties often seek discovery from nonparty government witnesses. It is better to litigate the disputes where the witnesses are.

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In response to a question whether any Committee member favors relaxing the exceptional circumstances test, it was observed that it is "incoherent" to offer examples in the Committee Note of circumstances that many observers describe as not exceptional, indeed nearly routine. Reliance on "exceptional" as a standard seems to raise an empirical question: how common are the "circumstances" offered to support transfer? And the empirical response seems to be that these illustrations are not exceptional. On the other hand, it was suggested that "in the full federal caseload," not many cases will present the problems. This view was repeated from a slightly different perspective. In the overall federal caseload, not many cases involve discovery from nonparties away from the court where the action is pending. Distant nonparty discovery is itself exceptional. Circumstances that warrant transfer will themselves be exceptional even within this category of exceptional cases.

An observer suggested that the Subcommittee report seemed to favor relaxing the exceptional circumstances test, and asked what happened? It was responded that the Subcommittee had not really decided to support one view or the other. The seeming unanimity of the discussion with the Committee was not anticipated.

The focus on the Committee Note examples led to asking how to integrate the task of articulating a transfer standard in rule text with the task of offering helpful illustrations in the Committee Note. If there is to be a transfer text, "transfer should at least be possible. Judges who encounter these problems find it difficult to deal with a piece of a broader picture."

It was suggested that the Committee Note must be changed. The paragraph that begins by stating that it is difficult to define exceptional circumstances should be revised, first, by moving the final sentence to become the first sentence: "The rule contemplates that transfers will be truly rare events." Beyond that, the Note should attempt to reduce the risk that transfer will "become the rule." The standard might be explained as involving circumstances so compelling as to make it contrary to the interests of justice to resolve the dispute in the court where compliance is required. That could reduce the perceived incoherence between the rule standard and the present examples.

One reaction to this discussion was that if transfer is to be so tightly circumscribed it may not be right to say only that the court "may" transfer. If the case for transfer is so compelling, why not say that it must be transferred? An immediate response was that "any judge will transfer if there are exceptional reasons to transfer." A related suggestion by an observer was put as a

question — can a judge of the court where the action is pending arrange to be designated to sit in the court where compliance is required so as to protect the nonparty's interests while also achieving the benefits of transfer? Another suggestion was that judges will manage to confer with each other when there is a substantial need for coordination, and reduce the costs of separate proceedings by informal arrangements.

It was agreed that the exceptional circumstances test should remain in rule text, and that the Committee Note should be revised to reflect better the exacting standard that is intended. One possibility would be to suggest a distinction between disputes that focus on considerations specific to the local witness and disputes that focus on the main action. But it was responded that the nonparty witness should not be subjected to this distinction. A nonparty should not be dragged around the country merely because the dispute is between the parties and focuses on the merits of the action. It was left to the Subcommittee to prepare a revised Committee Note, to be circulated to the full Committee for review and approval.

Rule 45: Place of Compliance

The published proposal, Rule 45(c)(2)(A), provided that a subpoena may command production of documents, tangible things, or electronically stored information at a place reasonably convenient for the person who is commanded to produce. As in the present rule, the place is designated by the party serving the subpoena, not the person subject to the subpoena. This formulation reflected at least two concerns. The more prominent concern was that discovery increasingly includes production of electronically stored information by transmission to the requesting party. Production by transmission is equally convenient to any electronic address. A subsidiary concern was the ambiguity of applying present Rule 45 to nonparty entities who are subject to service, and who transact business, in many places. So far, so good. But it was asked how this provision plays into the provisions in proposed Rule 45(d) that call for motions to enforce a subpoena, or for relief from it, in the court where compliance is required.

A simple illustration was proposed. A New York law firm is litigating an action in Arizona. It serves a subpoena on an Arizona nonparty to produce documents at the law firm offices in New York. The nonparty wishes to protest that production in New York is not reasonably convenient within the meaning of Rule 45(c)(2)(A). As the rule is structured, the Arizona nonparty must seek relief by motion in the court in New York. Or, to make it one

step more complicated, the subpoena requests production of documents that in fact are stored in a warehouse in Oregon.

The Committee agreed that Rule 45(c)(2)(A) should be revised to delete the published provision looking for production at a place reasonably convenient for the person who is commanded to produce. The starting point will be to adopt the 100-mile provisions that apply to nonparty depositions, unless the parties agree on a different place for production. Agreement is very likely to be reached as to electronically stored materials. The Subcommittee will propose new language to be included in the package of Rule 45 revisions for e-mail review by the Committee.

RULE 45: OTHER ISSUES

One of the comments, from a lawyer in Hawaii, observed that difficulty had been encountered in persuading courts on the mainland to enforce subpoenas to testify at trials in Hawaii by means of contemporaneous transmission under Rule 43(a). The Subcommittee agrees that a Rule 45 subpoena is properly used for this purpose — a witness outside the reach of a subpoena from the court where the action is pending can be compelled to testify from a place within the limits imposed by Rule 45. The Committee agreed that the Committee Note should be revised to confirm this plain reading of the revised Rule 45 text.

The comments also raised a concern that Rule 45 will somehow be read to limit the present practice that supports discovery from parties outside the Rule 45 limits. Rule 37(d) authorizes sanctions when a party or its officer, director, or managing agent fails to appear for a deposition after being served proper notice. Rule 37(d) extends as well to Rule 33 and Rule 34 requests. There is no need for a subpoena. Limits are imposed as a matter of reasonableness. The Subcommittee and Committee agreed that the Committee Note should be revised to include a reminder that the revisions do not change this established practice.

Other changes made to the published Committee Note were identified and accepted.

RULE 45: RECOMMENDATION

The Committee voted, without dissent, to recommend to the Standing Committee that revised Rule 45 be recommended for adoption upon Committee approval by e-mail submission of the revisions adopted at this meeting.

Discovery: Preservation and Spoliation

April 9 version

Judge Grimm introduced the Discovery Subcommittee report of its work on preservation of materials for future discovery requests and spoliation sanctions for failure to preserve. The report describes the status of Subcommittee deliberations and requests guidance.

The immediate source of concern is the costs associated with the duty to preserve evidence relevant to a claim, particularly when a foreseeable claim has not yet become the subject of litigation. This concern was brought to the fore by panel discussion at the Duke Conference. Initial Subcommittee work was considered at a miniconference in September 2011, and the Committee reviewed the topic at its November 2011 meeting. In December the Subcommittee on the Constitution of the House Judiciary Committee held a hearing. Congressman Franks has submitted a letter on the costs of discovery and preservation that will be considered by the Advisory Committee at this meeting and in future deliberations. Others also have provided valuable information, including Lawyers for Civil Justice, the RAND Institute for Civil Justice, the Department of Justice, and regular observers Allman, Butterfield, and Tadler, all present today. The Sedona Conference continues to work on these issues. The Subcommittee has continued to work by conference call.

The difficulties of the underlying questions are highlighted by the number of comments from outside and by the disparity of views expressed by the comments. The Department of Justice letter suggests that it is premature to attempt to develop new rules provisions. The ongoing studies by several groups will, when complete, provide a better foundation. The Department itself has carried out a survey but will extend the survey.

These sources of information are valuable. But it is difficult to locate them along the line from anecdote to an accumulation of anecdotes to hard numbers. "Getting numbers in a helpful way is hard." The Department of Justice survey shows that few adversaries request — or even threaten to request — sanctions against Department lawyers or against the United States, and that Department lawyers seldom threaten to request or actually request sanctions against their adversaries. Most cases do not seem to involve the sanctions that are said to drive many institutional litigants to overpreserve in costly and disruptive ways.

These uncertainties about actual current problems are compounded by the common concerns about making new rules. Will litigants comply with a new rule? What unintended consequences may follow — including impact on state tort law, and interaction with obligations to preserve evidence imposed by rules of professional

responsibility? Remember that there are many constraints that require preservation of vast amounts of information quite without regard to the prospect of litigation. It may be that the increase in total preservation caused by a duty to preserve for reasonably anticipated litigation would be quite small.

The Subcommittee initially developed draft rules to illustrate three different approaches. The first set included detailed provisions governing the events that trigger a duty to preserve; the scope of the information that must be preserved in terms of subject matter, number of sources or "key custodians" that must be drafted into the preservation, the reach back in time for information to be preserved, the duration of the duty to preserve; and more. The second set described the same dimensions of the duty, but in general terms that mostly exhorted reasonable behavior. The third set focuses on the occasions for remedies and sanctions, affecting the duty to preserve only by reflection from the circumstances that justify remedies or sanctions. The approach by way of remedies and sanctions derives from the legions of statements that the fear of sanctions leads to vast over-preservation, at great cost. This approach aims "to give some shelter from the storm."

The Subcommittee consensus, although not a unanimous view, is that it would be difficult to create good rules that seek to define the duty to preserve, either in detail or by simply exhorting reasonable behavior. Detailed provisions, further, could easily be superseded by advances in technology. Social media offer an example of complex sources of information that likely would have been overlooked in a detailed rule drafted even a few years ago. It cannot be guessed what new sources of information will develop, and become important, even in the near future. Work on the drafts now presented looked to describing the basic concept, developing a bedrock concept of proportionality, and such. Much of the focus is on shaping a distinction between remedies designed to cure the loss of information that should have been preserved by searching for substitutes, and sanctions designed to provide some substitute for vanished information in cases of serious fault and serious prejudice.

Other questions have been considered. Should new rules address the scope of discovery? There is general agreement that the volume of information available for discovery, and thus preservation, has exploded. The explosion is in the form of electronically stored information; should any new rule address only ESI? The Subcommittee reached no consensus on this question. It considered the Federal Circuit presumptive limits on e-mail discovery, but only asks the question whether this should be

considered. The work of the Duke Subcommittee overlaps the work of the Discovery Subcommittee in these dimensions. The two subcommittees are working in tandem.

The Subcommittee has real reservations about some of the details that are regularly suggested for new discovery rules. Drafting in terms of limiting the number of "key words" for searches, for example, could easily lead to choices that will yield "100% recall and 0% precision." Predictive coding offers promise as a means of sharpening the focus of search and preservation efforts, but it is not yet fully developed — RAND is exploring this approach. One RAND finding is not surprising: reviewing available information for relevance, responsiveness, and privilege or other grounds of protection accounts for 70% of the cost of preservation and discovery.

One of the current drafts pursues an approach urged by Thomas Allman, focusing a preservation sanctions rule on ESI alone. Drafting may be easier on this approach, which can be framed as a revision of Rule 37(e) rather than a new Rule 37(g). Some Subcommittee members are attracted to this approach, while others think litigants should not be forced into the nightmare of different preservation regimes for ESI and all other information.

Professor Marcus said that after the November 2011 Committee meeting further work was devoted to developing a rule with more "hard specifics," but that approach presented problems and is not illustrated in the agenda materials for this meeting. Nor is there full agreement whether to frame rules amendments by focusing on ESI alone. For many years, many observers believed that the general discovery rules provided all the tools needed to manage discovery of ESI. But the 2006 amendments reflect a judgment that some specific provisions for ESI are necessary. ESI is different both in its nature and its extensiveness. Rule 37(e) is an example of an ESI-specific rule. On the other hand, Rule 26(f) addresses all discoverable information, and there continues to be a great deal of discoverable information that is not stored in electronic form. Non-ESI information likely continues to be important in many cases, but this is an uncertain proposition and the situation may change in the future. If the next set of amendments is limited to a focus on ESI, they can be fit into the more recent amendments.

The choice of focus will affect how the rules are shaped, and perhaps also when they should be adopted. The development of concept searching by such means as predictive coding, for example, is difficult to predict.

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Beyond these now familiar questions, another question persists: can a duty to preserve be defined in terms that limit the obligation to preserve by allowing destruction of information that would be discoverable if litigation were actually in being? And should the Subcommittee continue to work on rule provisions that would define specific limits on the scope of ESI discovery, along the lines sketched in the informal discussion draft Rule 26(b)(1)(B) set out in the agenda materials at p. 275?

The first of these questions to be discussed was whether preservation provisions should focus only on ESI, or should encompass all discoverable information. Some Subcommittee members think ESI presents all the significant problems, that only minor problems are presented by other forms of information. Others think it unwise to focus on ESI alone.

The first question asked how to draw a line between ESI and other information. What is a print-out copy of ESI? Many people recycle the hard copy, relying on the electronic storage. But where would this fall within an ESI rule: must it be preserved as one form of the ESI? Under present rules, preservation in one form should suffice. But if the rules start to distinguish between ESI and other forms of information, the distinction could become difficult. This is an aggravation of a current problem — if you have both hard-copy and ESI forms, can you satisfy a request for ESI by producing only in the hard-copy form? If a rule is drafted to protect against adverse consequences from a failure to produce, it does not say you can discard other forms of the same information. But the Subcommittee does not intend or recommend creation of more onerous preservation requirements. The focus is on relevance and prejudice. If the information remains available in one form, there is no problem. But then it was asked whether creating a safe harbor for some kinds of destruction — most apparently ESI — may cause difficulty for other kinds of information outside the safe harbor category.

Another question was whether anyone has done a survey to determine whether preserving ESI is qualitatively different from preserving paper, and why? One current debate is whether the § 1920 provision that allows recovery of costs for "exemplification * * * of any materials where the copies are necessarily obtained for use in the case" extends to the expense of producing ESI.

Turning to the relationship between severity of sanctions and the degree of culpability in failing to preserve, should "case-ending sanctions" be limited to cases of intentional destruction? What of gross negligence? And what of merely negligent, or perhaps innocent, loss of critically important information — the running

example is compacting a wrecked automobile before the defendant has an opportunity to examine it for claimed defects? The Lawyers for Civil Justice suggest the test should be an intent to make information unavailable for trial. That would prohibit an adverse inference, or stronger sanctions, even when a non-intentional loss of information defeats an adversary's ability to litigate the case. Loss of ESI can have the same consequences as loss of physical evidence.

The FJC survey found that about half of sanctions motions involve loss of ESI. Half involve loss of other forms of information. That suggests an attempt should be made to address all forms of information. And there is sufficient controversy about preservation obligations and sanctions to warrant continuing work now. The continuing development of information in various projects, including the Seventh Circuit e-discovery work, the Southern District of New York complex litigation project, and the like, will provide help as the drafts mature, but the work will be prolonged in any event. Ongoing work elsewhere weighs against precipitous action, but precipitous action is not likely in this project.

It was further urged that new provisions should not be limited to ESI. "The problems are shared." For that matter, the very concept of ESI is bound to change.

A distinctive consequence of ESI was then urged. "Everyone is a filekeeper in the era of ESI. There is no central file as in a paper world." The culpability standard, however, should be the same. "It is easy to delete very quickly." Identifying the trigger for preservation before litigation is filed is important, especially for individuals.

An observer noted that there clearly are differences between ESI and other forms of information. The rulemaking question is whether rules that do not distinguish between ESI and other forms of information provide sufficient guidance. The 2006 amendments were shaped in light of information suggesting that judges were not aware of distinctions that make a huge difference for sanctions, and did not understand the loss of information in the routine operation of ESI systems. Are we sufficiently confident now in the case law, and in awareness of computers, to be able to go back to an overarching rule that does not distinguish ESI from "physical stuff"? If not confident, it may be better to distinguish ESI, and not go for a generally applicable approach.

A related perspective was offered. Traditionally, common law adapted to evolving technology through decisions. But sanctions

affect professional careers. "This affects professional responsibility by sanctions." We want rules that provide guidance. Without rule guidance, lawyers will be very careful. And that can mean costly over-preservation.

Another observer reported urging the ABA Business Law section to set up standards of good preservation practice. What preservation features should be incorporated as an entity develops an overall efficient information system? This is a very dynamic field. "The techniques for penetrating into systems to get information are evolving and unstable." A focus on the sanctions problem seems appropriate. Gross negligence may be the right standard for ESI and other forms of information. A general standard can adjust to changing technology.

Agreement with this view was expressed. The culpability standard should be the same for ESI and other forms of information. Today we can identify four or five different standards in different circuits. "We need a rule to give us a uniform standard. We can do that more readily than a rule defining trigger and scope." "Residential Funding changed the rules of the game." And the culpability standards should be consistent across all information forms. To be sure, attention to these issues increased exponentially with ESI. But a lot of cases "focus on what individuals have done, and they were things that might have been done with paper files." The ESI cases have simply magnified the disparities around the country. Consider a personal injury victim. To be careful, the victim would have to consider how to respond to inquiries from friends and relatives: is it safe to put a brave face on it, to say "I'm much improved," when the e-mail record may be used to challenge the seriousness of the injury? It will be important to define a culpability standard.

It was agreed that harmonizing the approaches to sanctions will not solve all the problems, "but it can improve the situation." And this can leave time for ongoing studies that may help define and resolve some of the other problems. A like comment was that "we may not be able to deal with trigger and scope any time soon. These are difficult problems that cannot be solved as quickly" as sanctions.

An observer noted that many kinds of actors are involved in preservation. There is the lawyer in court, house counsel, corporate staff, "the e-mail sitter." It can be hard to figure out who is in a position to do something. The Qualcomm case shows how difficult it can be to pinpoint responsibility.

Judge Grimm summarized the discussion by suggesting an apparent Committee view that the Subcommittee should focus first on sanctions, and should focus on tangible as well as intangible information. And the tentative exploration of a separate discovery standard for ESI should be deferred.

It was noted that the Department of Justice continues to believe that it is premature to undertake rule revisions even with regard to sanctions. "The time may come for sanctions, but not too soon." In response it was asked whether the desire for more pilot projects reflects a view that the Department encounters problems different from other litigants. The United States is plaintiff or defendant in about one-third of all cases in federal courts. "The jury is still out on exactly what are the problems we need to address. Ongoing studies may shed light. But the United States is not in a distinctive position as compared to other litigants."

Observing that some districts have local e-discovery rules, it was asked whether we know about experience with those rules? The Discovery Subcommittee is aware of them, but has not yet attempted to look for a synthesis of experience. It will be good to look when there seems to be a sufficient basis of experience. The Seventh Circuit project, which focuses heavily on cooperation among lawyers by conferring at the beginning of a case, is being studied by the FJC. The FJC also is studying the still young complex litigation project in the Southern District of New York. Eventually there will be information more rigorous than an accumulation of anecdotes. But in the meantime it is useful to continue working on a sanctions rule. A rule will not be developed overnight. The Duke Conference panel said this is an area where the bar really needs guidance. They urged the Committee to take courage. But it also takes time. The Sedona Conference, for example, has been working on these problems for a long time. Meanwhile, "the Subcommittee is doing a great job and should continue."

An observer noted that the letter from the Sedona Conference reflects hard and continuing work on these problems. "This demonstrates just how difficult this is." The working group includes people from all sides, from all areas of practice, and is finding it difficult even to find points of agreement. "The process needs to be completely informed." "People have a sense the Committee is about to do something. It would help for people in the bar to hear it's a process."

Another observer agreed that it is a process. People have thought the Committee is on the verge of action since the Duke Conference two years ago. The Committee has an obligation to act

to clarify when there are clear conflicts in cases purporting to interpret a Federal Rule of Civil Procedure. When conflicts appear in addressing questions not directly addressed by a Rule, the Committee also should consider acting. There is a clear conflict in correlating sanctions with levels of culpability in failing to preserve discoverable information. The Committee must determine whether it would be good to address this conflict while other problems percolate and are studied further.

This question was fit into a broader framework. The Committee is charged by § 331 to carry on a continuous study of the operation of Enabling Act rules. "We can study local rules. We can learn from them. But there is a problem. It is difficult to get rid of deeply rooted local rules."

Judge Kravitz echoed these views. The law is inconsistent as to sanctions. We know that the Second Circuit has one approach, while other circuits take different approaches. There is no reason not to have a uniform rule. Sanctions — as compared to remedial or curative measures — should be available only for bad behavior. This work was started in 2010. We should be able to continue working toward a rule on sanctions that establishes uniformity, displacing a circuit-by-circuit regime.

A Committee member agreed that the primary focus should first be on sanctions. "It will take time." It may be possible to fold the lessons of ongoing studies into the process. "Trigger and scope are not going to go away," but they are not problems for now.

Another Committee member also urged a "look at sanctions. Human nature is constant. Duties of lawyers and clients should be constant. Cooperation should be constant." But ESI has a relationship to this. The ongoing studies by the Sedona Conference, the Department of Justice, and others are valuable. For a long time we thought there is a problem of symmetry, that some categories of litigants have far greater stores of information than others have. "But all of us have lots of information." It would be good to focus, through sanctions, on preserving the information that is needed to present a case. "This topic addresses the totality of what happens in court today. The Subcommittee should not work on sanctions in isolation."

Judge Grimm expressed the Subcommittee's gratitude for the helpful Committee discussion.

Duke Subcommittee

April 9 version

Judge Koeltl reported that the Duke Subcommittee has made substantial progress in developing a set of rules sketches to advance the primary goals identified at the Duke Conference. Proportionality, cooperation, and early hands-on case management are central to reducing cost and delay. One initiative encouraged by the Subcommittee was the development of the protocols for initial discovery in employment cases. The protocols call for an exchange of information 30 days after the defendant's responsive pleading or motion. Every judge on the Committee has adopted the protocols, and has urged their colleagues to adopt them. They work extremely well.

Ellen Messing, who was involved in drafting the protocols, observed that the protocols, shaped with great help from Judge Koeltl, provide a great boost in streamlining employment actions. They replace current initial disclosures under Rule 26(a)(1), providing information expected to have a significant effect on the parties' ability to get through a case with better focus and efficiency. But there has not been as widespread adoption "as we had fantasized." Direct judicial involvement in promoting use of the protocols will be helpful. Judge Koeltl responded that he and Judge Rosenthal had urged adoption of the protocols to a group of some 70 judges at a recent program at NYU. And the FJC has informed all chief judges of the protocols.

Judge Koeltl continued by noting that the Subcommittee would meet the next morning, and would welcome both general and specific discussion of the rules sketches. Are they wise or unwise? Do they go too far, or not far enough? "The book is open." The sketches fall into three categories, focusing on the beginning stages of an action; revising discovery rules; and cooperation.

Beginning-stage. One issue is the length of time it takes to get actual litigation started in an action. The 120 days allowed by Rule 4(m) to serve process, the 120- or 90-day periods set for a scheduling order in Rule 16(b), draw things out. The first set of proposals reduce the period in Rule 4(m) to 60 days, and likewise reduce the Rule 16(b) periods by half, to 60 days after service or 45 days after an appearance. These periods were chosen simply for illustration; the actual choice may be rather different.

Another set of questions addresses how the scheduling order should be developed. The sketches carry forward current Rule 16(b)(1)(A), which allows the court to adopt an order after receiving the parties' report under Rule 26(f) without an actual conference. But otherwise, the means of holding a conference are sharpened to require an in-person conference or contemporaneous communication; the provision for consulting by "mail, or other

means" would be deleted. Another aspect of scheduling-order practice addressed by the sketches is the provision in Rule 16(b)(1) that allows categories of actions to be exempted by local rule. Local-rule exemptions may differ from the exemptions enumerated in Rule 26(a)(1)(B). Rule 26(a)(1)(B) exemptions also apply to the Rule 26(f) meeting of the parties and the Rule 26(d) discovery moratorium. It seems desirable to establish a uniform set of exemptions. The simplest way to do this would be to eliminate the present provision for local-rule exemptions and replace it with adoption of the Rule 26(a)(1)(B) exemptions by cross-reference.

The sketches also include alternative provisions aiming at encouraging a conference with the court before filing a discovery motion. The more modest approach would add to Rule 16(b)(3) a new item, providing that a scheduling order may direct the movant to request an informal conference with the court before filing a discovery motion. The more ambitious approach would add a new provision — perhaps in Rule 7 governing motions, or perhaps somewhere in Rule 26 — directing that the movant must request the informal conference before filing a discovery motion. It appears that about two-thirds of federal judges do not now require a pre-motion conference, so it can be anticipated that many would resist a rule making it mandatory.

The Rule 26(d) discovery moratorium is addressed by another set of sketches. Many lawyers seem unaware of the moratorium now, as witnessed by frequent requests to determine whether discovery should be suspended pending disposition of a motion to dismiss made by lawyers who are subject to the moratorium because they have not yet had a Rule 26(f) meeting. The moratorium may make it more difficult to have an effective discussion at the Rule 26(f) meeting. These sketches provide that any party can make discovery requests at a stated time after service or after some other event, but defer the time to respond until a stated period after a scheduling order enters. The idea is that the parties can plan discovery more effectively at the 26(f) meeting if they have actual discovery requests to consider. This system is not intended to support arguments that the first party to serve requests is entitled to priority in discovery. The only purpose is to make the 26(f) conference more productive. The hope is to expedite discovery at the outset and to make both the 26(f) meeting and the scheduling order conference more productive.

Discovery proposals. The need for proportionality in discovery was repeatedly emphasized at the Duke Conference. The word "proportionality" does not now appear in the rules. Rule 26(b)(2)(C) does impose proportionality limits, but parties and

courts continue to speak of discovery in terms of the full sweep of the Rule 26(b)(1) scope provisions. Even appellate courts do this. The cross-reference to 26(b)(2)(C) at the end of present 26(b)(1) does not seem to have any real effect.

"Proportionality is important." The Subcommittee prefers to incorporate the concepts of present 26(b)(2)(C) into the (b)(1) definition of the scope of discovery. This can be done in various ways, as illustrated by alternative sketches. Still other sketches expressly incorporate "proportionality" into the (b)(1) scope provision, but this seems risky. It would introduce a new concept; with or without an attempt at further definition, the new concept would generate uncertainty and corresponding contention.

Proportionality also is approached by reducing the numerical limits on the presumptively available numbers and length of depositions, and on the number of interrogatories. Numerical limits would be added for the first time to Rule 34 requests to produce and Rule 36 requests for admission. It is possible that the presumptive limits now in Rules 30, 31, and 33 encourage some lawyers to engage in more discovery than they would seek without these targets. The proposed numbers still exceed the level of discovery activity in the median of federal cases as reported by the FJC study for the Duke Conference. If lower presumptive limits encourage the parties to rein in unnecessary discovery, so much the better.

Discovery problems are not confined to requests. Inappropriate objection behavior also can be a problem. The sketches aim to deal with evasive responses, particularly with respect to document requests. Rule 34 is drawn to require a response within 30 days, but the response may be either a statement that inspection and related activities will be permitted as requested or an objection to the request, "including the reasons." One narrow proposal is to add to Rule 34 the explicit statement in Rule 33 that an objection must be stated with specificity. A broader proposal addresses the common practice of framing a response to begin with broad boilerplate objections, followed by producing documents with a statement that the objections are not waived. This leaves the requesting party uncertain whether anything has in fact been withheld under the objections. A sketch addresses this phenomenon by directing that an objection must state whether anything is being withheld on the basis of the objection.

Contention interrogatories have become a subject of some contention, particularly with respect to the time when answers should be provided. The sketches would emphasize a presumption

that ordinarily answers need not be made until other discovery has been completed.

The value of Rule 26(a)(1) initial disclosures was discussed inconclusively at the Duke Conference. Some participants think the practice is useless. Others think it has some small value. Still others think it could be made truly useful if greater disclosures were required, perhaps going back to some version of the broader requirements in place from 1993 to 2000. The Subcommittee is agnostic on this subject; no sketches have been prepared to illustrate possible changes. But it is to be noted that the employment case protocols are designed to displace Rule 26(a)(1) by providing for initial disclosure of the materials each side routinely seeks in the first wave of discovery.

The sketches also illustrate possible approaches to shifting discovery costs from the responding party to the requesting party. Congress has shown an interest in this topic. Cost shifting commands a continuing place on the Subcommittee agenda, and remains an open issue. The Subcommittee is convinced that judges have the power to order cost shifting now in appropriate cases, and doubts the need to add emphasis by new rule provisions, but will continue to consider these questions.

Cooperation. It is difficult to legislate cooperation among adversary parties. But the sketches provide illustrations of ways in which parties could be brought into the aspirational provisions of Rule 1 by a direction to cooperate in seeking the just, speedy, and inexpensive determination of every action. The importance of cooperation is continually emphasized in Committee discussions of preserving discovery materials and shaping discovery more generally. Professor Gensler has long supported this Rule 1 approach.

Package. The sketches address many separate rules provisions. But they have been developed as a coherent package of interdependent changes that are designed to produce a whole greater than the sum of the parts. That is not to suggest that each part of the package is indispensable. Far from it. Specific sketches may deserve to be abandoned. Others may deserve to be added. But the target will continue to be a comprehensive package that advances the goals so clearly and repeatedly expressed at the Duke Conference.

One distinct question is how to seek review by a broader audience. One possibility would be to attempt to recreate the Duke Conference by a similar, broad-gauged "Duke II." But it may be wiser to frame a more limited undertaking, perhaps a miniconference designed to focus specifically on a package of rules proposals

somewhat like the current package. The Committee benefits continually from input from the bar and organized bar groups. It seems likely that real benefits would accrue to a conference held in some form before preparing rules proposals for publication and general public comment.

Cooperation became the first subject of Committee discussion. It was asked how litigation is possible without real efforts by lawyers to work together, to join in solving litigation problems. Cooperation is especially needed in discovery. Good lawyers cooperate automatically, without sacrificing representation of their clients. Courts insist on cooperation. Emphasizing the duty to cooperate in Rule 1 is a good idea. Another Committee member agreed that it will be useful to add party cooperation to Rule 1 — now it is common to find efforts to cooperate rebuffed by arguments that the Rules nowhere require it.

More general enthusiasm was expressed for "what the Subcommittee is attempting to do. Judicial involvement at the earliest possible time is important." Judges who do this now get good results. Without judge involvement, delay and expense are increased by "weeks of letter writing" to iron out disputes. When there is judicial involvement, "you lose all credibility with the court by taking a bad position."

Another Committee member offered similar support. "There is a sense of embarrassment that some judges are not doing their jobs." Time limits, and the reductions in the numbers of discovery requests, "are to be applauded."

Another judge expressed support for adding cooperation among the parties to Rule 1. "If the court puts its weight and prestige behind cooperation, with a representative who is responsible, it can work."

Further support for the package was expressed by describing it as "impressive." There is reason to worry about limiting the number of depositions in "megacases," but lawyers and the court can determine what is appropriate relief from the presumptive limit. "Complex litigation should not drive the train too much." The sketches incorporate a sufficient degree of flexibility.

An observer agreed, but emphasized the need to be clear that the presumptive limits on discovery are only presumptive, and can be changed to meet the needs of particular litigation. This can be dealt with in the Committee Note.

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Another observer suggested that it makes sense to hold a conference on a specific set of proposals, more sense than another broad and general conference in the model of the Duke Conference.

The same observer suggested that it would be useful to explore the value of outside facilitators in the discovery process. Not an arbitrator, but a mediator, conciliator, or special master. The effort would be to help the parties toward agreed solutions. "The business of mediation has become very much part of our profession." A Committee member extended this observation by noting the formation of a new American College of e-Neutrals. He added that when he acts as special master in discovery matters he asks the court for authority to reapportion allocation of his fees by assessing more against a party who is unreasonable. This works. The parties do behave reasonably.

The Committee was reminded that possible rules changes are only one focus of the Duke Subcommittee's work. It is important that judges be schooled in best practices, and reminded of them. Judge Fogel has incorporated case management into conferences for judges, and they will be emphasized in new judges school. The benchbook has been revised by adding a detailed explanation of Rules 16(b) and 26(f) prepared by Committee members, with an emphasis on the importance of management.

An observer offered special support for the case-management proposals. "The bar is thirsting for this." The informal conference before any discovery motion is especially important. it avoids paperwork and saves time. But she expressed concern about reducing the presumptive number of depositions and Rule 34 requests to produce. There is not a significant problem now with excess numbers of depositions. The presumptive limit to 5 depositions of 4 hours each is insufficient, especially when one party has all the information and the events in suit cover a broad period of time. One reaction in employment litigation will be to bring more cases, so as to be able to multiply the presumptive number of permitted depositions. In response to a question, she added that the employment case protocols focus primarily on exchanging documents. That diminishes the need for Rule 34 requests, and can help identify the persons who should be deposed, but it is not likely to reduce the number of depositions that should be taken. Many employment actions focus on more than one action against the employee — first discipline, then demotion, then discharge. Although the proposals allow a request for more depositions, "why should I have to go to court to get it?" A response was that this is the beauty of Rule 1 cooperation, and the informal conference before a discovery motion: if you need 12 depositions, cooperation should generate authorization for them.

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A final question from an observer asked whether the Subcommittee had considered amending Rule 26(c) to focus on disproportionate preservation demands, or amending Rule 27 to allow prefiling requests for a preservation order. "Prelitigation preservation is a hugely difficult problem. Consideration should be given to means of securing pre-litigation guidance from the court." Judge Koeltl responded that those questions are for the Discovery Subcommittee, or perhaps in some measure for the continuing study of pleading in the wake of the *Twombly* and *Iqbal* decisions. In this vein, it was added that two pre-litigation problems should be clearly distinguished. The preservation problem may seem analogous to a Rule 27 petition to preserve testimony, but there are great differences that suggest any rule-based solution should be approached independently. The problem of discovering information needed to frame a pleading with the fact specificity that may be required by new pleading standards is distinct from both these problems, and might be addressed by providing discovery in aid of a complaint already filed rather than discovery before any action is filed. In whatever form, however, these problems will not be lost from sight.

Panel Discussions: Professor Cooper's 20 Years as Reporter

The afternoon portion of the meeting was devoted to presentations of outlines of ten of the papers in a set celebrating the 75th birthday of the Civil Rules in 2013 and Professor Cooper's twenty years of service as Reporter for the Civil Rules Advisory Committee. The tribute was organized and carried out by present and former members of the Committee. The papers will be published in the Michigan Journal of Law Reform.

Professor Marcus presided over the first panel. Papers were presented by Professors Burbank, Coquillette, Gensler, Rowe, and Struve. Collectively, they traced the concept of formal rules of procedure as far back as Francis Bacon and forward to such issues as the need to take advantage of what may be ever-increasing opportunities for rigorous empirical evaluation of the operation of rules in practice. The difficulties of matching rule direction to the importance of case-specific discretion were explored, as well as the difficulties of separating substance from procedure and the corresponding challenge of framing rules of procedure designed to transcend any particular substantive field and to be transported across all substantive subjects of litigation. It was urged that rulesmakers need to be particularly careful when framing rules that affect access to court.

Judge Mosman presided over the second panel. Papers were presented by Judge Rosenthal and Professors Carrington, Kane,

Marcus, and Mullenix. Again a broad range of topics was covered, beginning with the efforts to confirm the openness of Committee proceedings by legislation in 1988, and ranging through more recent and continuing work on class actions, discovery, and the Style Project.

Detailed summaries of the summaries presented in the panel discussions would be premature. The finished papers, along with other papers assessing the ways in which Rules Enabling Act responsibilities are being carried out, will provide far better accountings.

FJC: Early Stages of Litigation Attorney Survey

Emery Lee presented a summary of his closed-case study of cases terminated in the last quarter of 2011. The study focused on categories of cases likely to have discovery activity. It excluded cases terminated less than 90 days after filing. A survey was sent to nearly 10,000 lawyers identified from the case files, divided equally between plaintiffs' lawyers and defendants' lawyers. About 3,500 replied, giving a 36% response rate.

The purpose was to explore actual timing, duration, and use of Rule 16(b)(2) scheduling conferences and orders, and of parties' Rule 26(f) meetings. The preliminary findings include these:

Seventy-two percent of respondents reported that they met and conferred as required by Rule 26(f). But it is tricky to know just what this figure means, remembering that cases not likely to have any discovery were winnowed out of the survey sample. Seven percent could not answer this question — it may be that the "wrong" attorneys were asked because those who appeared in the docket had not been involved in the early stages of the litigation. The figure increased among attorneys involved in cases that had a scheduling conference with the judge — in those cases, 92% of the attorneys reported a Rule 26(f) meeting. (The 2009 case study found 26(f) meetings in 86% of the cases that had any discovery. The complex litigation survey in SDNY had only a 68% meeting rate; it is hard to be sure, but one reason for part of the lower rate may be a high rate of Private Security Litigation Reform Act cases in which discovery is suspended pending disposition of a motion to dismiss. The survey of the Seventh Circuit pilot e-discovery project has no direct question, but it may be possible to back out a 54% rate.)

Rule 26(f) conferences were most often held by telephone or videoconference. 86% of the respondents who reported meeting used one of these means. 9% of the respondents reported in-person

meetings. 25% reported there was some correspondence. 6% reported there was only correspondence or e-mail exchanges. 74% concluded the meeting in a single conversation. 96% reported that the meeting was held far enough in advance of the Rule 16(b) conference to plan discovery. The modal response indicated that the 26(f) meeting took from 10 to 30 minutes. Only 8% lasted more than an hour. The meetings that discuss ESI tend to take longer. These responses suggest that whatever may be the failings of memory, the participants do not perceive that 26(f) meetings take a lot of time.

The reasons for not having a 26(f) conference in cases where there were none varied. Some of the responses suggest behavior in defiance of the rule — "we agreed not to," "one side refused," or "I don't do that." 45% of the answers were "other"; perhaps not surprisingly, cases in the "other" category had the highest rate of "other" responses. "Probably Rule 26(f) is honored in most cases where it should be."

Other questions asked whether the 26(f) meeting served various ends. 71% reported that the meeting assisted in making arrangements for initial disclosure; 60% reported it helped to develop a proportional discovery plan; 50% reported it helped better understand the opposing party's claims or defenses; 40% discussed discovery of ESI; and 30% reported that the meeting increased the likelihood of prompt resolution. Of the 40% that discussed discovery of ESI, 60% discussed preservation obligations. These rates suggest there is a lot of room to encourage parties to discuss ESI discovery and to clarify preservation obligations. They compare to the Department of Justice survey indicating that preservation was discussed in 48% of conferences; the rate in the Seventh Circuit project is 62%, but the project involves cases expected to have discovery issues. Lower rates were reported in the survey undertaken to establish a basis of comparison for studying the new Southern District of New York project for complex litigation.

Fifty percent of all respondents reported a Rule 16(b) scheduling conference, either in person or by phone; the rate increased to 60% of those who had a Rule 26(f) meeting. 94% of those who reported a Rule 16(b) conference also reported a scheduling order. Table 12 of the report shows responses to a question asking the reasons for responses indicating that the Rule 26(f) meeting did not clarify your client's preservation obligations. 89% answered that their clients' preservation obligations were clear prior to the conference. Only 7% of the answers were that opposing counsel was not adequately prepared to

discuss preservation, and 4% reported opposing counsel was not cooperative.

The cases that did not have a Rule 16(b) conference in person or by telephone involved various explanations. Of them, 40% stated that the case was resolved before the conference took place. 12% reported that the conference was conducted by correspondence. 24% were cases exempted from the conference by local rule or judicial order. And 24% gave "other" as the reason.

Proportionality of discovery requests relative to the stakes in litigation was discussed by the judge in 24% of the Rule 16(b) conferences, and not discussed in 76%.

The parties' proposed discovery plan was approved without modification in 39% of the cases, with minor modifications in 57%, and with major modifications in 4%. But it is difficult to know how respondents drew the line between minor and major changes. The most common change appears to involve the time for discovery — are such changes major or minor?

It has not been done yet, but it will be possible to correlate the length of the Rule 26(f) meeting with the respondents' views of how helpful the conference was. It also will be possible to correlate the length of the meeting with the amount of discovery.

An attempt was made to separate complex cases from other cases. 25% of those who were asked reported that cases the researchers expected to be complex were not.

It is not clear how much information can be drawn from the survey about the topics that were discussed in the Rule 26(f) meetings that did discuss discovery of ESI. The most commonly discussed question was the format of production.

Pleading

Pleading occupies less than one page in the agenda book. The page puts a single question. The Committee continues to pay close attention to the evolution of pleading practices as lower courts continue to work through the implications of the *Twombly* and *Iqbal* decisions. Although there is a sense that practices are converging and settling down, there also is a sense that there may be still closer convergence over the next year or two. In addition, empirical studies of pleading and motions to dismiss continue. The FJC, through Joe Cecil, is about to begin a comprehensive study of motions to dismiss that will extend beyond Rule 12(b)(6) motions to include other Rule 12 motions, and to extend beyond that to summary

judgment. The study will be designed to facilitate comparison with the findings in earlier FJC studies, and to integrate findings on case terminations by all dispositive pretrial motions. The study is designed to involve members of the academic community, and to generate a data base that will be freely available for scholarly use. This integration with the academic community was lauded as a very good development.

A second impression supplements the potential values of deferring any decision whether to begin work toward publication of possible rules revisions. The potential advantages of delay are apparent. The potential costs must also be counted. The sense is that there is no present crisis in federal pleading practice. Hasty action is not compelled by a need to forestall frequent unwarranted denial of access to press worthy claims before the courts. There appears to be an increase in the frequency of motions to dismiss for failure to state a claim. There may be some increase in the number of cases terminated by these motions. But it is not clear whether, if so, the outcomes are good, bad, or neutral.

So the question put to the Committee was whether this assessment is wrong. Is there reason to begin immediate work to refine the many possible alternatives that have been outlined in earlier meetings? Many of the alternatives focus directly on pleading standards. Some focus on motions practice. And some describe different approaches to discovery in aid of framing a complaint. Models abound and can proliferate. Should they be advanced now?

Brief discussion concluded that while it is vitally important to maintain careful and continual study of pleading standards and practices, the topic is paradoxically too important to justify present action. It will continue to command a regular place in agenda materials.

Rule 23 Subcommittee

Judge Mosman, Subcommittee chair, led discussion of the Rule 23 Subcommittee's initial work. The Subcommittee, helped by discussion at the November Committee meeting and the panel discussion at the January Standing Committee meeting, has identified five major topics for study. The most important present question is whether all five of them warrant further work, and whether there are other topics that also should be considered. Another question is timing: the Committee has a rather full agenda. And it will be important to decide on means of gathering information from outside the Subcommittee and Committee.

The five topics at the front of the present agenda are these: (1) The role of considering the merits in ruling on class certification, as illuminated by Ellis v. Costco, Hydrogen Peroxide, and some parts of WalMart v. Dukes. Is there confusion, or are there differences, in the role of rigorous analysis? (2) Should there be criteria for certifying a settlement class different from the criteria for certifying a litigation class? (3) What about issues classes, and the relationship between Rule 23(b)(3) and (c)(4)? Is predominance always required, so (c)(4) is only a trial tool? (4) Are settlement reviews working properly under the 2003 revision of Rule 23(e)? (5) What is the proper role of individual monetary awards in Rule 23(b)(2) mandatory classes?

Subcommittee members Klonoff and Cabraser were asked to describe their views on these subjects.

Dean Klonoff began with the observation that "Hydrogen Peroxide has caused a sea change in conduct of the class-certification stage." Courts look to the merits and resolve fact disputes relevant to determining certification requirements. Hydrogen Peroxide directs the court to decide which parties' experts are more credible. Bifurcating class-certification discovery from merits discovery is more difficult.

As to settlement, the Amchem decision says that certification of a settlement class does not require finding that the same class would be manageable as a litigation class. But all other class-action requirements must be satisfied. Courts refuse certification, for example, for want of predominance. As Judge Scirica noted in his opinion concurring in the DeBeers case, the Amchem decision has caused lawyers to shift to settling claims in non-class ways without any of the oversight that applies to class settlements. This development is troubling.

As to issues classes, the Castano decision in the Fifth Circuit requires predominance for the case as a whole. The Second and Seventh Circuits, on the other hand, find certification proper if class disposition "materially advances the case as a whole."

The ALI Principles of Aggregate Litigation attempted to refine the criteria for reviewing class settlements. Judicial opinions list a dozen factors or more to be considered, without assigning relative weights to the different factors. Courts have seized on the ALI Principles precepts for cy pres settlements, including a wonderful recent opinion by Judge Rosenthal. Section 3.07 has been adopted by a couple of courts.

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As to Rule 23(b)(2) classes, it would be premature to attempt to measure the impact of WalMart on some things. WalMart conflates commonality with predominance, but it is difficult to know how seriously lower courts will take all statements in the opinion. There is some question how far Rule 23 can be amended to allow determination of individual backpay awards in a (b)(2) class, given the discussion of due process in WalMart. So the role of individual damages claims remains unsettled.

Any attempt to reformulate the categories of Rule 23(b), whether along the lines sketched twenty years ago or some other lines, would be an aggressive move.

In response to a question, Dean Klonoff expressed uncertainty whether due process can be satisfied by notice on a web site, or by e-mail. "Individual notice seems too expensive.

Elizabeth Cabraser observed that the "jurisprudence is very active" in attempting to work through the extent to which the merits should be considered in deciding on certification. Berry v. Comcast in the Third Circuit, 655 F.3d 182, formulates a distinction between looking at the merits for certification and decision at trial. There are huge issues on how this affects expert analysis. Must it be done twice? Must discovery be done twice? The courts are attempting to clarify these issues, but they deserve Committee study. There is an extreme position that a class can include only those people who will win at trial; that asks for too much consideration of the merits at the certification stage.

The developing law, such as the Sullivan case, suggests that courts can navigate the certification of settlement classes, but it would be good to develop express rule provisions.

As to issues classes, some courts now fail to navigate the rule. A recent Seventh Circuit decision, McReynolds v. Merrill Lynch, is very good, an interesting source on Rule 23(c)(4). The central perception is that (c)(4) plays different roles at different stages of a case.

As to settlement review, it would be good to have a "unified field theory," identifying the factors that can be considered. And it would be useful to clarify the role of cy pres settlements.

Employment lawyers and civil rights groups are interested in clarifying Rule 23(b)(2). One approach is to view backpay as equitable relief. Or it may be that an opportunity to opt out should be provided; the issue may be the cost of notice. This could be combined with the issue-class question, recognizing a

(b)(2) class for common issues, with a right to opt out for individual remedies.

Professor Marcus, Reporter for the Subcommittee, offered comments on where the Committee has been in the past.

The first observation is that it takes a long time to become familiar, and then comfortable, with class-action issues. It will be useful to get to work now. But the WalMart decision is still recent. Its impact will be worked out only over time.

The Hydrogen Peroxide decision "is a big, big deal," but it continues to evolve. It may develop into a terrific idea. Or it may lead to putting the entire cart before the horse, and lead to litigating the merits in full twice.

Amchem says that the prerequisites to class certification cannot be bypassed in order to approve a good settlement. Perhaps that deserves consideration.

There may be an inherent tension between Rules 23(b)(3) and (c)(4) on issues classes. The circuits have divided. That may be sufficient reason to take on this subject.

Rule 23(e) as amended in 2003 provides more guidance on settlement review than its earlier form. Coming to agreement on a list of the real concerns that should shape review may be a challenge.

The question of damages in a (b)(2) class is important, but it is too early to know what the impact of WalMart will be.

Finally, "an academic might want to rethink the categories of (b)(3), but this would stir controversy."

Discussion began with an observation that review of Rule 23 is good to the extent of "real legal issues that we can nail down." The role of issues classes under Rule 23(c)(4) is an example. The five topics identified by the Subcommittee reflect what is going on in the courts. It will be useful to study settlement classes and issues classes. It is not so clear whether there is much for the Committee to do about Hydrogen Peroxide.

A committee member suggested that it would be useful to address settlement classes. If often happens that defendants argue that class certification is impossible, and then switch and want to certify a class with a settlement already worked out. There is a

temptation to get rid of the case by certifying a class for settlement.

An observer suggested that the direction to decide on certification "as soon as practicable" generates enormously complex issues that make it difficult to decide when to propose Rule 23 revisions. The requirement of strict scrutiny of all the Rule 23 factors before making a certification decision, combined with uncertainties as to the scope of pre-certification discovery, may contribute to an urge to settle without doing all the work needed to satisfy Hydrogen Peroxide standards. "Hydrogen Peroxide has made a huge difference in the amount of work before certification." Even if discovery begins with an attempt to bifurcate certification discovery from merits discovery, you find the plaintiff needs more information and defendants resist requests for more as involving merits discovery.

Another observer noted that he had been involved in the Hydrogen Peroxide litigation. The aftermath is that there is really no such thing as bifurcated discovery. This is particularly true as to ESI — it is not feasible to search only for information bearing on class certification. And much money is being spent on full expert damages analysis. It takes six months to a year longer to reach a certification decision than was required before Hydrogen Peroxide. In response to a question whether all that pre-certification discovery makes it easier to be ready for trial after certification, the observer stated that judges allow 90% of discovery before the certification decision. "Only clean-up is left."

The first observer described experience in a current case with bifurcated certification discovery. The schedule sets a 2-month deadline. The information has not yet been provided. When it comes, it will be an "information dump." More time will be needed to explore it. Clarification of what is needed for certification is important. This is not an argument to delete the "as soon as practicable" requirement, but is an argument to clarify for the courts what it is that you need to win certification, and how you are to gather that information.

When asked, these two observers said that these problems are both problems of discretion and problems of confusion about legal standards. The issues are resolved when an experienced judge has the case, but it takes too long. "Then there are judges who do not understand." The legal issues need to be clarified to guide them.

Another observer suggested that the question whether rules can help depends on the source of the problems. If it is lack of

clarity in the standard of proof — a preponderance of the evidence required for all certification elements, as in Hydrogen Peroxide — a rule might help. If the problem is that cases vary in case-specific ways, such as defining the scope of the class, the issues for certification, claims, or defenses, there is less room for rulemaking.

Objectors have been a source of concern in the past, especially as they affect the appeal process. Is this still a problem? If it is, can it be effectively addressed by a rule? One response was that this still is a problem.

A different observer said that civil rights plaintiffs "are clamoring about (b)(2)." They do not know how to handle Title VII classes. The Seventh Circuit has provided some help. And it may help to make use of (c)(4) issues classes.

This observation led to a statement that backpay "is a subset of a bigger problem." Class actions have been used for a long time to resolve liability, with follow-on individual proceedings. How does this work after WalMart? The question of commonality involves far more than (b)(2) classes and backpay. An extreme position would be that class actions cannot be certified when individual follow-on proceedings are needed. The observer agreed that Title VII cases can be seen as a subset. This also relates to scrutiny of the merits at the certification stage. One approach has been to require that each class member have "standing," and to limit standing to those who have valid claims on the merits. That could be crippling.

A different approach to the issue-class question was suggested. The WalMart opinion makes assertions about the preclusive effects of class decisions on individual actions. This is a thorny set of problems. Will lower courts say that all individual claims must be resolved in full, so as to achieve claim preclusion foreclosing any later individual actions? Or will a narrower scope of preclusion suffice, as with a (c)(4) issue class?

Returning to an earlier observation, it was said again that there have been many class certifications, such as those involving pharmaceuticals or other mass torts, that look for resolution of central liability issues on a class basis — something of an issue class, although often not conceived that way — to be followed by a claims resolution mechanism to determine individual awards. "What have we done with this structure"?

One observer responded that, putting aside dicta on due process, the WalMart decision is, on its face, an interpretation of

Rule 23. The biggest due process concern arises from issue and claim preclusion. Current Rule 23(b)(2) is cast in equitable terms because the cases finding it fair to bind an individual not personally present were decided in equity. It may be possible to fit into (b)(2) low-value consumer cases, cases with formulaic relief, cases in which individual awards can be determined by a spreadsheet.

A Committee member said that many courts use (b)(3) the same way others use (c)(4). A class is certified to deal with common issues, then the follow-on issues. There need not be an inescapable tension, a choice. Rule 23(c) requires definition of class claims, issues, or defenses, and the definition must be included in the class notice. This addresses due process concerns. So it would be possible to amplify (b)(2) notice requirements for some purposes.

An observer suggested that "notice is something you can do quickly. Paper notice is not practical. People toss out the mail as junk."

Judge Mosman asked how the Subcommittee should proceed in its next steps. One Committee member responded that these issues attract great attention. The Subcommittee should ask at the beginning what the questions will be, so that everyone can participate in providing information and points of view. The Subcommittee should reach out to groups that represent practitioners — the ABA, the American College, the American Association for Justice, and so on. It should describe the issues that are being considered, and ask whether there are other issues that should be considered. "There will be people with real information, and different views." And beyond the beginning, we want involvement in an ongoing way, so we can consider all the things that we are most likely to hear later if we do not hear them and react to them earlier.

Another Committee member recalled the very useful initial Rule 56 miniconference that was held while the drafts were still in a preliminary stage.

An observer suggested that a miniconference would be good. She also noted that the Sedona Conference is hard at work on these issues.

Judge Koeltl thanked the Rule 23 Subcommittee for all its hard work, and urged that further comments be sent to them.

Rule 55

April 9 version

At the November meeting Judge Harris described a problem that some courts have encountered in understanding the interrelationships between Rules 54(b), 55(c), and Rule 60(b). Rule 55(c) states that a court may set aside a default judgment under Rule 60(b). The issue arises when a court enters a default "judgment" that disposes of less than all of the claims among all the parties in the case. Unless the court specifically directs entry of final judgment, the default judgment is not final. Rule 54(b) provides that the judgment may be revised at any time before entry of a judgment "adjudicating all the claims and all the parties' rights and liabilities." Rule 60(b), which sets demanding standards for relief from a final judgment, applies only to final judgments. A proper understanding of Rule 55(c) is that it invokes Rule 60(b) only as to a final default judgment. But some courts have had to struggle to reach this understanding.

The proposal is to revise Rule 55(c) by adding a single word: "The court * * * may set aside a final default judgment under Rule 60(b)."

The proposal was described as "a simple fix." It adds clarity, and will spare confusion in the future.

Agreement was expressed. This is a perfectly reasonable change, in keeping with the Style Project approach to adding clarity that merely expresses the rule's present meaning.

The Committee unanimously approved a recommendation to publish this amendment of Rule 55(c) for comment. Because it is a simple clarification, there is no urgency about rushing to publication. It should be held until it can be included in a package with other published proposals.

The draft Committee Note included three paragraphs. The second and third were enclosed in brackets, to indicate that they are subject to challenge as offering advice about practice in ways better avoided in Committee Notes. The Committee agreed. Only the first paragraph, explaining the "purpose to make plain the interplay between Rules 54(b), 55(c), and 60(b)," will remain.

Rule 84

Judge Pratter introduced the Subcommittee Report on Rule 84. Questions about the role of Rule 84 forms arose with the perception that the pleading forms seem inconsistent with the pleading standards described in the *Twombly* and *Iqbal* decisions. At the same time, concerns were expressed that it might be better to explore not only the pleading forms, but more general questions as

to the continuing role of the full Enabling Act process in promulgating forms that "suffice under these rules."

A subcommittee was formed with representatives from each of the advisory committees for rules that are in some way connected to forms. The Appellate Rules Committee and the Civil Rules Committees are the only committees that adopt forms through the full Enabling Act process. Bankruptcy forms are approved by the Judicial Conference and do not proceed further in the Enabling Act process. Criminal Rules forms are developed by the Administrative Office; the Administrative Office occasionally consults with the Criminal Rules Committees.

More importantly, it was decided that forms play different roles with respect to different sets of rules. There are only a few Appellate Rules forms. The bankruptcy forms play an integral role with much bankruptcy administration. The criminal forms are seldom used by defendants.

More importantly still, it was concluded that — in light of different histories, present practices, and differing uses of rules-annexed forms — there is no need to adopt a common approach to forms among all of the advisory committees. Each advisory committee should be free to determine the approach most suitable for its set of rules, keeping the other advisory committees informed of any changes in basic approach.

There are a lot of Rule 84 pleading forms. The beginning question was whether an attempt should be made to revise them to accord with new pleading standards. "We could choose to do nothing. that would make some people very unhappy. There is real concern that pleading forms — especially Form 18 for patent infringement cases — do not fit with *Twombly* and *Iqbal*."

One approach would be to "manicure" the collection of forms. One possibility would be to cut off the pleading forms, retaining the others. (The alternative of drafting revised pleading forms is unattractive.)

Another alternative would be to drop Rule 84 entirely. Or it could be retained, but modified to delete the statement that the forms suffice under the rules. The forms would become mere illustrations of possibilities.

Or the Civil Rules Committee could adopt the approach followed for the Criminal Rules, relying on the Administrative Office as the primary source of forms. "Wonderful forms abound. The least wonderful are the Rule 84 forms." The Administrative Office rules

group will meet next fall; the meeting could be scheduled next to the Civil Rules Committee meeting, affording an opportunity for Committee members to observe if that seems useful.

Or the Committee could review the forms and decide which forms deserve to be retained in some form, apart from pleading. Forms may be desirable when addressing topics that seem particularly important, or that seem to present special needs for uniformity. Forms 5 and 6, dealing with a request to waive service of process and waiver, are examples of important forms. Rule 4(d), indeed, requires use of Form 5. The form invitation to consent to trial before a magistrate judge may be another illustration — it is important to avoid any hint that the court encourages consent. Uniformity may be useful in dealing with such things as the caption of pleadings, the summons served at the beginning of an action, and possibly some others.

If only a few forms deserve "official" status, they might be retained. Form 5 is an example of a form made mandatory; perhaps that approach should be followed for a few other forms. Rule 84 might be used for that purpose, or the requirement could be expressed in rule text, as in Rule 4(d).

Discussion began with the suggestion that "'do nothing' is not an option." Case law suggests that the pleading forms do not suffice under Rule 8, contrary to the statement in Rule 84. "No one would think we should have Rule 84 if we were starting today. We should disavow it." The Administrative Office forms can help. Any really important form can be adopted by specific rule provisions.

Another Committee member agreed that the best step is to eliminate Rule 84.

Some concern was expressed about the value of Forms 60 and 61, the Notice of Condemnation and a Complaint for Condemnation. The Department of Justice will review them.

It was noted that going through the full Enabling Act process is time consuming. If the Committee wishes to retain responsibility for the Forms, it will be necessary to lavish more time on reviewing and maintaining them than has been devoted to them in the last many years. Diversion of Committee resources to this task could exact a high price in discharging more important responsibilities.

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It was suggested that the forms were adopted in 1938 for pedagogic purposes, to draw pictures of what the new rules contemplated. That is not a reason to continue them now.

An observer described Judge Hamilton's dissent in a recent Seventh Circuit case pointing out the incongruity of the Rule 84 forms with recent pleading decisions. That may suggest the need to act sooner, not later.

Other Committee members agreed that "people like simplification," and that it would be good to abrogate Rule 84, and all the forms with it. "There are other ways of getting forms out there." But it will remain important to retain, in some way, any form that is mandated by a specific rule outside Rule 84.

The Rule 84 question has been on the agenda for some time. It may be that the pleading forms raise questions sufficiently awkward as to counsel prompt action. The Committee agreed that the Rule 84 Subcommittee should consider these questions promptly, and determine whether the Committee should recommend publication of a proposal to the Standing Committee this spring. If the Subcommittee concludes that a recommendation should be made, it will circulate a proposal to the Committee. The Committee can then decide whether to carry the issue forward to the November meeting, or instead to recommend publication this summer.

Next Meeting

The next Committee meeting is scheduled for November 1, and 2 at the Federal Judicial Center in Washington, D.C.

The Committee expressed all best wishes to Judge Kravitz, and to Judge and Mrs. Campbell. And it noted that the same thoughts and wishes were expressed in toasts at the Committee dinner.

The Committee also expressed its thanks to all the panel members who traveled to Ann Arbor to deliver summaries of their papers. It is important to keep in mind, and to publicize, the achievements of the Committees over time and the importance of maintaining the Enabling Act tradition of open, deliberate, responsible rulemaking.

Respectfully submitted,

Edward H. Cooper
Reporter.

April 9 version

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

MEMORANDUM

TO: Honorable Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

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

DATE: May 14, 2012

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 29 and 30, 2012, in Phoenix, Arizona. The draft minutes of that meeting follow this report in Appendix C.

At the meeting the Advisory Committee took action on the proposed rule and form amendments that were published for comment in August 2011. Fifteen comments were submitted in response to the publication, and the Committee received testimony telephonically. The Committee considered the comments and testimony in a series of subcommittee conference calls and in discussions at the Phoenix meeting. The comments and testimony are summarized below. The Advisory Committee now seeks the Standing Committee's final approval and transmission to the Judicial Conference of the published amendments to five rules and one official form.

The Advisory Committee also took action at the spring meeting on proposed rule and form amendments that resulted from two long-term Committee projects: (1) revision of the

bankruptcy appellate rules (Part VIII of the Rules of Bankruptcy Procedure) and (2) revision of all of the official bankruptcy forms (the Forms Modernization Project). The Committee requests publication for public comment of revised Part VIII and several modernized forms for use in individual-debtor bankruptcy cases.

Other matters considered by the Advisory Committee included suggestions for rule or form amendments that were submitted by members of the bench and bar, including rule amendments proposed in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Committee voted to recommend several rule and form amendments in response to these suggestions.

Part II of this report discusses the action items, which are grouped into three categories:
(a) matters published in August 2011 for which the Advisory Committee seeks approval for transmission to the Judicial Conference—amendments to Rules 1007(b), 5009(b), 9006, 9013, and 9014, and Official Form 7;
(b) matters for which the Advisory Committee seeks approval for transmission to the Judicial Conference without publication—technical or conforming amendments to Rule 4004(c) and Official Forms 9A - 9I, 10, and 21; and
(c) matters for which the Advisory Committee seeks approval for publication in August 2012—amendments to Rules 1014, 7004, 7008, 7012, 7016, 8001-8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, 6J, 22A-1, 22A-2, 22B, 22C-1, and 22C-2.

After discussing these action items, the report in Part III presents information about the rule and form amendments published for comment last August that the Advisory Committee is not seeking at this meeting to have approved for transmission to the Judicial Conference.

Finally, Part IV discusses the Committee's ongoing work in preparing a model chapter 13 plan with related rule amendment proposals, plans for a September mini-conference on the mortgage forms that went into effect last December, the continuing work of the Forms Modernization Project, and the Committee's decision to consider issues related to the use of electronic signatures in documents filed in the bankruptcy court.

II. Action Items

A. Items for Final Approval

1. Amendments Published for Comment in August 2011. **The Advisory Committee recommends that the proposed rule and form amendments that are summarized below be approved and forwarded to the Judicial Conference. It recommends that the amended form take effect on December 1, 2012.** The texts of the amended rules and form are set out in Appendix A.

Action Item 1. Rules 1007(b)(7) and 5009(b) involve the obligation of individual debtors in chapters 7, 11, and 13 to complete a personal financial management course as a condition of receiving a discharge in bankruptcy. Rule 1007(b)(7) currently requires the debtor to file a "statement of completion of a course concerning personal financial management, prepared as prescribed by the appropriate Official Form." That form is Official Form 23, which requires the debtor to certify completion of an instructional course in personal financial

management. Accordingly, Rule 5009(b) now requires the clerk to send notice to an individual debtor who has not filed Official Form 23 within 45 days after the first date set for the meeting of creditors. Debtors who do not file the necessary statement of completion from their course provider are not given a discharge before their cases are closed. Many of these cases are reopened later, necessitating the payment of an additional fee.

The Advisory Committee sought publication of amendments that would streamline the process of filing statements of the completion of financial management courses. The amendments remove the obligation of the debtor to file Official Form 23 if the financial management course provider has notified the court of the debtor's successful completion of the course. Rule 1007(b)(7) would be amended to authorize providers to file course completion statements directly with the court. Rule 5009(b) would be amended to direct the clerk to send notice to the debtor only if the debtor is required to file the statement and the provider has not already done so. At its June 2011 meeting, the Standing Committee approved the request for publication.

Upon publication, the Advisory Committee received five comments. Three comments expressed support for the amendments. They were submitted by Michael Shklar, Phillip Dy, and Ganna Gudkova. Two comments opposed the amendments. Jeanne E. Hovenden, an attorney in Virginia, urged that the debtor's attorney should be required to file the statement of completion. She expressed concern that allowing a financial course management provider to file the statement directly with the court may lead to a discharge even when it is not in the debtor's best interest. Because the provider is not familiar with all the circumstances of a case, the provider will not know if a particular debtor would be better served by not receiving a discharge. Raymond P. Bell, Jr., of Pennsylvania submitted a comment agreeing with Ms. Hovenden and emphasizing that the debtor's attorney or the debtor should bear responsibility for filing the statement of completion.

The Advisory Committee did not view the concern raised by the negative comments as a substantial one. As Ms. Hovenden's comment recognized, only in rare cases would a debtor want to avoid a discharge. When those cases do arise, the debtor may decline to receive a discharge in other ways. The debtor has the option of waiving the discharge under § 727(a)(10) of the Code or failing to complete plan payments under chapter 11 or 13, which would result in denial of a discharge despite the filing of a notification of course completion by the provider.

Accordingly, the Advisory Committee voted unanimously to recommend approval of the amended rules as published.

Action Item 2. Rules 9006, 9013, and 9014 would be amended to highlight the default deadlines for the service of motions and written responses. Rule 9006, based on Civil Rule 6, contains a subsection regarding the time for service of motions. Rule 9006(d) regulates timing for any motions not addressed elsewhere in the Bankruptcy Rules or by order of the court. 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 Advisory Committee proposed several amendments to highlight the existence of Rule 9006(d). The title of Rule 9006 would be amended 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. Coverage of subdivision (d) would be expanded to

address the timing of the service of any written response to a motion (rather than only opposing affidavits as the rule current states). This change would make the provision as inclusive as possible in order to capture differences in local motion practice. 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 is also intended 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. Rule 9014, which addresses contested matters in bankruptcy, would similarly be amended to provide a cross-reference to the times under Rule 9006(d) for serving motions and responses.

No comment was received on these amendments. The Advisory Committee voted unanimously to recommend approval of the proposed amendments to Rules 9006, 9013, and 9014 as published.

Action Item 3. Official Form 7 is the debtor's Statement of Financial Affairs. The form requires debtors to disclose certain payments made to or for the benefit of insiders. The current version of the form contains a definition of "insider" that differs from the Bankruptcy Code's definition of the term. As used in the form, the term includes "any owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives." The Code definition of "insider" lists other qualifying relationships, including a "person in control" of a corporate debtor, but makes no reference to a five-percent shareholder. 11 U.S.C. § 101(31). Although the Code gives a nonexclusive definition of an insider, the Advisory Committee found no basis for concluding that § 101(31) provides authority for the current definition used in the form. The Code does not contain a bright-line test that invariably makes a five-percent shareholder an insider. That language was added to the form in 2000, but no explanation for the addition appears in the Committee Note, the Advisory Committee's report to the Standing Committee, or the Advisory Committee minutes.

As amended, the definition of insider in Form 7 would adhere more closely to the Code. The language regarding a five-percent shareholder of a corporate debtor would be deleted. In its place, the definition would include "any persons in control of a corporate debtor." The statutory reference following the definition would also be updated to give a pinpoint citation to the definition of insider in the Code.

Upon publication, no comment was received on this amendment. The Advisory Committee voted unanimously to recommend approval of the proposed amendment to Official Form 7 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. It recommends that the amended forms become effective on December 1, 2012.** 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 4. Rule 4004(c)(1) would be amended to conform to the simultaneous amendment of Rule 1007(b)(7) and to state in more precise language other provisions of the subdivision.

As discussed above, the Advisory Committee is recommending that the Standing Committee forward to the Judicial Conference an amendment to Rule 1007(b)(7) that would allow providers of courses on personal financial management to notify a bankruptcy court directly that a debtor had completed the course. Notification by the provider would relieve the debtor of the obligation to file a certificate of completion. Consistent with that change, Rule 4004(c)(1)(H) would be amended to provide that the court must delay entering a discharge for a debtor who has not filed a certificate of completion only if the debtor was in fact required to do so under Rule 1007(b)(7).

The other two changes to Rule 4004(c)(1) are clarifications. One makes clear that the circumstances listed in the paragraph prevent the court from entering a discharge. The other states specifically that the prohibition on entering a discharge under subdivision (c)(1)(K) ceases when a presumption of undue hardship expires or the court concludes a hearing on the presumption.

Because the latter amendments would simply state more precisely the existing meaning of the provision and because the first one is conforming, the Committee voted unanimously to recommend that they be approved without publication.

Action Item 5. Official Forms 9A-9I and 21 would be amended to reduce the risk that a debtor's Social Security number will be inadvertently disclosed publicly in a bankruptcy case. The Advisory Committee would add prominent warnings about proper submission of the forms, which may contain a debtor's Social Security information.

Official Form 9 is directed at creditors. A particular version of the form (denoted Form 9A through Form 9I) applies depending on the nature of the bankruptcy case, but all serve the same function. The form gives notice to potential creditors of the debtor's bankruptcy case and provides important information, such as the date of the meeting of creditors and the deadline to object to an individual debtor's discharge. The form includes identifying information to allow a recipient to determine whether it is a creditor of the debtor. For individual debtors, that identifying information includes the debtor's Social Security information. A redacted version of Form 9 is included in the court files. Official Form 21 is directed at the debtor. The form requires debtors to disclose, under penalty of perjury, their Social Security numbers. Neither the unredacted version of Form 9 sent to creditors nor Form 21 is intended to be placed on the public docket of a bankruptcy case.

The Judicial Conference's Committee on Court Administration and Case Management raised the concern that bankruptcy forms may be mistakenly filed in ways that publicly reveal debtors' private identifying information. To respond to that concern, the Advisory Committee would amend Form 9 to make clear that a creditor should not attach a copy of the form when filing a proof of claim. Stylistic changes have also been made to the form. Similarly, the Advisory Committee would add to Form 21 a prominent warning about proper submission of the form, so as to avoid its inadvertent inclusion on the court's public docket.

Because the changes to the forms do not alter their function or purpose, the Advisory Committee voted unanimously to recommend that the amended forms be approved without publication.

Action Item 6. Official Form 10 would be amended (1) to eliminate a reference to filing a power of attorney with a proof of claim, thereby conforming to Rule 9010(c), and (2) to include statements about the attachment of required documentation for certain types of claims.

Rule 9010(c) generally requires an agent to give evidence of its authority to act on behalf of a creditor in a bankruptcy case by providing a power of attorney. This requirement, however, does not apply when an agent files a proof of claim. The Committee therefore voted unanimously to remove from the signature box of Form 10 the instruction that an authorized agent "attach copy of power of attorney, if any."

The Committee voted unanimously at its spring 2011 meeting to include in line 7 of Form 10 statements that certain required documentation is attached. For claims secured by the debtor's principal residence, the form would state that the Mortgage Proof of Claim Attachment—required as of December 1, 2011—is being filed with the claim. For claims based on an open-end or revolving consumer credit agreement, the form would state that the information required by Rule 3001(c)(3)(A)—scheduled to take effect on December 1, 2012—is attached.

B. Items for Publication in August 2012

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 7. Rule 1014(b) would be amended to clarify the proper course of action when bankruptcy petitions involving the same or related debtors are filed in different districts. The current rule provides that, upon a motion, the court in which the first-filed petition is pending may determine—in the interest of justice or for the convenience of the parties—the district or districts in which the cases will proceed. Courts in the other districts must stay proceedings in later-filed cases until the first court makes its determination, unless that court orders otherwise. By default, the later cases are therefore stayed while the venue question is pending before the first court.

The Advisory Committee voted to seek publication of an amendment to Rule 1014(b) that alters this default requirement. The amendment provides that proceedings in subsequently filed cases are stayed only upon order of the court in which the first-filed petition is pending. This change is intended to prevent disruption of the other cases unless there is a judicial determination that a stay of a related case is needed while the first court makes its venue determination. The amendment will also clarify who should receive notice of the hearing on the venue motion by incorporating by reference the entities entitled to notice under Rule 2002(a). In addition, stylistic changes have been made to the rule.

Action Item 8. Rule 7004(e) would be amended to change the time in which a summons remains valid after it is issued. The amendment reduces that period from fourteen days to seven days. This change is intended to ensure that a defendant has sufficient time to respond to a complaint in bankruptcy litigation. The Civil Rules and Bankruptcy Rules use different methods to calculate a defendant's time to respond to a complaint. Under the Civil Rules, the defendant's time to respond begins when the summons and complaint are served. The Bankruptcy Rules, however, calculate the defendant's response time from the date the summons is issued. Although Rule 7012(a) of the Bankruptcy Rules gives a defendant (other than a United States

officer or agency) thirty days to answer a complaint, a lengthy delay between issuance and service of the summons may unduly shorten the defendant's time to respond in a bankruptcy proceeding.

Concluding that a seven-day window of time is sufficient for service of the summons, the Advisory Committee voted unanimously to seek publication of an amendment to shorten the period of time in which a summons remains valid. The amendment is intended to encourage prompt service after issuance of a summons.

Action Item 9. Rules 7008, 7012, 7016, 9027, and 9033 would be amended to respond to the Supreme Court's recent decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). In *Stern*, the Court held that a non-Article III bankruptcy judge could not enter final judgment on a debtor's common law counterclaim brought against a creditor of the bankruptcy estate. Although the Judicial Code, 28 U.S.C. § 157(b), deemed the counterclaim a "core" proceeding that a bankruptcy judge could hear and determine, the Court found Congress's assignment of final adjudicatory authority to the bankruptcy judge in the proceeding to be unconstitutional.

The Bankruptcy Rules follow the Judicial Code's division between core and non-core proceedings. The current rules contemplate that a bankruptcy judge's adjudicatory authority is more limited in non-core proceedings than in core proceedings. For example, parties are required to state whether they do or do not consent to final adjudication by the bankruptcy judge in non-core proceedings. There is no comparable requirement for core proceedings. *Stern* has introduced the possibility, however, that a proceeding defined as core under the Judicial Code may nevertheless lie beyond the constitutional power of a bankruptcy judge to adjudicate finally. Accordingly, a proceeding could be "core" as a statutory matter but "non-core" as a constitutional matter.

The Advisory Committee voted unanimously to seek publication of amendments to the Bankruptcy Rules that address this concern. The proposed amendments will alter the Bankruptcy Rules in three respects. First, the terms core and non-core will be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) will be required to state whether they do or do not consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial procedures, will be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

These amendments are not intended to take a position on the question whether party consent is sufficient to permit a bankruptcy judge to enter final judgment in a proceeding that would otherwise lie beyond the judge's adjudicatory authority. Instead, the proposed changes to the Bankruptcy Rules are designed to frame the question of adjudicatory authority and allow the bankruptcy judge to determine the appropriate course of action. The court must decide whether to hear and finally adjudicate the proceeding, whether to hear it and issue proposed findings and conclusions, or whether to take some other action.

Action Item 10. Rules 8001-8028 (Part VIII of the Bankruptcy Rules) are the proposed revision of the bankruptcy appellate rules. They result from a multi-year project to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure; to incorporate a presumption favoring the electronic transmission, filing, and service of court documents; and to adopt a clearer style. At the outset of the project, the Committee hosted two mini-conferences on the subject of the bankruptcy appellate rules. Judges, lawyers, court

personnel, and academics who had substantial experience with bankruptcy appeals attended. Subsequent drafting, review, and refinement of the proposed rules received the benefit of input from the Appellate Rules Committee and its reporter, Professor Struve. The Committee also incorporated style suggestions of the Standing Committee's style consultant, Professor Kimble.

The Advisory Committee presented the first half of the Part VIII revision (Rule 8001-8012) to the Standing Committee at its January 2012 meeting for preliminary review. The Committee later made revisions to the draft in response to the Standing Committee's comments.

The Advisory Committee unanimously approved the entire draft of revised Part VIII at its spring meeting and approved some additional revisions by a later email vote. It now requests approval of the publication of revised Part VIII for public comment in August. The text of the proposed rules and their committee notes are set out in Appendix B.2.

As the Committee explained in January, the revision of Part VIII is comprehensive. Existing rules have been reorganized and renumbered, some rules have been combined, and provisions of other rules have been moved to new locations. Much of the language of the existing rules has been restyled. Because of the comprehensive nature of the proposed revision, it is not possible to present the amendments in a redlined version that points out changes to the existing rules. Nor can the proposed revision be presented in a comparative format like the one used for the restyled Evidence Rules.

This part of the report instead discusses substantive changes that were made to the first half of the Part VIII rules after the January meeting, and then, following the same approach as in the Committee's last report, it addresses individually the rules not previously presented to the Standing Committee (Rules 8013-8028). For each rule, the report notes significant changes from the existing Bankruptcy Rules and decisions to depart from the Appellate Rules.

Rule 8001 (Scope of the Part VIII Rules; Definition of "BAP"; Method of Transmission). In response to comments at the Standing Committee meeting, the Advisory Committee revised this rule to eliminate the definitions of "appellate court" and "transmit." Prior drafts of Part VIII used the term "appellate court" to mean only a district court or BAP. Some members of the Standing Committee pointed out that this narrow definition of "appellate court," which excludes courts of appeals, would be confusing to a reader who did not first consult Rule 8001. The proposed rules now refer to all courts by name: bankruptcy court, district court, BAP, and court of appeals. Because the term "appellate court" is no longer used, its definition in Rule 8001 was removed. Due to the repeated references to "district court or BAP," the acronym for bankruptcy appellate panel, well known by bankruptcy judges and lawyers, was retained, and its definition remains in this rule.

The Committee changed what had been a definition of "transmit" in this rule to a provision that directly addresses the method of transmitting documents. This change responds to the concern raised at the Standing Committee meeting about treating only in a definition the important presumption favoring filing, serving, and sending documents by electronic means. The title of this rule has also been revised to highlight the fact that it addresses the method of transmission. The presumption in favor of electronic transmission now includes an exception for pro se individuals.

Rule 8007 (Stay Pending Appeal; Bonds; Suspension of Proceedings). The Committee corrected the omission of a reference to the court of appeals in subdivision (c).

Rule 8010 (Completion and Transmission of the Record). The Committee made several changes to the draft of this rule after consulting with clerks of bankruptcy courts, the clerk of a BAP, and representatives of the Administrative Office of the U.S. Courts. These sources advised the Committee that court reporters should be required to file documents only in a bankruptcy court and that all duties associated with preparing and filing transcripts should be carried out by reporters and transcription services, not the clerk's office.

The proposed rule now clarifies that in courts that record proceedings without a reporter present in the courtroom, the term "reporter" includes the person or service designated by the court to transcribe the recording. Unlike FRAP 11, proposed Rule 8010 does not require the reporter to send anything to an appellate court. And in a change from current bankruptcy practice, the clerk of the appellate court will no longer docket the appeal when the complete record is received. Docketing will occur upon receipt of the notice of appeal (proposed Rules 8003(d) and 8004(c)). The appellate-court clerk will still provide notice to the parties of the date on which the transmission of the record was received, because under proposed Rule 8018(a) that date generally commences the briefing schedule.

Rule 8013 (Motions; Intervention). In a change from current bankruptcy practice, the proposed rule does not permit briefs to be filed in support of or in response to motions. Instead, like the practice under FRAP 27, legal arguments must be included in the motion or response.

Proposed subdivision (g) permits motions for intervention in a bankruptcy appeal pending in a district court or BAP. The current Part VIII rules do not address intervention, and the appellate rules provide for intervention only with respect to the review of agency decisions. Someone seeking to intervene in a bankruptcy appeal must explain whether intervention was sought in the bankruptcy court and why intervention is being sought at the appellate stage.

Rule 8014 (Briefs). Proposed subdivision (a)(6) regarding the statement of the case adopts the language of the proposed amendment of FRAP 28(a)(6) for which the Appellate Rules Committee is seeking final approval at this meeting. In a change from existing bankruptcy practice, proposed subdivision (a)(7) would require appellants' and appellees' briefs to contain a summary of the argument. This requirement is consistent with current FRAP 28(a)(8).

The proposed rule departs from the requirements of FRAP 28 by not including provisions regarding references to parties and references to the record. The Committee concluded that this level of detail in the bankruptcy appellate rules is unnecessary.

Subdivision (f) adopts the provision of FRAP 28(j) regarding the submission of supplemental authorities. Unlike the FRAP provision, the proposed rule imposes a definite time limit (seven days) for any response, unless the court orders otherwise.

Rule 8015 (Form and Length of Briefs; Form of Appendices and Other Papers). The proposed rule is modeled on FRAP 32. The title was changed to call attention to the fact that this rule governs the length of briefs. Unlike FRAP 32(a)(2), subdivision (a)(2) of the proposed rule does not prescribe colors for brief covers.

Subdivision (a)(7) decreases the length of principal and reply briefs currently permitted by Rule 8010. This change imposes on briefs filed in a district court or BAP the same page limits that apply to briefs filed in a court of appeals.

Rule 8016 (Cross-Appeals). This provision is new to Part VIII. It is modeled on FRAP 28.1.

Rule 8017 (Brief of an Amicus Curiae). The current Part VIII rules do not provide for amicus briefs. The proposed rule is modeled on FRAP 29. Unlike FRAP 29(a), subdivision (a) of this rule permits the court to request amicus participation.

Rule 8018 (Serving and Filing Briefs; Appendices). The proposed rule continues the existing bankruptcy practice of allowing the appellee to file a separate appendix. It differs in this respect from FRAP 30, which requires the filing of a single appendix by all parties.

The time periods for the appellant and appellee to file their initial briefs are lengthened from 14 to 30 days. For the appellant, that period will still be shorter than the 40-day period prescribed by FRAP 31.

Rule 8019 (Oral Argument). Subdivision (a) alters existing Rule 8012 by (1) authorizing the court to require the parties to submit a statement about the need for oral argument and (2) permitting statements to explain why oral argument is not needed, rather than only why it should be allowed. The proposed rule tracks FRAP 34(a)(1).

Subdivision (f) differs from FRAP 34(e) by giving the court discretion, when the appellee fails to appear for oral argument, either to hear the appellant's argument or postpone argument.

Rule 8020 (Frivolous Appeal and Other Misconduct). Subdivision (a) of the proposed rule is derived from existing Rule 8020, which in turn is modeled on FRAP 38. Subdivision (b) is derived from FRAP 46(c). It expands the FRAP provision to apply to misconduct by parties as well as by attorneys.

Rule 8021 (Costs). FRAP 39 requires both the court of appeals and the district court to be involved in the taxing of costs. The court of appeals fixes maximum rates for producing copies of documents, and the clerk of the court of appeals prepares and certifies an itemized statement of costs for insertion in the mandate. Additional costs on appeal are taxable in the district court. The proposed rule, by contrast, is intended to continue the practice under current Rule 8014 of giving the bankruptcy clerk the entire responsibility for taxing the costs of appeal.

Subdivision (b) adds a provision regarding the taxing of costs against the United States. This provision, which is not included in current Rule 8014, is derived from FRAP 39(b).

Rule 8022 (Motion for Rehearing). Subdivision (a)(1) retains the requirement of current Rule 8015 that in all cases parties must file a motion for rehearing within 14 days after the judgment is entered. It differs from FRAP 40(a)(1), which allows 45 days for filing the motion in a civil case if the United States is a party.

The provision in existing Rule 8015 that specifies when the time for appeal to the court of appeals begins to run is not retained because the matter is addressed by FRAP 6(b)(2).

Rule 8023 (Voluntary Dismissal). The provision of current Rule 8001(c)(1) for dismissal by the bankruptcy court prior to the docketing of the appeal has been omitted. Under

the proposed rules, appeals would be docketed shortly after the notice of appeal is filed—a period likely to be especially short if the notice of appeal is transmitted electronically. The Committee therefore thought it unlikely that a voluntary dismissal of the appeal would be sought after the appellant filed the notice of appeal but before the appeal had been docketed. It noted, however, that FRAP 42 has a provision for dismissal by the district court prior to docketing, even though docketing under FRAP 12 also occurs upon receipt by the circuit clerk of the notice of appeal (and docket entries).

FRAP 42(b) provides that the circuit clerk "may" dismiss an appeal if the parties (1) file a signed dismissal agreement specifying how costs are to be paid and (2) pay any fees that are due. The proposed rule requires the clerk of the district court or BAP to dismiss under those circumstances. That requirement is consistent with current Rule 8001(c)(2).

Rule 8024 (Clerk's Duties on Disposition of the Appeal). The only change from existing Rule 8016, other than stylistic ones, is the recognition that in some cases no original documents may have been transmitted to the appellate court.

Rule 8025 (Stay of District Court or BAP Judgment). The proposed rule is derived from current Rule 8017. Only subdivision (c) is new. It provides for the stay of a bankruptcy court's order, judgment, or decree that is affirmed on appeal for the duration of any stay of the appellate judgment.

Rule 8026 (Rules by Circuit Councils and District Courts; Procedure When There Is No Controlling Law). The only changes from current Rule 8018 are stylistic.

Rule 8027 (Mediation). This rule is new and has no counterpart in the Appellate Rules. It provides that if a district court or BAP has a mediation procedure that is applicable to bankruptcy appeals, the clerk must advise the parties—promptly after the docketing of the appeal—that the procedure applies, what its requirements are, and how the procedure affects the time for filing briefs in the appeal.

Rule 8028 (Suspension of Rules in Part VIII). The proposed rule provides a more expansive list of rules that may not be suspended than either current Rule 8019 or FRAP 2.

Deletion of Current Rule 8013. The proposed Part VIII rules do not include a rule similar to current Rule 8013 (Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact). The Committee concluded that no rule is needed to specify the actions that a district court or BAP may take (affirm, modify, reverse, or remand with instructions) in ruling on bankruptcy appeals. It further concluded that the remainder of the rule—prescribing the weight to be accorded the bankruptcy court's findings of fact—duplicates Rule 7052, which applies in adversary proceedings and is made applicable to contested matters by Rule 9014. The Appellate Rules do not contain a similar rule. The Committee's decision not to include in revised Part VIII a rule similar to current Rule 8013 is not intended to change existing law. It merely reflects a determination that the rule is unnecessary.

Action Item 11. Rules 9023 and 9024 would be amended to refer to the procedure in proposed new Rule 8008 governing indicative rulings. Unlike the Civil and Appellate Rules, the Bankruptcy Rules would include a single rule prescribing the procedure for indicative rulings in both the bankruptcy and appellate courts. Proposed Rule 8008 would govern the issuance of

indicative rulings by bankruptcy judges and the corresponding procedures applicable in district courts and bankruptcy appellate panels. In order to remind litigants who file postjudgment motions of the possibility of seeking an indicative ruling from a bankruptcy court that lacks jurisdiction to grant relief due to the pendency of an appeal, the Committee voted at its fall 2008 meeting to amend Rules 9023 and 9024 to add a cross-reference to Rule 8008. The Committee delayed seeking publication of these proposed amendments until the completion of the Part VIII revision project.

Action Items 12-14. Initial revised forms for individual debtors.

The nine forms proposed for publication in these action items are the initial products of the Forms Modernization Project or FMP, a multi-year endeavor of the Advisory Committee, working in conjunction with the Federal Judicial Center and the Administrative Office. The dual goals of the FMP are to improve the official bankruptcy forms and to improve the interface between the forms and available technology. The judiciary is in the process of developing "the next generation" of CM/ECF (NextGen), and the modernized forms are being designed to use enhanced technology that will become available through NextGen. From a forms perspective, the major change in NextGen will be the ability to store all information on forms as data so that authorized users can produce customized reports containing the information they want from the forms, displayed in whatever format they choose.

The FMP made a preliminary decision that the debtor forms for individuals and entities other than individuals should be separated. There is a greater need for the forms submitted by individuals to be less technical, because individuals are generally less sophisticated than other entities and because individuals may not have the assistance of counsel. Accordingly, the forms for individual debtors are designed to use language more common in ordinary conversation, to employ more intuitive layouts, and to include both clearer instructions, examples within the forms, and more extensive separate instruction sheets.

This approach in form drafting was followed in the new forms adopted in connection with proofs of claim for certain mortgages in chapter 13 cases—Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2)—that went into effect on December 1, 2011. The format of these new forms has generally been well accepted.

The nine forms now being submitted for publication are among those that an individual debtor would file at the outset of a case.

Before adoption by the Advisory Committee, drafts of all of the individual debtor forms were circulated to organizations representing a range of users and to other reviewers. A concern expressed by some of the user groups was that the new format resulted in forms of greater length, creating additional difficulty in locating the information needed by the users. This problem would be addressed by allowing extraction of data from the forms, which could be reported in formats tailored to the users' needs, but the availability of such access depends in part on the timing of the development of NextGen, which is not certain.

Accordingly, the Advisory Committee has suggested an incremental approach. The nine forms now being proposed for publication—the fee waiver and installment fee forms, the income and expense forms, and the means test forms—reflect the FMP approach to form-drafting without imposing major changes in utility. These particular forms make no change in the substantive content and simply replace existing forms. They are not significantly longer than the

forms they replace, they all involve the debtors' income and expenses, and they are employed by a range of users: the courts, U.S. Trustees, and case trustees, for varied purposes. Their publication and, if adopted, their use, will provide a useful gauge of the effectiveness of the FMP approach.

The text of the nine new forms is set out in Appendix B.3 to this report. The separate instructions for the forms are also included, even though the Advisory Committee does not anticipate requesting that the instructions be approved as Official Forms, and debtors are instructed not to file the instructions with the forms. The inclusion of the instructions with the published forms is to illustrate the manner in which the new forms will be presented to debtors. Setting out detailed instructions on a separate document will reduce the need for lengthy instructions in the forms themselves.

Action Item 12. Official Forms 3A and 3B

These forms both deal with payment of the filing fee for an individual's bankruptcy case, and replace current Official Forms 3A and 3B. Form 3A is the application for paying the filing fee installments; Form 3B is the application for waiver of the filing fee in a chapter 7 case. Because these forms are most frequently completed by unrepresented debtors, the Advisory Committee concluded that the additional clarity of the FMP approach may be of particular value here. The only changes in Form 3A are stylistic, consistent with the overall approach of the project.

Official Form 3B also includes three technical changes. First, Line 1 of the form asks the size of the debtor's family. Because the debtor's dependents are now proposed to be listed in revised Official Form 6J, rather than in Official Form 6I, as done presently, the reference to the number of dependents changed from Schedule I to Schedule J. Second, consistent with the Judicial Conference Interim Procedures For Waiver of Chapter 7 Fees, proposed Official Form 3B specifies that non-cash governmental assistance (such as food stamps or housing subsidies) should not be included in stating the debtor's income level for purposes of determining eligibility for a fee waiver, although it continues to be reported for purposes of determining the debtor's ability to pay the filing fee. Third, the declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 19. That form must be completed and signed by the BPP, and filed with each document for filing prepared by a BPP.

Action Item 13. Official Forms 6I and 6J

Official Forms 6I and 6J—usually referred to as Schedules I and J—set out the income and expenses of an individual debtor. In addition to the stylistic changes made as part of the Forms Modernization Project, the revised versions of the forms contain several changes intended to provide more accurate and useful information.

The revised forms address the situation of a debtor who lives with and pools assets with other people who are not related by blood or marriage to debtor. Schedule I now includes as income any contributions made by someone else to the expenses listed on Schedule J, and the debtor is instructed to include contributions from an unmarried partner, members of the debtor's household, dependents, roommates, and other friends or relatives.

Revised Schedule J now requests separate information on dependents who live with the debtor, dependents who live separately, and other members of the household.

In chapter 13 cases, revised Schedule J asks for expenses at two different points in time—the date the debtor files bankruptcy (Column A) and the date a proposed 13 plan is confirmed (Column B). This allows Schedule J to state what the debtor's expenses will be as a result of the confirmed plan, thus facilitating a determination of the plan's feasibility.

A new line 23 is added to Schedule J, setting out a calculation of the debtor's monthly net income.

Action Item 14. Official Forms 22A-1, 22A-2, 22B, 22C-1, 22C-2

These forms are used in determining a debtor's current monthly income under 11 U.S.C. § 110(10A), and—in chapter 7 and 13 cases—in determining income remaining after deduction of expenses specified in statutes governing those chapters. The forms for chapter 7 and 13 cases are generally referred to as the "means test" forms. In Official Form 22B, the statement of current monthly income in chapter 11 cases filed by individuals, the only changes are stylistic, conforming to the overall approach of the Forms Modernization Project. For chapters 7 and 13, however, the means test forms have been revised in several additional ways.

First, and most significantly, the means test forms have been divided into two separate forms: one for income (Official Form 22A-1 in chapter 7, Official Form 22C-1 in chapter 13), and the other for expenses (Official Form 22A-2 in chapter 7, Official Form 22C-2 in chapter 13). Because expense information is only required of debtors whose currently monthly income exceeds the applicable state median income, most debtors will not have to complete the expense forms, thereby reducing the volume of the filed forms.

Second, in both the chapter 7 and chapter 13 forms, the deduction for cell phone and internet expenses is modified to reflect more accurately the IRS allowances incorporated by the Bankruptcy Code. Under the applicable IRS "other necessary expense" standard, cell phone and other optional telecommunication services expenses are deductible not only if necessary for the health and welfare of the debtor and the debtor's dependents, as stated in the current forms, but also if necessary for the production of income if not reimbursed by the debtor's employer or deducted by the debtor in calculating net self-employment income. Revised Official Form 22A-2 (in line 23) and Official Form 22C-2 (in line 19) make this correction. On the other hand, unlike their counterparts in the current forms, these lines do not permit deduction of basic home internet expenses, because under IRS guidelines adopted in 2011, these expenses are included in the Local Standards for housing and utilities.

Third, line 60 of current Official Form 22C has not been repeated in Official Form 22C-2. Line 60 allows debtors to list, but not deduct from income, "Other Necessary Expense" items that are not included within the categories specified by the Internal Revenue Service. Because debtors are separately allowed to list—and deduct—any expenses arising from special circumstances, former Line 60 was rarely used.

Finally, Form 22C-2 also reflects the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Adopting a forward-looking approach, the Court stated in *Lanning* that the calculation of a chapter 13 debtor's projected disposable income under 11 U.S.C. § 1325(b)

requires consideration of changes to income or expenses that, at the time of plan confirmation, have occurred or are virtually certain to occur. Such changes could result in either an increased or decreased projected disposable income. Because only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined by the information provided on Official Form 22C-2, only these debtors are required to provide the information about changes to income and expenses on Official Form 22C-2. Part 3 of Official Form 22C-2 provides for the reporting of those changes.

III. Items Published in August 2011 for which Final Approval Is Not Being Sought

A. Rule 3007(a). An amendment of this rule, which addresses the time and manner of serving objections to claims, was published for public comment last August. The Advisory Committee proposed the amendment in response to two suggestions submitted on behalf of the Administrative Office's Bankruptcy Judges Advisory Group. The first suggestion proposed that Rule 3007(a) be amended to permit the use of a negative notice procedure for objections to claims. The second suggestion sought clarification of the proper method of serving objections to claims.

To accomplish these goals, the preliminary draft of amended Rule 3007(a) would have no longer required notice of a claim objection to be provided at least 30 days before "the hearing" on the objection. Instead, it would have required notice of the objection to be provided at least 30 days before "any scheduled hearing on the objection or any deadline for the claimant to request a hearing." It also would have specified how and on whom an objecting party must serve the objection and notice of objection.

Two comments were submitted in response to the publication of the proposed amendment. Bankruptcy Judge Eric Frank (E.D. Pa.) questioned whether a negative notice procedure is generally appropriate for an objection to a claim, since Rule 3001(f) provides that a properly executed and filed proof of claim is entitled to be treated as prima facie evidence of the validity and amount of the claim. Given this evidentiary effect of a proof of claim, Judge Frank suggested that in many situations a claim should not be disallowed by default and without a hearing. Raymond P. Bell, Jr., submitted a comment agreeing with Judge Frank.

At its spring meeting, the Advisory Committee concluded that the proposed amendment to Rule 3007(a) should be withdrawn for the time being so that it can be considered along with rule amendments that are being studied in connection with the drafting of a national chapter 13 form plan. Under consideration are possible rule amendments that would permit the allowed amount of certain types of claims to be determined in a chapter 13 plan, as well as by motion or claim objection. The Committee decided that the method of service on a claimant should be the same regardless of the method used for seeking the determination of a claim amount. Rather than proceed with the published amendment of Rule 3007(a), which generally allows service by mail on the person designated on the proof of claim, the Committee voted to postpone further action on the amendment of Rule 3007(a) until a unified approach to the service of claim objections and claim modifications in plans can be proposed. The Committee will also give further consideration to the appropriateness of a negative notice procedure for claim objections.

B. Official Form 6C. The proposed amendment to Form 6C—the debtor's schedule of property claimed as exempt—was intended to reflect the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), by providing an option for the debtor to state the value of the claimed exemption as the "full fair market value of the exempted property." The *Schwab* opinion explained that if the debtor used the quoted language to claim an exemption and "the trustee fails to object, or . . . 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.

The proposed amendment of Schedule C prompted seven written comments and testimony during a telephonic hearing.

Opponents—including representatives of the chapter 7 and chapter 13 trustee associations—asserted that the proposed amendment would encourage debtors to claim the full market value when invoking exemptions that are capped at a dollar amount. This, they said, would lead to a "plethora of objections" and increased gamesmanship in claiming exemptions. The trustees stated that they would be forced to spend additional time analyzing exemption claims and litigating claims to exempt the full market value.

Supporters of amendment—including the National Association of Consumer Bankruptcy Attorneys—disputed the trustees' prediction of a "plethora of objections" and contended that the amendment is consistent with the *Schwab* decision. The supporters asserted that debtors need to know promptly whether property claimed exempt is exempt and thus is available for the debtor's use, sale, or other disposition.

The Advisory Committee considered the comments and testimony, debated the merits of the proposed amendment, and explored the alternative of rules amendments to require trustees to make prompt decisions on abandonment of property. The Committee concluded, however, that potential rule amendments would be inconsistent with either § 554 of the Bankruptcy Code or the *Schwab* decision.

After a further discussion, the Advisory Committee voted, with two dissents, to withdraw the Form 6C amendment and refer the revision of Schedule C to the Forms Modernization Project. The Committee's decision was based on two factors. First, debtors are incorporating into existing Schedule C the language suggested by the Supreme Court in *Schwab*. The need to amend the form in response to that decision therefore appears to be less compelling than the Committee initially thought. Second, courts are divided on whether it is always improper for a debtor to claim an exemption of full fair market value when the exemption in question is capped at a specific dollar amount. The Committee decided that any amendment of Schedule C should await further development of the case law. The recommendation to withdraw the published amendment is therefore intended to maintain the status quo and does not signal the Committee's rejection of the permissibility of claiming as exempt the full fair market value of property.

C. Official Forms 22A and 22C. The proposed amendments to both Forms 22A and 22C reflected changes in the IRS collection financial standards regarding telecommunication expenses, and an additional amendment to Form 22C responded to the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010).

Two comments were submitted regarding the proposed *Hamilton v. Lanning* amendment. The first, from California attorney Peter M. Lively, objected to the amendment on the ground that its one-year period for reporting expected changes in income or expenses conflicts with a Ninth Circuit decision. The other comment was from attorney Henry J. Sommer, writing on behalf of the National Association of Consumer Bankruptcy Attorneys. He stated that the proposed amendment is unnecessary and confusing, since changes in income and expenses in the year after filing are already required to be reported on Schedules I and J and can be addressed by motions to modify a confirmed Chapter 13 plan.

The Committee concluded that neither comment provided grounds for reconsidering the proposed amendment of Form 22C. The Committee found that the proposed amendment, by

requiring debtors to provide information about changes in income and expenses, does not prevent the debtor from arguing that there is no applicable commitment period if the debtor has no projected disposable income. In this respect, the proposed revised form continues to apply the rule that the applicable commitment period is determined by the debtor's current monthly income, pursuant to 11 U.S.C. § 1325(b)(4), rather than by the debtor's projected disposable income, determined under 11 U.S.C. § 1325(b)(2).

The Committee was also unpersuaded by Mr. Sommer's comments. Schedules I and J report different income and expenses than those called for in calculating projected disposable income under Form 22C. And modification of a confirmed plan is not an appropriate method for dealing with changes of the kind involved in *Lanning.* Proper treatment of projected disposable income is a requirement for plan confirmation in the first instance.

Despite its continued support for the published amendments to Forms 22A and 22C, the Committee is not seeking final approval of them at this meeting. In order to avoid having the previously published amendments take effect in 2012 and then reformatted versions of the forms designed by the Forms Modernization Project take effect in 2013, the Advisory Committee incorporated all of the proposed amendments to the two forms into the "modernized" forms that the Committee is seeking to have published this summer.

IV. Information Items

A. <u>Official form for chapter 13 plan and related amended rules</u>. During the past year, on the basis of suggestions received from a bankruptcy judge and an organization of state attorneys general, the Advisory Committee has been exploring the adoption of an official form for chapter 13 plans. The adoption of an official form would have several benefits. First, it would make more uniform the practice of plan confirmation, which now varies substantially among the districts. Many districts require the use of local model plans containing distinctive features. These differences impose substantial costs on both on creditors with regional or national businesses and on software vendors, whose products must accommodate all of the local variations. Second, a national form would also allow for earlier resolution of differences in interpretation. And finally, a national form could provide a specific location within the form for any variances from its standard provisions, allowing for easier review by the court, trustees, and creditors, consistent with the Supreme Court's direction in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (March 23, 2010), that bankruptcy judges independently review chapter 13 plans for conformity with applicable law.

A survey of the bankruptcy bench established widespread support for a national form plan, and the Advisory Committee has established a working group to develop one. The working group has discussed an initial draft and expects soon to have a draft that can be informally circulated for comments. Additionally, in the course of the group's work, it became apparent that the effectiveness of a national form plan would depend, to a large extent, on amendments to the Bankruptcy Rules harmonizing practice among the local courts and eliminating ambiguity about the extent to which official forms may be modified locally. The working group has drafted several such amendments, governing the need to file proofs of secured claims, establishing shortened filing deadlines, and clarifying procedures for treatment of claims, which the Advisory Committee will consider in the coming year. The Committee expects to be able to propose an official form for a Chapter 13 plan, with accompanying rule amendments, during 2013.

B. <u>September mini-conference on the new mortgage forms</u>. The Advisory Committee is planning a mini-conference on the effectiveness of new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2), which were designed to implement the new mortgage claim disclosure requirements in Rules 3001(c) and 3002.1. The rules and forms went into effect on December 1, 2011.

When the Advisory Committee gave final approval to the forms at the spring 2011 meeting, it considered written comments and hearing testimony that suggested the need for a detailed loan history, rather than just an itemization of prepetition fees, expenses, and charges. It also considered questions about the sufficiency of the information sought regarding escrow accounts. The Committee concluded that it was important for the forms to go into effect simultaneously with the new rules, which it had approved the year before, but that it would be useful to convene a mini-conference on the effectiveness of the forms after a period of experience with them.

The purpose of the mini-conference is to ensure that the new forms are enabling debtors and trustees to obtain the information they need to deal properly with home mortgages in bankruptcy, particularly in chapter 13 cases, and that the disclosure requirements are not imposing an undue burden on mortgage creditors or costs on the debtors not commensurate with the benefits. The specific goals of the mini-conference are to learn how the forms are operating in actual practice and to determine whether any modifications are needed.

The mini-conference will be held on September 19, 2012, in conjunction with the Advisory Committee's fall meeting in Portland, Oregon. Home mortgage servicers and attorneys (or others who are actually filing the documents), consumer debtor attorneys, chapter 13 trustees, bankruptcy judges, and clerks of court will be invited to attend.

C. <u>Forms Modernization Project</u>. As discussed above, the Forms Modernization Project began its work by revising forms used in cases of individual debtors, and several of these forms are now being recommended for publication and comment. The FMP's work on all of the individual debtor forms is now nearly complete, and the FMP has begun revision of forms for non-individual cases.

As with its initial work, the FMP discussed the format of non-individual forms with a variety of professionals who use them, including attorneys, software providers, claims managers, trustees, and staff of the United States Trustee Program. These discussions resulted in the FMP's adoption of several goals for revision of the non-individual forms. Among the principal goals that emerged from these discussion were:

- revising the forms to eliminate unnecessary requests for information (such as questions relevant only in the cases of individuals),

- seeking information in the form that businesses commonly keep their financial records, and

- providing clear direction for reporting information that departs from the data maintained according to standard accounting practices.

Drafting of revised non-individual forms has begun, and the initial drafts will be tested and modified, as necessary, before being recommended for publication. In this process, the FMP continues to have the assistance of its forms consultant.

Through the FMP's work, the Advisory Committee expects to recommend adoption of the remaining revised forms for both individual and non-individual cases.

D. Electronic signatures. As part of the Forms Modernization Project, the Advisory Committee has considered the use of electronic signatures. Two initial questions were presented. The first is whether and under what circumstances bankruptcy courts should accept for filing documents signed electronically without requiring the retention of a paper copy containing a "wet" or original signature. If retention of an original signature is required, the second question is who should be required to maintain the paper document bearing the signature.

The Advisory Committee was presented with three alternative approaches in response. One is set out in a model local rule adopted by several bankruptcy courts, which requires retention of original documents with wet signatures, and imposes the duty of retention on the entity—most commonly the debtor's attorney— that files the document electronically. Another approach, used in at least two other bankruptcy courts, does not require retention of paper documents with original signatures. Instead, these courts require that, for any electronically-filed document signed by someone other than the filing attorney, the document be accompanied by a declaration of authenticity wet-signed by the non-attorney. That declaration is scanned and maintained, in electronic form, by the clerk's office. A third approach is taken by the Internal Revenue Service, pursuant to 26 U.S.C. § 6061(b)(2), which validates electronic signatures on tax returns. The IRS uses personal identification numbers as electronic signatures, with no requirement for any original wet-signed document.

The Advisory Committee has been informed that, although the issue will arise in the context of the procedures of other federal courts, it would be appropriate for electronic signatures to be addressed initially in the bankruptcy context. Accordingly, the Advisory Committee will continue to examine the issue with the goal of recommending an amendment to the bankruptcy rules that establishes a uniform procedure for electronic signatures.

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APPENDIX A-1

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Appendix A.1

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**

* * * * *

(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

---

* 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.

case shall file the statement ~~in a chapter 11 case in which~~ if § 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).

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

11-BK-001. Michael C. Shklar (Elliott Jasper Auten Shklar & Wellman-Ally LLP). The proposed amendment relieves the debtor of the obligation to file Form 23 if the counseling agency files proof of completion of the financial management course. It would make sense if the rule also expressly permitted the debtor or debtor's counsel to file the certificate of completion in lieu of Form 23.

11-BK-002. Phillip Dy. The amended rule will be very helpful. Financial management course providers should assist debtors with their cases.

11-BK-003. Ganna L. Gudkova. I support the amendment to Rule 1007 and the related amendment to Rule 5009.

11-BK-008. Jeanne E. Hovenden. I oppose the amendment. The financial management course provider is not an attorney and has no specific knowledge of the debtor's situation during a case. There are rare circumstances in which a discharge injures the debtor due to unforseen events that occur after the filing of the case. The course provider will not

know when a discharge is no longer in the debtor's best interest. The debtor's attorney should ensure that the certificate of completion is filed. If the course provider fails to file the certificate, the attorney will be held responsible by the debtor and will bear the burden of paying to reopen the case.

11-BK-015. Raymond P. Bell, Jr. (Mercantile Adjustment Bureau LLC). I agree with Jeanne Hovenden's comment. The responsibility for filing the certificate of completion of a course in financial management should lie with the debtor's attorney or the debtor acting pro se. Otherwise, creditors will be faced with uncertainty about whom to contact when a case is terminated without a discharge due to the failure to file a certificate of completion.

Rule 4004. Grant or Denial of Discharge

* * * * *

(c) GRANT OF DISCHARGE.

(1) In a chapter 7 case, on expiration of the times fixed for objecting to discharge and for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge ~~unless~~, except that the court shall not grant the discharge if:

(A) the debtor is not an individual;

(B) a complaint, or a motion under § 727(a)(8) or (a)(9), objecting to the discharge has been filed and not decided in the debtor's favor;

(C) the debtor has filed a waiver under § 727(a)(10);

(D) a motion to dismiss the case under § 707 is pending;

(E) a motion to extend the time for filing a complaint objecting to the discharge is pending;

(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending;

(G) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code, unless the court has waived the fees under 28 U.S.C. § 1930(f);

(H) the debtor has not filed with the court a statement of completion of a course concerning personal financial management ~~as~~ if required by Rule 1007(b)(7);

(I) a motion to delay or postpone discharge under § 727(a)(12) is pending;

(J) a motion to enlarge the time to file a reaffirmation agreement under Rule 4008(a) is

pending;

(K) a presumption ~~has arisen~~ is in effect under § 524(m) that a reaffirmation agreement is an undue hardship and the court has not concluded a hearing on the presumption; or

(L) a motion is pending to delay discharge~~,~~ because the debtor has not filed with the court all tax documents required to be filed under § 521(f).

* * * * *

COMMITTEE NOTE

Subdivision (c)(1) is amended in several respects. The introductory language of paragraph (1) is revised to emphasize that the listed circumstances do not just relieve the court of the obligation to enter the discharge promptly but that they prevent the court from entering a discharge.

Subdivision (c)(1)(H) is amended to reflect the simultaneous amendment of Rule 1007(b)(7). The amendment of the latter rule relieves a debtor of the obligation to file a statement of completion of a course concerning personal financial management if the course provider notifies the court directly that the debtor has completed the course. Subparagraph (H) now requires postponement of the discharge when a debtor fails to file a statement of course completion only if the debtor has an obligation to file the statement.

Subdivision (c)(1)(K) is amended to make clear that the prohibition on entering a discharge due to a presumption of undue hardship under

§ 524(m) of the Code ceases when the presumption expires or the court concludes a hearing on the presumption.

Because this amendment is being made to conform to a simultaneous amendment of Rule 1007(b)(7) and is otherwise technical in nature, final approval is sought without publication.

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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

11-BK-003. Ganna L. Gudkova. I support the amendment to Rule 1007 and the related amendment to Rule 5009.

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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted on this amendment.

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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted on this amendment.

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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted on this amendment.

APPENDIX A-2

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APPENDIX A.2

PROPOSED AMENDMENTS TO OFFICIAL FORMS 7, 9A – 9I, 10, and 21

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UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

In re:_____ _____, Debtor

Case No. _____ (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 ~~owner of 5 percent or more of the voting or equity securities~~ 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).

---

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

* * * * *

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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted on this amendment.

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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.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
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. *Do not include this notice with any filing you make with the court.*
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

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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.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
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. *Do not include this notice with any filing you make with the court.*
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

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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.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
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:

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: 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.
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. *Do not include this notice with any filing you make with the court.*
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

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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.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
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:

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. *Do not include this notice with any filing you make with the court.*
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

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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

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
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. *Do not include this notice with any filing you make with the court.*
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	

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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.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
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. *Do not include this notice with any filing you make with the court.*
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

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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.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
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:

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. *Do not include this notice with any filing you make with the court.*
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

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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.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
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. *Do not include this notice with any filing you make with the court.*
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	

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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.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
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:

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. *Do not include this notice with any filing you make with the court.*
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

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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.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
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:

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. *Do not include this notice with any filing you make with the court.*
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

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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.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
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:

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. *Do not include this notice with any filing you make with the court.*
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

All versions of the form have been updated on the first page and in the claims box on the explanation page to remind creditors that the form should not be included with or attached to any proof of claim or other filing in the case. Stylistic changes to the form are also made.

Final approval of these conforming and stylistic amendments is sought without publication.

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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 to 11 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).

❒ 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 – 11 U.S.C. § 507 (a)(8).

❒ Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)(__).

Amount entitled to priority:

$______________________

**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, or, in the case of a claim based on an open-end or revolving consumer credit agreement, a statement providing the information required by FRBP 3001(c)(3)(A). 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. If the claim is secured by the debtor's principal residence, the Mortgage Proof of Claim Attachment is being filed with this claim. *(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 and documents required by FRBP 3001(c) for claims based on an open-end or revolving consumer credit agreement or secured by a security interest in the debtor's principal residence. 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

Section 7 of the form is amended to remind filers of the need to attach documents required by Rule 3001(c) for claims based on an open-end or revolving consumer credit agreement or claims secured by a security interest in the debtor's principal residence.

Section 8 is revised to delete the direction that an authorized agent attach a power of attorney if one exists. Rule 9010(c) does not require that an agent's authority to file a proof of claim be evidenced by a power of attorney.

Final approval of these conforming and stylistic amendments is sought without publication.

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Do not file this form as part of the public case file. This form must be submitted separately and must not be included in the court's public electronic records. Please consult local court procedures for submission requirements.

United States Bankruptcy Court

_____ District Of _____

In re _____,	)	
[Set forth here all names including married, maiden,	)	
and trade names used by debtor within last 8 years]	)	
	)	
Debtor	)	Case No. _____
Address _____	)	
_____	)	Chapter _____
	)	
Last four digits of Social-Security or Individual Taxpayer-	)	
Identification (ITIN) No(s).,(if any): _____	)	
_____	)	
Employer Tax-Identification (EIN) No(s).(if any): _____	)	
_____	)	

STATEMENT OF SOCIAL-SECURITY NUMBER(S)

(or other Individual Taxpayer-Identification Number(s) (ITIN(s)))[*]

1.Name of Debtor (Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

☐ Debtor has a Social-Security Number and it is:_____
(If more than one, state all.)
☐ Debtor does not have a Social-Security Number but has an Individual Taxpayer-Identification Number (ITIN), and it is: _____
(If more than one, state all.)
☐ Debtor does not have either a Social-Security Number or an Individual Taxpayer-Identification Number (ITIN).

2.Name of Joint Debtor (Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

☐ Joint Debtor has a Social-Security Number and it is: _____
(If more than one, state all.)
☐ Joint Debtor does not have a Social-Security Number but has an Individual Taxpayer-Identification Number (ITIN) and it is: _____
(If more than one, state all.)
☐ Joint Debtor does not have either a Social-Security Number or an Individual Taxpayer-Identification Number (ITIN).

I declare under penalty of perjury that the foregoing is true and correct.

X _____
Signature of Debtor Date

X _____
Signature of Joint Debtor Date

---

*<u>*Joint debtors must provide information for both spouses*</u>.
Penalty for making a false statement: Fine of up to $250,000 or up to 5 years imprisonment or both. 18 U.S.C. §§ 152 and 3571.

COMMITTEE NOTE

The form is amended to remind debtors that, in accordance with Rule 1007(f), it should be submitted to the court, but not filed on the public docket. This rule protects an individual debtor's social-security number or taxpayer-identification number from becoming accessible to the public.

Final approval of the conforming amendment is sought without publication.

APPENDIX B-1

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Appendix B.1

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

Rule 1014. Dismissal and Change of Venue

* * * * *

(b) PROCEDURE WHEN PETITIONS INVOLVING THE SAME OR RELATED DEBTORS ARE FILED IN DIFFERENT COURTS. If petitions commencing cases under the Code or seeking recognition under chapter 15 are filed in different districts by, regarding, or against (1) the same debtor, (2) a partnership and one or more of its general partners, (3) two or more general partners, or (4) a debtor and an affiliate, ~~on motion filed~~ the court in the district in which the first-filed petition ~~filed first~~ is pending ~~and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court,~~ ~~the court~~ may determine, in the interest of justice or for the convenience of the parties, the district or districts in which ~~the case or~~ any of the cases should proceed. The court may so determine on motion and after a hearing, with notice to the following entities in these cases: the United States trustee, entities entitled to notice

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

under Rule 2002(a), and other entities as the court directs. ~~Except as otherwise ordered by t~~ The court ~~in the district in which the petition filed first is pending,~~ may order the parties to the later-filed cases not to proceed further ~~the proceedings on the other petitions shall be stayed by the courts in which they have been filed~~ until it makes the determination ~~is made~~.

COMMITTEE NOTE

Subdivision (b) provides a practical solution for resolving venue issues when related cases are filed in different districts. It designates the court in which the first-filed petition is pending as the decision maker if a party seeks a determination of where the related cases should proceed. Subdivision (b) is amended to clarify when proceedings in the subsequently filed cases are stayed. It requires an order of the court in which the first-filed petition is pending to stay proceedings in the related cases. Requiring a court order to trigger the stay will prevent the disruption of other cases unless there is a judicial determination that this subdivision of the rule applies and that a stay of related cases is needed while the court makes its venue determination.

Notice of the hearing must be given to all debtors, trustees, creditors, indenture trustees, and United States trustees in the affected cases, as well as any other entity that the court directs. Because the clerk of the court that makes the determination often may lack access to the names and addresses of entities in other cases, a court may order the moving party to provide notice.

The other changes to subdivision (b) are stylistic.

Rule 7004. Process; Service of Summons, Complaint

* * * * *

(e) SUMMONS: TIME LIMIT FOR SERVICE WITHIN THE UNITED STATES. Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F.R. Civ. P. shall be by delivery of the summons and complaint within ~~14~~ 7 days after the summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within ~~14~~ 7 days after the summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served. This subdivision does not apply to service in a foreign country.

* * * * *

COMMITTEE NOTE

Subdivision (e) is amended to alter the period of time during which service of the summons and complaint must be made. The amendment reduces that period from fourteen days to seven days after issuance of the summons. Because Rule 7012 provides that the defendant's time to answer the complaint is calculated from the date the summons is issued, a lengthy delay between issuance and service of the summons may unduly shorten the defendant's time to respond. The amendment is therefore intended to encourage prompt service after issuance of a summons.

Rule 7008. General Rules of Pleading[**]

~~(a) APPLICABILITY OF RULE 8 F.R.CIV.P.~~ Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy ~~judge~~ court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement ~~that the proceeding is core or noncore and, if non-core~~ that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~ court.

~~(b) ATTORNEY'S FEES. A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate.~~

COMMITTEE NOTE

Former subdivision (a) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings,

[**] In addition to newly proposed amendments, this draft includes amendments that the Standing Committee approved for publication at the January 2012 meeting.

28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. Rule 7012(b) has been amended to require a similar statement in a responsive pleading. The bankruptcy judge will then determine the appropriate course of proceedings under Rule 7016.

The rule is also amended to delete subdivision (b), which required a request for attorney's fees always to be pleaded as a claim in an allowed pleading. That requirement, which differed from the practice under the Federal Rules of Civil Procedure, had the potential to serve as a trap for the unwary.

The procedures for seeking an award of attorney's fees are now set out in Rule 7054(b)(2), which makes applicable most of the provisions of Rule 54(d)(2) F.R. Civ. P. As specified by Rule 54(d)(2)(A) and (B) F.R. Civ. P., a claim for attorney's fees must be made by a motion filed no later than 14 days after entry of the judgment unless the governing substantive law requires those fees to be proved at trial as an element of damages. When fees are an element of damages, such as when the terms of a contract provide for the recovery of fees incurred prior to the instant adversary proceeding, the general pleading requirements of this rule still apply.

Rule 7012. Defenses and Objections—When and How Presented— By Pleading or Motion—Motion for Judgment on the Pleadings

* * * * *

(b) APPLICABILITY OF RULE 12(b)-(I) F.R. CIV. P.

Rule 12(b)-(i) F.R. Civ. P. applies in adversary proceedings. A responsive pleading ~~shall admit or deny an allegation that the proceeding is core or non-core. If the~~ response is that the ~~proceeding is non-core it~~ shall include a statement that the party does or does not consent to entry of final orders or judgment by the

bankruptcy ~~judge~~ court. ~~In non-core proceedings, final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties~~.

COMMITTEE NOTE

Subdivision (b) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. The amended rule also removes the provision requiring express consent before the entry of final orders and judgments in non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. This amendment complements the requirements of amended Rule 7008(a). The bankruptcy judge's subsequent determination of the appropriate course of proceedings, including whether to enter final orders and judgments or to issue proposed findings of fact and conclusions of law, is a pretrial matter now provided for in amended Rule 7016.

Rule 7016. Pre-~~T~~trial Procedures~~; Formulating Issues~~

(a) PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT. Rule 16 F.R.Civ.P. applies in adversary proceedings.

(b) DETERMINING PROCEDURE. The bankruptcy court shall decide, on its own motion or a party's timely motion, whether:

(1) to hear and determine the proceeding;

(2) to hear the proceeding and issue proposed findings of fact and conclusions of law; or

(3) to take some other action.

COMMITTEE NOTE

This rule is amended to create a new subdivision (b) that provides for the bankruptcy court to enter final orders and judgment, issue proposed findings and conclusions, or take some other action in a proceeding. The rule leaves the decision as to the appropriate course of proceedings to the bankruptcy court. The court's decision will be informed by the extent of the district court's order of reference to the bankruptcy court and by the parties' statements, required under Rules 7008(a), 7012(b), and 9027(a) and (e), regarding consent to the entry of final orders and judgment. If the bankruptcy court chooses to issue proposed findings of fact and conclusions of law, Rule 9033 applies.

Rule 9023. New Trials; Amendment of Judgments

Except as provided in this rule and Rule 3008, Rule 59 F.R.Civ.P. applies in cases under the Code. A motion for a new trial or to alter or amend a judgment shall be filed, and a court may on its own order a new trial, no later than 14 days after entry of judgment. In some circumstances, Rule 8008 governs post-judgment motion practice after an appeal has been docketed and is pending.

COMMITTEE NOTE

This rule is amended to include a cross-reference to Rule 8008. That rule governs the issuance of an indicative ruling when relief is sought that the court lacks authority to grant because of an appeal that has been docketed and is pending.

Rule 9024. Relief from Judgment or Order

Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one-year limitation prescribed in Rule 60(c), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330. In some circumstances, Rule 8008 governs post-judgment motion practice after an appeal has been docketed and is pending.

COMMITTEE NOTE

This rule is amended to include a cross-reference to Rule 8008. That rule governs the issuance of an indicative ruling when relief is sought that the court lacks authority to grant because of an appeal that has been docketed and is pending.

Rule 9027. Removal

(a) NOTICE OF REMOVAL.

(1) *Where filed; form and content*. A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action ~~the proceeding is core or non-core and, if non-core~~, ~~that~~ the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~ court, and be accompanied by a copy of all process and pleadings.

* * * * *

(e) PROCEDURE AFTER REMOVAL.

* * * * *

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement ~~admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state~~ that the

party does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~ court. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

* * * * *

COMMITTEE NOTE

Subdivisions (a)(1) and (e)(3) are amended to delete the requirement for a statement that the proceeding is core or non-core and to require in all removed actions a statement that the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for a statement regarding consent at the time of removal, whether or not a proceeding is termed non-core.

The party filing the notice of removal must include a statement regarding consent in the notice, and the other parties who have filed pleadings must respond in a separate statement filed within 14 days after removal. If a party to the removed claim or cause of action has not filed a pleading prior to removal, however, there is no need to file a separate statement under subdivision (e)(3), because a statement regarding consent must be included in a responsive pleading filed pursuant to Rule 7012(b). Rule 7016 governs the bankruptcy court's decision whether to hear and determine the proceeding, issue proposed findings of fact and conclusions of law, or take some other action in the proceeding.

Rule 9033. ~~Review of~~ Proposed Findings of Fact and Conclusions of Law ~~in Non-Core Proceedings~~

(a) SERVICE. ~~In non-core proceedings heard pursuant to 28 U.S.C. § 157(c)(1)~~In a proceeding in which the bankruptcy court has issued ~~the bankruptcy judge shall file~~ proposed findings of fact and conclusions of law.~~.~~ ~~T~~the clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to delete language limiting this provision to non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. If the bankruptcy court decides, pursuant to Rule 7016, that it is appropriate to issue proposed findings of fact and conclusions of law in a proceeding, this rule governs the subsequent procedures.

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APPENDIX B-2

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Appendix B.2

FEDERAL RULES OF BANKRUPTCY PROCEDURE

PART VIII. BANKRUPTCY APPEALS

Rule 8001. Scope of Part VIII Rules; Definition of "BAP"; Method of Transmission

(a) GENERAL SCOPE. These Part VIII rules govern the procedure in a United States district court and a bankruptcy appellate panel on appeal from a judgment, order, or decree of a bankruptcy court. They also govern certain procedures on appeal to a United States court of appeals under 28 U.S.C. § 158(d).

(b) DEFINITION OF "BAP." "BAP" means a bankruptcy appellate panel established by a circuit's judicial council and authorized to hear appeals from a bankruptcy court under 28 U.S.C. § 158.

(c) METHOD OF TRANSMITTING DOCUMENTS. A document must be sent electronically under these Part VIII rules, unless it is being sent by or to an individual who is not represented by counsel or the court's governing rules permit or require mailing or other means of delivery.

COMMITTEE NOTE

These Part VIII rules apply to appeals under 28 U.S.C. § 158(a) from bankruptcy courts to district courts and BAPs. The Federal Rules of Appellate Procedure generally govern bankruptcy appeals to courts of appeals.

Eight of the Part VIII rules do, however, relate to appeals to courts of appeals. Rule 8004(e) provides that the authorization by a court of appeals of a direct appeal of a bankruptcy court's interlocutory order or decree constitutes a grant of leave to appeal. Rule 8006 governs the procedure for certification under 28 U.S.C. § 158(d)(2) of a direct appeal

from a judgment, order, or decree of a bankruptcy court to a court of appeals. Rule 8007 addresses stays pending a direct appeal to a court of appeals. Rule 8008 authorizes a bankruptcy court to issue an indicative ruling while an appeal is pending in a court of appeals. Rules 8009 and 8010 govern the record on appeal in a direct appeal to a court of appeals. Rule 8025 governs the granting of a stay of a district court or BAP judgment pending an appeal to the court of appeals. And Rule 8028 authorizes the court of appeals to suspend applicable Part VIII rules in a particular case, subject to certain enumerated exceptions.

These rules take account of the evolving technology in the federal courts for the electronic filing, storage, and transmission of documents. Except as applied to pro se parties, the Part VIII rules require documents to be sent electronically, unless applicable court rules or orders expressly require or permit another means of sending a particular document.

Rule 8002. Time for Filing Notice of Appeal

(a) IN GENERAL.

(1) *Fourteen-Day Period*. Except as provided in subdivisions (b) and (c), a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.

(2) *Filing Before the Entry of Judgment*. A notice of appeal filed after the bankruptcy court announces a decision or order—but before entry of the judgment, order, or decree—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals*. If one party files a timely notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise allowed by this rule, whichever period ends later.

(4) *Mistaken Filing in Another Court*. If a notice of appeal is mistakenly filed in a district court, BAP, or court of appeals, the clerk of that court must state on the notice the date on which it was received and transmit it to the bankruptcy clerk. The notice of appeal is then

considered filed in the bankruptcy court on the date so stated.

(b) EFFECT OF A MOTION ON THE TIME TO APPEAL.

(1) *In General*. If a party timely files in the bankruptcy court any of the following motions, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;

(B) to alter or amend the judgment under Rule 9023;

(C) for a new trial under Rule 9023; or

(D) for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered.

(2) *Filing an Appeal Before the Motion is Decided*. If a party files a notice of appeal after the court announces or enters a judgment, order, or decree—but before it disposes of any motion listed in subdivision (b)(1)—the notice becomes effective when the order disposing of the last such remaining motion is entered.

(3) *Appealing the Motion*. If a party intends to challenge an order disposing of any motion listed in subdivision (b)(1)—or the alteration or amendment of a judgment, order, or decree upon the motion—the party must file a notice of appeal or an amended notice of appeal. The notice or amended notice must comply with Rule 8003 or 8004 and be filed within the time prescribed by this rule, measured from the entry of the order disposing of the last such remaining motion.

(4) *No Additional Fee*. No additional fee is required to file an amended notice of appeal.

(c) APPEAL BY AN INMATE CONFINED IN AN INSTITUTION.

(1) *In General*. If an inmate confined in an institution files a notice of appeal from a judgment, order, or decree of a bankruptcy court to a district court or BAP, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If the institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized

statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) *Multiple Appeals*. If an inmate files under this subdivision the first notice of appeal, the 14-day period provided in subdivision (a)(3) for another party to file a notice of appeal runs from the date when the bankruptcy clerk dockets the first notice.

(d) EXTENDING THE TIME TO APPEAL.

(1) *When the Time May be Extended*. Except as provided in subdivision (d)(2), the bankruptcy court may extend the time to file a notice of appeal upon a party's motion that is filed:

(A) within the time prescribed by this rule; or

(B) within 21 days after that time, if the party shows excusable neglect.

(2) *When the Time May Not be Extended*. The bankruptcy court may not extend the time to file a notice of appeal if the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, 922, 1201, or 1301 of the Code;

(B) authorizes the sale or lease of property

or the use of cash collateral under § 363 of the Code;

(C) authorizes the obtaining of credit under § 364 of the Code;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code;

(E) approves a disclosure statement under § 1125 of the Code; or

(F) confirms a plan under § 943, 1129, 1225, or 1325 of the Code.

(3) *Time Limits on an Extension*. No extension of time may exceed 21 days after the time prescribed by this rule, or 14 days after the order granting the motion to extend time is entered, whichever is later.

COMMITTEE NOTE

This rule is derived from former Rule 8002 and F.R.App.P. 4(a) and (c). With the exception of subdivision (c), the changes to the former rule are stylistic. The rule retains the former rule's 14-day time period for filing a notice of appeal, as opposed to the longer periods permitted for appeals in civil cases under F.R.App.P. 4(a).

Subdivision (a) continues to allow any other party to file a notice of appeal within 14 days after the first notice of appeal is filed, or thereafter to the extent otherwise authorized by this rule. Subdivision (a) also retains provisions of the former rule that prescribe the date the notice of appeal is deemed filed if the appellant files it prematurely or in the wrong court.

Subdivision (b), like former Rule 8002(b) and F.R.App.P. 4(a), tolls the time for filing a notice of appeal when certain postjudgment motions are filed, and it prescribes the effective date of a notice of appeal that is filed before the court disposes of all of the specified motions. As under the former rule, a party that wants to appeal the court's disposition of the motion or the alteration or amendment of a judgment, order, or decree in response to such a motion must file a notice of appeal or, if it has already filed one, an amended notice of appeal.

Although Rule 8003(a)(3)(C) requires a notice of appeal to be accompanied by the required fee, no additional fee is required for the filing of an amended notice of appeal.

Subdivision (c) mirrors the provisions of F.R.App.P. 4(c)(1) and (2), which specify timing rules for a notice of appeal filed by an inmate confined in an institution.

Subdivision (d) continues to allow the court to grant an extension of time to file a notice of appeal, except with respect to certain specified judgments, orders, and decrees.

Rule 8003. Appeal as of Right—How Taken; Docketing the Appeal

(a) FILING THE NOTICE OF APPEAL.

(1) *In General*. An appeal from a judgment, order, or decree of a bankruptcy court to a district court or BAP under 28 U.S.C. § 158(a)(1) or (a)(2) may be taken only by filing a notice of appeal with the bankruptcy clerk within the time allowed by Rule 8002.

(2) *Effect of Not Taking Other Steps*. An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the district court or BAP to act as it considers appropriate, including dismissing the appeal.

(3) *Contents*. The notice of appeal must:

(A) conform substantially to the appropriate Official Form;

(B) be accompanied by the judgment, order, or decree, or the part of it, being appealed; and

(C) be accompanied by the prescribed fee.

(4) *Additional Copies*. If requested to do so, the appellant must furnish the bankruptcy clerk with enough copies of the notice to enable the clerk to comply with

subdivision (c).

(b) JOINT OR CONSOLIDATED APPEALS.

(1) *Joint Notice of Appeal*. When two or more parties are entitled to appeal from a judgment, order, or decree of a bankruptcy court and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) *Consolidating Appeals*. When parties have separately filed timely notices of appeal, the district court or BAP may join or consolidate the appeals.

(c) SERVING THE NOTICE OF APPEAL.

(1) *Transmitting to the United States Trustee and Other Parties*. The bankruptcy clerk must transmit the notice of appeal to the United States trustee and to counsel of record for each party to the appeal, excluding the appellant. If a party is proceeding pro se, the clerk must send the notice of appeal to the party's last known address. The clerk must note, on each copy, the date when the notice of appeal was filed.

(2) *Effect of Failing to Transmit Notice*. The bankruptcy clerk's failure to transmit notice to a party or the United States trustee does not affect the validity of

the appeal.

(3) *Noting Service on the Docket.* The clerk must note on the docket the names of the parties served and the date and method of the service.

(d) TRANSMITTING THE NOTICE OF APPEAL TO THE DISTRICT COURT OR BAP; DOCKETING THE APPEAL.

(1) *Transmitting the Notice.* The bankruptcy clerk must promptly transmit the notice of appeal to the BAP clerk if a BAP has been established for appeals from that district and the appellant has not elected to have the district court hear the appeal. Otherwise, the bankruptcy clerk must promptly transmit the notice to the district clerk.

(2) *Docketing in the District Court or BAP*. Upon receiving the notice of appeal, the district or BAP clerk must docket the appeal under the title of the bankruptcy court action and must identify the appellant, adding the appellant's name if necessary.

COMMITTEE NOTE

This rule is derived from several former Bankruptcy Rule and Appellate Rule provisions. It addresses appeals as of right, joint and consolidated appeals, service of the notice of appeal, and the timing of the docketing of an appeal in the district court or BAP.

Subdivision (a) incorporates, with stylistic changes, much of the content of former Rule 8001(a) regarding the taking of an appeal as of right

under 28 U.S.C. § 158(a)(1) or (2). The rule now requires that the judgment, order, or decree being appealed be attached to the notice of appeal.

Subdivision (b), which is an adaptation of F.R.App.P. 3(b), permits the filing of a joint notice of appeal by multiple appellants that have sufficiently similar interests that their joinder is practicable. It also allows the district court or BAP to consolidate appeals taken separately by two or more parties.

Subdivision (c) is derived from former Rule 8004 and F.R.App.P. 3(d). Under Rule 8001(c), the former rule's requirement that service of the notice of appeal be accomplished by mailing is generally modified to require that the bankruptcy clerk serve counsel by electronic means. Service on pro se parties must be made by sending the notice to the address most recently provided to the court.

Subdivision (d) modifies the provision of former Rule 8007(b), which delayed the docketing of an appeal by the district court or BAP until the record was complete and the bankruptcy clerk transmitted it. The new provision, adapted from F.R.App.P. 3(d) and 12(a), requires the bankruptcy clerk to promptly transmit the notice of appeal to the clerk of the district court or BAP. Upon receipt of the notice of appeal, the district or BAP clerk must docket the appeal. Under this procedure, motions filed in the district court or BAP prior to completion and transmission of the record can generally be placed on the docket of an already pending appeal.

Rule 8004. Appeal by Leave—How Taken; Docketing the Appeal

(a) NOTICE OF APPEAL AND MOTION FOR LEAVE TO APPEAL. To appeal from an interlocutory order or decree of a bankruptcy court under 28 U.S.C. § 158(a)(3), a party must file with the bankruptcy clerk a notice of appeal as prescribed by Rule 8003(a). The notice must:

(1) be filed within the time allowed by Rule 8002;

(2) be accompanied by a motion for leave to appeal prepared in accordance with subdivision (b); and

(3) unless served electronically using the court's transmission equipment, include proof of service in accordance with Rule 8011(d).

(b) CONTENTS OF THE MOTION; RESPONSE.

(1) *Contents*. A motion for leave to appeal under 28 U.S.C. § 158(a)(3) must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why leave to appeal should be granted; and

(E) a copy of the interlocutory order or

decree and any related opinion or memorandum.

(2) *Response*. A party may file with the district or BAP clerk a response in opposition or a cross-motion within 14 days after the motion is served.

(c) TRANSMITTING THE NOTICE OF APPEAL AND THE MOTION; DOCKETING THE APPEAL; DETERMINING THE MOTION.

(1) *Transmitting to the District Court or BAP*. The bankruptcy clerk must promptly transmit the notice of appeal and the motion for leave to the BAP clerk if a BAP has been established for appeals from that district and the appellant has not elected to have the district court hear the appeal. Otherwise, the bankruptcy clerk must promptly transmit the notice and motion to the district clerk.

(2) *Docketing in the District Court or BAP*. Upon receiving the notice and motion, the district or BAP clerk must docket the appeal under the title of the bankruptcy court action and must identify the appellant, adding the appellant's name if necessary.

(3) *Oral Argument Not Required*. The motion and any response or cross-motion are submitted without oral argument unless the district court or BAP orders otherwise.

If the motion is denied, the district court or BAP must dismiss the appeal.

(d) FAILURE TO FILE A MOTION WITH A NOTICE OF APPEAL. If an appellant timely files a notice of appeal under this rule but does not include a motion for leave, the district court or BAP may order the appellant to file a motion for leave, or treat the notice of appeal as a motion for leave and either grant or deny it. If the court orders that a motion for leave be filed, the appellant must do so within 14 days after the order is entered, unless the order provides otherwise.

(e) DIRECT APPEAL TO A COURT OF APPEALS. If leave to appeal an interlocutory order or decree is required under 28 U.S.C. § 158(a)(3), an authorization of a direct appeal by the court of appeals under 28 U.S.C. § 158(d)(2) satisfies the requirement.

COMMITTEE NOTE

This rule is derived from former Rules 8001(b) and 8003 and F.R.App.P. 5. It retains the practice for interlocutory bankruptcy appeals of requiring a notice of appeal to be filed along with a motion for leave to appeal. Like current Rule 8003, it alters the timing of the docketing of the appeal in the district court or BAP.

Subdivision (a) requires a party seeking leave to appeal under 28 U.S.C. § 158(a)(3) to file with the bankruptcy clerk both a notice of appeal and a motion for leave to appeal.

Subdivision (b) prescribes the contents of the motion, retaining the

requirements of former Rule 8003(a). It also continues to allow another party to file a cross-motion or response to the appellant's motion. Because of the prompt docketing of the appeal under the current rule, the cross-motion or response must be filed in the district court or BAP, rather than in the bankruptcy court as the former rule required.

Subdivision (c) requires the bankruptcy clerk to transmit promptly to the district court or BAP the notice of appeal and the motion for leave to appeal. Upon receipt of the notice and the motion, the district or BAP clerk must docket the appeal. Unless the district court or BAP orders otherwise, no oral argument will be held on the motion.

Subdivision (d) retains the provisions of former Rule 8003(c). It provides that if the appellant timely files a notice of appeal, but fails to file a motion for leave to appeal, the court can either direct that a motion be filed or treat the notice of appeal as the motion and either grant or deny leave.

Subdivision (e), like former Rule 8003(d), treats the authorization of a direct appeal by the court of appeals as a grant of leave to appeal under 28 U.S.C. § 158(a)(3) if the district court or BAP has not already granted leave. Thus, a separate order granting leave to appeal is not required. If the court of appeals grants permission to appeal, the record must be assembled and transmitted in accordance with Rules 8009 and 8010.

Rule 8005. Election to Have an Appeal Heard by the District Court Instead of the BAP

(a) FILING OF A STATEMENT OF ELECTION. To elect to have an appeal heard by the district court, a party must:

(1) file a statement of election that conforms substantially to the appropriate Official Form; and

(2) do so within the time prescribed by 28 U.S.C. § 158(c)(1).

(b) TRANSFERRING THE DOCUMENTS RELATED TO THE APPEAL. Upon receiving an appellant's timely statement of election, the bankruptcy clerk must transmit to the district clerk all documents related to the appeal. Upon receiving a timely statement of election by a party other than the appellant, the BAP clerk must transmit to the district clerk all documents related to the appeal.

(c) DETERMINING THE VALIDITY OF AN ELECTION. A party seeking a determination of the validity of an election must file a motion in the court where the appeal is then pending. The motion must be filed within 14 days after the statement of election is filed.

(d) MOTION FOR LEAVE WITHOUT A NOTICE OF APPEAL—EFFECT ON THE TIMING OF AN ELECTION. If an appellant moves for leave to appeal under Rule 8004 but fails to

file a separate notice of appeal with the motion, the motion must be treated as a notice of appeal for purposes of determining the timeliness of a statement of election.

COMMITTEE NOTE

This rule, which implements 28 U.S.C. § 158(c)(1), is derived from former Rule 8001(e).

As the former rule required, subdivision (a) provides that an appellant that elects to have a district court, rather than a BAP, hear its appeal must file with the bankruptcy clerk a statement of election when it files its notice of appeal. The statement must conform substantially to the appropriate Official Form. If a BAP has been established for appeals from the bankruptcy court and the appellant does not file a timely statement of election, any other party that elects to have the district court hear the appeal must file a statement of election with the BAP clerk no later than 30 days after service of the notice of appeal.

Subdivision (b) requires the bankruptcy clerk to transmit all appeal documents to the district clerk if the appellant files a timely statement of election. If the appellant does not make that election, the bankruptcy clerk must transmit those documents to the BAP clerk, and upon a timely election by any other party, the BAP clerk must promptly transmit the appeal documents to the district clerk.

Subdivision (c) provides a new procedure for the resolution of disputes regarding the validity of an election. A motion seeking the determination of the validity of an election must be filed no later than 14 days after the statement of election is filed. Nothing in this rule prevents a court from determining the validity of an election on its own motion.

Subdivision (d) provides that, in the case of an appeal by leave, if the appellant files a motion for leave to appeal but fails to file a notice of appeal, the filing and service of the motion will be treated for timing purposes under this rule as the filing and service of the notice of appeal.

Rule 8006. Certifying a Direct Appeal to the Court of Appeals

(a) EFFECTIVE DATE OF A CERTIFICATION. A certification of a judgment, order, or decree of a bankruptcy court for direct review in a court of appeals under 28 U.S.C. § 158(d)(2) is effective when:

(1) the certification has been filed;

(2) a timely appeal has been taken under Rule 8003 or 8004; and

(3) the notice of appeal has become effective under Rule 8002.

(b) FILING THE CERTIFICATION. The certification must be filed with the clerk of the court where the matter is pending. For purposes of this rule, a matter remains pending in the bankruptcy court for 30 days after the effective date of the first notice of appeal from the judgment, order, or decree for which direct review is sought. A matter is pending in the district court or BAP thereafter.

(c) JOINT CERTIFICATION BY ALL APPELLANTS AND APPELLEES. A joint certification by all the appellants and appellees under 28 U.S.C. § 158(d)(2)(A) must be made by using the appropriate Official Form. The parties may supplement the certification with a short statement of the basis for the certification,

which may include the information listed in subdivision (f)(2).

(d) THE COURT THAT MAY MAKE THE CERTIFICATION. Only the court where the matter is pending, as provided in subdivision (b), may certify a direct review on request of parties or on its own motion.

(e) CERTIFICATION ON THE COURT'S OWN MOTION.

(1) *How Accomplished*. A certification on the court's own motion must be set forth in a separate document. The clerk of the certifying court must serve it on the parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1). The certification must be accompanied by an opinion or memorandum that contains the information required by subdivision (f)(2)(A)-(D).

(2) *Supplemental Statement by a Party*. Within 14 days after the court's certification, a party may file with the clerk of the certifying court a short supplemental statement regarding the merits of certification.

(f) CERTIFICATION BY THE COURT ON REQUEST.

(1) *How Requested*. A request by a party for certification that a circumstance specified in 28 U.S.C.

§158(d)(2)(A)(i)-(iii) applies—or a request by a majority of the appellants and a majority of the appellees—must be filed with the clerk of the court where the matter is pending within 60 days after the entry of the judgment, order, or decree.

(2) *Service and Contents*. The request must be served on all parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1), and it must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the direct appeal should be allowed, including which circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) applies; and

(E) a copy of the judgment, order, or decree and any related opinion or memorandum.

(3) *Time to File a Response or a Cross-Request*. A party may file a response to the request within 14 days after the request is served, or such other time as the court where

the matter is pending allows. A party may file a cross-request for certification within 14 days after the request is served, or within 60 days after the entry of the judgment, order, or decree, whichever occurs first.

(4) *Oral Argument Not Required*. The request, cross-request, and any response are not governed by Rule 9014 and are submitted without oral argument unless the court where the matter is pending orders otherwise.

(5) *Form and Service of the Certification*. If the court certifies a direct appeal in response to the request, it must do so in a separate document. The certification must be served on the parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1).

(g) PROCEEDING IN THE COURT OF APPEALS FOLLOWING A CERTIFICATION. Within 30 days after the date the certification becomes effective under subdivision (a), a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk.

COMMITTEE NOTE

This rule is derived from former Rule 8001(f), and it provides the

procedures for the certification of a direct appeal of a judgment, order, or decree of a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Once a case has been certified in the bankruptcy court, the district court, or the BAP for direct appeal and a request for permission to appeal has been timely filed, the Federal Rules of Appellate Procedure govern further proceedings in the court of appeals.

Subdivision (a), like the former rule, requires that an appeal be properly taken—now under Rule 8003 or 8004—before a certification for direct review in the court of appeals takes effect. This rule requires the timely filing of a notice of appeal under Rule 8002 and accounts for the delayed effectiveness of a notice of appeal under the circumstances specified in that rule. Ordinarily, a notice of appeal is effective when it is filed in the bankruptcy court. Rule 8002, however, delays the effectiveness of a notice of appeal when (1) it is filed after the announcement of a decision or order but prior to the entry of the judgment, order, or decree; or (2) it is filed after the announcement or entry of a judgment, order, or decree but before the bankruptcy court disposes of certain postjudgment motions.

When the bankruptcy court enters an interlocutory order or decree that is appealable under 28 U.S.C. § 158(a)(3), certification for direct review in the court of appeals may take effect before the district court or BAP grants leave to appeal. The certification is effective when the actions specified in subdivision (a) have occurred. Rule 8004(e) provides that if the court of appeals grants permission to take a direct appeal before leave to appeal an interlocutory ruling has been granted, the authorization by the court of appeals is treated as the granting of leave to appeal.

Subdivision (b) provides that a certification must be filed in the court where the matter is pending, as determined by this subdivision. This provision modifies the former rule. Because of the prompt docketing of appeals in the district court or BAP under Rules 8003 and 8004, a matter is deemed—for purposes of this rule only—to remain pending in the bankruptcy court for 30 days after the effective date of the notice of appeal. This provision will in appropriate cases give the bankruptcy judge, who will be familiar with the matter being appealed, an opportunity to decide whether certification for direct review is appropriate. Similarly, subdivision (d) provides that only the court where the matter is then pending according to subdivision (b) may make a certification on its own motion or on the request of one or more parties.

Section 158(d)(2) provides three different ways in which an appeal may be certified for direct review. Implementing these options, the rule

provides in subdivision (c) for the joint certification by all appellants and appellees; in subdivision (e) for the bankruptcy court's, district court's, or BAP's certification on its own motion; and in subdivision (f) for the bankruptcy court's, district court's, or BAP's certification on request of a party or a majority of appellants and a majority of appellees.

Subdivision (g) requires that, once a certification for direct review is made, a request to the court of appeals for permission to take a direct appeal to that court must be filed with the clerk of the court of appeals no later than 30 days after the effective date of the certification. Federal Rule of Appellate Procedure 6(c), which incorporates all of F.R.App.P. 5 except subdivision (a)(3), prescribes the procedure for requesting the permission of the court of appeals and governs proceedings that take place thereafter in that court.

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

(a) INITIAL MOTION IN THE BANKRUPTCY COURT.

(1) *In General*. Ordinarily, a party must move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;

(B) the approval of a supersedeas bond;

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or

(D) the suspension or continuation of proceedings in a case or other relief permitted by subdivision (e).

(2) *Time to File*. The motion may be made either before or after the notice of appeal is filed.

(b) MOTION IN THE COURT OF APPEALS ON DIRECT APPEAL, THE DISTRICT COURT, OR THE BAP.

(1) *Request for Relief*. A motion for the relief specified in subdivision (a)(1)—or to vacate or modify a bankruptcy court's order granting such relief—may be made in the court where the appeal is pending or where it will be taken.

(2) *Showing or Statement Required*. The motion must:

(A) show that moving first in the bankruptcy court would be impracticable; or

(B) if a motion was made in the bankruptcy court, either state that the court has not yet ruled on the motion, or state that the court has ruled and set out any reasons given for the ruling.

(3) *Additional Content*. The motion must also include:

(A) the reasons for granting the relief requested and the facts relied upon;

(B) affidavits or other sworn statements supporting facts subject to dispute; and

(C) relevant parts of the record.

(4) *Serving Notice*. The movant must give reasonable notice of the motion to all parties.

(c) FILING A BOND OR OTHER SECURITY. The district court, BAP, or court of appeals may condition relief on filing a bond or other appropriate security with the bankruptcy court.

(d) BOND FOR A TRUSTEE OR THE UNITED

STATES. The court may require a trustee to file a bond or other appropriate security when the trustee appeals. A bond or other security is not required when an appeal is taken by the United States, its officer, or its agency or by direction of any department of the federal government.

(e) CONTINUED PROCEEDINGS IN THE BANKRUPTCY COURT. Despite Rule 7062 and subject to the authority of the district court, BAP, or court of appeals, the bankruptcy court may:

(1) suspend or continue other proceedings in the case; or

(2) issue any other appropriate orders during the pendency of an appeal to protect the rights of all parties in interest.

COMMITTEE NOTE

This rule is derived from former Rule 8005 and F.R.App.P. 8. It now applies to direct appeals in courts of appeals.

Subdivision (a), like the former rule, requires a party ordinarily to seek relief pending an appeal in the bankruptcy court. Subdivision (a)(1) expands the list of relief enumerated in F.R.App.P. 8(a)(1) to reflect bankruptcy practice. It includes the suspension or continuation of other proceedings in the bankruptcy case, as authorized by subdivision (e). Subdivision (a)(2) clarifies that a motion for a stay pending appeal, approval of a supersedeas bond, or any other relief specified in paragraph (1) may be made in the bankruptcy court before or after the filing of a notice of appeal.

Subdivision (b) authorizes a party to seek the relief specified in (a)(1), or the vacation or modification of the granting of such relief, by means of a motion filed in the court where the appeal is pending or will be taken—district court, BAP, or the court of appeals on direct appeal. Accordingly, a notice of appeal need not be filed with respect to a bankruptcy court's order granting or denying such a motion. The motion for relief in the district court, BAP, or court of appeals must state why it was impracticable to seek relief initially in the bankruptcy court, if a motion was not filed there, or why the bankruptcy court denied the relief sought.

Subdivisions (c) and (d) retain the provisions of the former rule that permit the district court or BAP—and now the court of appeals—to condition the granting of relief on the posting of a bond by the appellant, except when that party is a federal government entity. Rule 9025 governs proceedings against sureties.

Rule 8008. Indicative Rulings

(a) RELIEF PENDING APPEAL. If a party files a timely motion in the bankruptcy court for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the bankruptcy court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state that the court would grant the motion if the court where the appeal is pending remands for that purpose, or state that the motion raises a substantial issue.

(b) NOTICE TO THE COURT WHERE THE APPEAL IS PENDING. The movant must promptly notify the clerk of the court where the appeal is pending if the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue.

(c) REMAND AFTER AN INDICATIVE RULING. If the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue, the district court or BAP may remand for further proceedings, but it retains jurisdiction unless it expressly dismisses the appeal. If the district court or BAP remands but retains jurisdiction, the parties must promptly notify

the clerk of that court when the bankruptcy court has decided the motion on remand.

COMMITTEE NOTE

This rule is an adaptation of F.R.Civ.P. 62.1 and F.R.App.P. 12.1. It provides a procedure for the issuance of an indicative ruling when a bankruptcy court determines that, because of a pending appeal, the court lacks jurisdiction to grant a request for relief that the court concludes is meritorious or raises a substantial issue. The rule does not attempt to define the circumstances in which an appeal limits or defeats the bankruptcy court's authority to act in the face of a pending appeal. In contrast, Rule 8002(b) identifies motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before the last such motion is resolved. In those circumstances, the bankruptcy court has authority to resolve the motion without resorting to the indicative ruling procedure.

Subdivision (b) requires the movant to notify the court where an appeal is pending if the bankruptcy court states that it would grant the motion or that it raises a substantial issue. This provision applies to appeals pending in the district court, the BAP, or the court of appeals.

Federal Rules of Appellate Procedure 6 and 12.1 govern the procedure in the court of appeals following notification of the bankruptcy court's indicative ruling.

Subdivision (c) of this rule governs the procedure in the district court or BAP upon notification that the bankruptcy court has issued an indicative ruling. The district court or BAP may remand to the bankruptcy court for a ruling on the motion for relief. The district court or BAP may also remand all proceedings, thereby terminating the initial appeal, if it expressly states that it is dismissing the appeal. It should do so, however, only when the appellant has stated clearly its intention to abandon the appeal. Otherwise, the district court or BAP may remand for the purpose of ruling on the motion, while retaining jurisdiction to proceed with the appeal after the bankruptcy court rules, provided that the appeal is not then moot and a party wishes to proceed.

Rule 8009. Record on Appeal; Sealed Documents

(a) DESIGNATING THE RECORD ON APPEAL; STATEMENT OF THE ISSUES.

(1) *Appellant.*

(A) The appellant must file with the bankruptcy clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented.

(B) The appellant must file and serve the designation and statement within 14 days after:

(i) the appellant's notice of appeal as of right becomes effective under Rule 8002; or

(ii) an order granting leave to appeal is entered.

A designation and statement served prematurely must be treated as served on the first day on which filing is timely.

(2) *Appellee and Cross-Appellant.* Within 14 days after being served, the appellee may file and serve on the appellant a designation of additional items to be included in

the record. An appellee who files a cross-appeal must file and serve a designation of additional items to be included in the record and a statement of the issues to be presented on the cross-appeal.

(3) *Cross-Appellee*. Within 14 days after service of the cross-appellant's designation and statement, a cross-appellee may file and serve on the cross-appellant a designation of additional items to be included in the record.

(4) *Record on Appeal*. The record on appeal must include the following:

- items designated by the parties;
- the notice of appeal;
- the judgment, order, or decree being appealed;
- any order granting leave to appeal;
- any certification required for a direct appeal to the court of appeals;
- any opinion, findings of fact, and conclusions of law relating to the issues on appeal, including transcripts of all oral rulings;
- any transcript ordered under subdivision (b);

- any statement required by subdivision (c); and
- any additional items from the record that the court where the appeal is pending orders.

(5) *Copies for the Bankruptcy Clerk.* If paper copies are needed, a party filing a designation of items must provide a copy of any of those items that the bankruptcy clerk requests. If the party fails to do so, the bankruptcy clerk must prepare the copy at the party's expense.

(b) TRANSCRIPT OF PROCEEDINGS.

(1) *Appellant's Duty to Order*. Within the time period prescribed by subdivision (a)(1), the appellant must:

(A) order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of such parts of the proceedings not already on file as the appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the appellant is not ordering a transcript.

(2) *Cross-Appellant's Duty to Order*. Within 14 days after the appellant files a copy of the transcript order or a certificate of not ordering a transcript, the appellee as cross-appellant must:

(A) order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of such additional parts of the proceedings as the cross-appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the cross-appellant is not ordering a transcript.

(3) *Appellee's or Cross-Appellee's Right to Order*. Within 14 days after the appellant or cross-appellant files a copy of a transcript order or certificate of not ordering a transcript, the appellee or cross-appellee may order in writing from the reporter a transcript of such additional parts of the proceedings as the appellee or cross-appellee considers necessary for the appeal. A copy of the order must be filed with the bankruptcy clerk.

(4) *Payment*. At the time of ordering, a party must

make satisfactory arrangements with the reporter for paying the cost of the transcript.

(5) *Unsupported Finding or Conclusion.* If the appellant intends to argue on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all relevant testimony and copies of all relevant exhibits.

(c) STATEMENT OF THE EVIDENCE WHEN A TRANSCRIPT IS UNAVAILABLE. If a transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be filed within the time prescribed by subdivision (a)(1) and served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the bankruptcy court for settlement and approval. As settled and approved, the statement must be included by the bankruptcy clerk in the record on appeal.

(d) AGREED STATEMENT AS THE RECORD ON APPEAL. Instead of the record on appeal as defined in

subdivision (a), the parties may prepare, sign, and submit to the bankruptcy court a statement of the case showing how the issues presented by the appeal arose and were decided in the bankruptcy court. The statement must set forth only those facts alleged and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is accurate, it—together with any additions that the bankruptcy court may consider necessary to a full presentation of the issues on appeal—must be approved by the bankruptcy court and must then be certified to the court where the appeal is pending as the record on appeal. The bankruptcy clerk must then transmit it to the clerk of that court within the time provided by Rule 8010. A copy of the agreed statement may be filed in place of the appendix required by Rule 8018(b) or, in the case of a direct appeal to the court of appeals, by F.R.App.P. 30.

(e) CORRECTING OR MODIFYING THE RECORD.

(1) *Submitting to the Bankruptcy Court*. If any difference arises about whether the record accurately discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly. If an item has been improperly designated as part of the

record on appeal, a party may move to strike that item.

(2) *Correcting in Other Ways*. If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected, and a supplemental record may be certified and transmitted:

(A) on stipulation of the parties;

(B) by the bankruptcy court before or after the record has been forwarded; or

(C) by the court where the appeal is pending.

(3) *Remaining Questions*. All other questions as to the form and content of the record must be presented to the court where the appeal is pending.

(f) SEALED DOCUMENTS. A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In doing so, a party must identify it without revealing confidential or secret information, but the bankruptcy clerk must not transmit it to the clerk of the court where the appeal is pending as part of the record. Instead, a party must file a motion with the court where the appeal is pending to accept the document under seal. If the motion is granted, the movant must notify the

bankruptcy court of the ruling, and the bankruptcy clerk must promptly transmit the sealed document to the clerk of the court where the appeal is pending.

(g) OTHER NECESSARY ACTIONS. All parties to an appeal must take any other action necessary to enable the bankruptcy clerk to assemble and transmit the record.

COMMITTEE NOTE

This rule is derived from former Rule 8006 and F.R.App.P. 10 and 11(a). The provisions of this rule and Rule 8010 are applicable to appeals taken directly to a court of appeals under 28 U.S.C. § 158(d)(2), as well as to appeals to a district court or BAP. See F.R.App.P. 6(c)(2)(A) and (B).

The rule retains the practice of former Rule 8006 of requiring the parties to designate items to be included in the record on appeal. In this respect, the bankruptcy rule differs from the appellate rule. Among other things, F.R.App.P. 10(a) provides that the record on appeal consists of all the documents and exhibits filed in the case. This requirement would often be unworkable in a bankruptcy context because thousands of items might have been filed in the overall bankruptcy case.

Subdivision (a) provides the time period for an appellant to file a designation of items to be included in the record on appeal and a statement of the issues to be presented. It then provides for the designation of additional items by the appellee, cross-appellant, and cross-appellee, as well as for the cross-appellant's statement of the issues to be presented in its appeal. Subdivision (a)(4) prescribes the content of the record on appeal. Ordinarily, the bankruptcy clerk will not need to have paper copies of the designated items because the clerk will either transmit them to the appellate court electronically or otherwise make them available electronically. If the bankruptcy clerk requires a paper copy of some or all of the items designated as part of the record, the clerk may request the party that designated the item to provide the necessary copies, and the party must comply with the request or bear the cost of the clerk's copying.

Subdivision (b) governs the process for ordering a complete or partial transcript of the bankruptcy court proceedings. In situations in

which a transcript is unavailable, subdivision (c) allows for the parties' preparation of a statement of the evidence or proceedings, which must be approved by the bankruptcy court.

Subdivision (d) adopts the practice of F.R.App.P. 10(d) of permitting the parties to agree on a statement of the case in place of the record on appeal. The statement must show how the issues on appeal arose and were decided in the bankruptcy court. It must be approved by the bankruptcy court in order to be certified as the record on appeal.

Subdivision (e), modeled on F.R.App.P. 10(e), provides a procedure for correcting the record on appeal if an item is improperly designated, omitted, or misstated.

Subdivision (f) is a new provision that governs the handling of any document that remains sealed by the bankruptcy court and that a party wants to include in the record on appeal. The party must request the court where the appeal is pending to accept the document under seal, and that motion must be granted before the bankruptcy clerk may transmit the sealed document to the district, BAP, or circuit clerk.

Subdivision (g) requires the parties' cooperation with the bankruptcy clerk in assembling and transmitting the record. It retains the requirement of former Rule 8006, which was adapted from F.R.App.P. 11(a).

Rule 8010. Completing and Transmitting the Record

(a) REPORTER'S DUTIES.

(1) *Proceedings Recorded Without a Reporter Present.* If proceedings were recorded without a reporter being present, the person or service that the bankruptcy court designates to transcribe the recording is the reporter for purposes of this rule.

(2) *Preparing and Filing the Transcript.* The reporter must prepare and file a transcript as follows:

(A) Upon receiving an order for a transcript, the reporter must file in the bankruptcy court an acknowledgment of the request that shows when it was received, and when the reporter expects to have the transcript completed.

(B) After completing the transcript, the reporter must file it with the bankruptcy clerk, who will notify the district, BAP, or circuit clerk of its filing.

(C) If the transcript cannot be completed within 30 days after receiving the order, the reporter must request an extension of time from the bankruptcy clerk. The clerk must enter on the

docket and notify the parties whether the extension is granted.

(D) If the reporter does not file the transcript on time, the bankruptcy clerk must notify the bankruptcy judge.

(b) CLERK'S DUTIES.

(1) *Transmitting the Record—In General*. Subject to Rule 8009(f) and subdivision (b)(5) of this rule, when the record is complete, the bankruptcy clerk must transmit to the clerk of the court where the appeal is pending either the record or a notice that the record is available electronically.

(2) *Multiple Appeals*. If there are multiple appeals from a judgment, order, or decree, the bankruptcy clerk must transmit a single record.

(3) *Receiving the Record*. Upon receiving the record or notice that it is available electronically, the district, BAP, or circuit clerk must enter that information on the docket and promptly notify all parties to the appeal.

(4) *If Paper Copies Are Ordered*. If the court where the appeal is pending directs that paper copies of the record be provided, the clerk of that court must so notify

the appellant. If the appellant fails to provide them, the bankruptcy clerk must prepare them at the appellant's expense.

(5) *When Leave to Appeal is Requested*. Subject to subdivision (c), if a motion for leave to appeal has been filed under Rule 8004, the bankruptcy clerk must prepare and transmit the record only after the district court, BAP, or court of appeals grants leave.

(c) RECORD FOR A PRELIMINARY MOTION IN THE DISTRICT COURT, BAP, OR COURT OF APPEALS. This subdivision (c) applies if, before the record is transmitted, a party moves in the district court, BAP, or court of appeals for any of the following relief:

- leave to appeal;
- dismissal;
- a stay pending appeal;
- approval of a supersedeas bond, or additional security on a bond or undertaking on appeal; or
- any other intermediate order.

The bankruptcy clerk must then transmit to the clerk of the court where the relief is sought any parts of the record designated by a

party to the appeal or a notice that those parts are available electronically.

COMMITTEE NOTE

This rule is derived from former Rule 8007 and F.R.App. P 11. It applies to an appeal taken directly to a court of appeals under 28 U.S.C. § 158(d)(2), as well as to an appeal to a district court or BAP.

Subdivision (a) generally retains the procedure of former Rule 8007(a) regarding the reporter's duty to prepare and file a transcript if a party requests one. It clarifies that the person or service that transcribes the recording of a proceeding is considered the reporter under this rule if the proceeding is recorded without a reporter being present in the courtroom. It also makes clear that the reporter must file with the bankruptcy court the acknowledgment of the request for a transcript and statement of the expected completion date, the completed transcript, and any request for an extension of time beyond 30 days for completion of the transcript.

Subdivision (b) requires the bankruptcy clerk to transmit the record to the district, BAP or circuit clerk when the record is complete and, in the case of appeals under 28 U.S.C. §158(a)(3), leave to appeal has been granted. This transmission will be made electronically, either by sending the record itself or sending notice that the record can be accessed electronically. The court where the appeal is pending may, however, require that a paper copy of some or all of the record be furnished, in which case the clerk of that court will direct the appellant to provide the copies. If the appellant does not do so, the bankruptcy clerk must prepare the copies at the appellant's expense.

In a change from former Rule 8007(b), subdivision (b) of this rule no longer directs the clerk of the appellate court to docket the appeal upon receipt of the record from the bankruptcy clerk. Instead, under Rules 8003(d) and 8004(c) and F.R.App.P. 12(a), the district, BAP, or circuit clerk dockets the appeal upon receipt of the notice of appeal or, in the case of appeals under 28 U.S.C. § 158(a)(3), the notice of appeal and the motion for leave to appeal. Accordingly, by the time the district, BAP, or circuit clerk receives the record, the appeal will already be docketed in that court. The clerk of the appellate court must indicate on the docket and give notice to the parties to the appeal when the transmission of the record is received.

Under Rule 8018(a) and F.R.App.P. 31, the briefing schedule is generally based on that date.

Subdivision (c) is derived from former Rule 8007(c) and F.R.App.P. 11(g) . It provides for the transmission of parts of the record that the parties designate for consideration by the district court, BAP, or court of appeals in ruling on specified preliminary motions filed prior to the preparation and transmission of the record on appeal.

Rule 8011. Filing and Service; Signature

(a) FILING.

(1*) With the Clerk*. A document required or permitted to be filed in a district court or BAP must be filed with the clerk of that court.

(2) *Method and Timeliness*.

(A) *In general*. Filing may be accomplished by transmission to the clerk of the district court or BAP. Except as provided in subdivision (a)(2)(B) and (C), filing is timely only if the clerk receives the document within the time fixed for filing.

(B) *Brief or Appendix*. A brief or appendix is also timely filed if, on or before the last day for filing, it is:

(i) mailed to the clerk by first-class mail—or other class of mail that is at least as expeditious—postage prepaid, if the district court's or BAP's procedures permit or require a brief or appendix to be filed by mailing; or

(ii) dispatched to a third-party

commercial carrier for delivery within 3 days to the clerk, if the court's procedures so permit or require.

(C) *Inmate Filing*. A document filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If the institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(D) *Copies*. If a document is filed electronically, no paper copy is required. If a document is filed by mail or delivery to the district court or BAP, no additional copies are required. But the district court or BAP may require by local rule or by order in a particular case the filing or furnishing of a specified number of paper copies.

(3) *Clerk's Refusal of Documents*. The court's

clerk must not refuse to accept for filing any document transmitted for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(b) SERVICE OF ALL DOCUMENTS REQUIRED. Unless a rule requires service by the clerk, a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal. Service on a party represented by counsel must be made on the party's counsel.

(c) MANNER OF SERVICE.

(1) *Methods*. Service must be made electronically, unless it is being made by or on an individual who is not represented by counsel or the court's governing rules permit or require service by mail or other means of delivery. Service may be made by or on an unrepresented party by any of the following methods:

(A) personal delivery;

(B) mail; or

(C) third-party commercial carrier for delivery within 3 days.

(2) *When Service Is Complete*. Service by electronic means is complete on transmission, unless the

party making service receives notice that the document was not transmitted successfully. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(d) PROOF OF SERVICE.

(1) *What Is Required*. A document presented for filing must contain either:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) the mail or electronic address, the fax number, or the address of the place of delivery, as appropriate for the manner of service, for each person served.

(2) *Delayed Proof*. The district or BAP clerk may permit documents to be filed without acknowledgment or proof of service, but must require the acknowledgment or

proof to be filed promptly thereafter.

(3) *Brief or Appendix*. When a brief or appendix is filed, the proof of service must also state the date and manner by which it was filed.

(e) SIGNATURE. Every document filed electronically must include the electronic signature of the person filing it or, if the person is represented, the electronic signature of counsel. The electronic signature must be provided by electronic means that are consistent with any technical standards that the Judicial Conference of the United States establishes. Every document filed in paper form must be signed by the person filing the document or, if the person is represented, by counsel.

COMMITTEE NOTE

This rule is derived from former Rule 8008 and F.R.App.P. 25. It adopts some of the additional details of the appellate rule, and it provides greater recognition of the possibility of electronic filing and service.

Subdivision (a) governs the filing of documents in the district court or BAP. Consistent with other provisions of these Part VIII rules, subdivision (a)(2) requires electronic filing of documents, including briefs and appendices, unless the district court's or BAP's procedures permit or require other methods of delivery to the court. An electronic filing is timely if it is received by the district or BAP clerk within the time fixed for filing. No additional copies need to be submitted when documents are filed electronically, by mail, or by delivery unless the district court or BAP requires them.

Subdivision (a)(3) provides that the district or BAP clerk may not refuse to accept a document for filing solely because its form does not comply with these rules or any local rule or practice. The district court or

BAP may, however, direct the correction of any deficiency in any document that does not conform to the requirements of these rules or applicable local rules, and may prescribe such other relief as the court deems appropriate.

Subdivisions (b) and (c) address the service of documents in the district court or BAP. Except for documents that the district or BAP clerk must serve, a party that makes a filing must serve copies of the document on the other parties to the appeal. Service on represented parties must be made on counsel. Subdivision (c) expresses the general requirement under these Part VIII rules that documents be sent electronically. *See* Rule 8001(c). Local court rules, however, may provide for other means of service, and subdivision (c) specifies non-electronic methods of service by or on an unrepresented party. Electronic service is complete upon transmission, unless the party making service receives notice that the transmission did not reach the person intended to be served in a readable form.

Subdivision (d) retains the former rule's provisions regarding proof of service of a document filed in the district court or BAP. In addition, it provides that a certificate of service must state the mail or electronic address or fax number to which service was made.

Subdivision (e) is a new provision that requires an electronic signature of counsel or an unrepresented filer for documents that are filed electronically in the district court or BAP. A local rule may specify a method of providing an electronic signature that is consistent with any standards established by the Judicial Conference of the United States. Paper copies of documents filed in the district court or BAP must bear an actual signature of counsel or the filer. By requiring a signature, subdivision (e) ensures that a readily identifiable attorney or party takes responsibility for every document that is filed.

Rule 8012. Corporate Disclosure Statement

(a) WHO MUST FILE. Any nongovernmental corporate party appearing in the district court or BAP must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party must file the statement with its principal brief or upon filing a motion, response, petition, or answer in the district court or BAP, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include a statement before the table of contents. A party must supplement its statement whenever the required information changes.

COMMITTEE NOTE

This rule is derived from F.R.App.P. 26.1. It requires the filing of corporate disclosure statements and supplemental statements in order to assist district court and BAP judges in determining whether they should recuse themselves. If filed separately from a brief, motion, response, petition, or answer, the statement must be filed and served in accordance with Rule 8011. Under Rule 8015(a)(7)(B)(iii), the corporate disclosure statement is not included in calculating applicable word-count limitations.

Rule 8013. Motions; Intervention

(a) CONTENTS OF A MOTION; RESPONSE; REPLY.

(1) *Request for Relief.* A request for an order or other relief is made by filing a motion with the district or BAP clerk, with proof of service on the other parties to the appeal.

(2) *Contents of a Motion*.

(A) *Grounds and the Relief Sought.* A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.

(B) *Motion to Expedite an Appeal*. A motion to expedite an appeal must explain what justifies considering the appeal ahead of other matters. If the district court or BAP grants the motion, it may accelerate the time to transmit the record, the deadline for filing briefs and other documents, oral argument, and the resolution of the appeal. A motion to expedite an appeal may be filed as an emergency motion under subdivision (d).

(C) *Accompanying Documents.*

(i) Any affidavit or other document

necessary to support a motion must be served and filed with the motion.

(ii) An affidavit must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the bankruptcy court's judgment, order, or decree, and any accompanying opinion as a separate exhibit.

(D) *Documents Barred or Not Required.*

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) *Response and Reply; Time to File*. Unless the district court or BAP orders otherwise,

(A) any party to the appeal may file a response to the motion within 7 days after service of the motion; and

(B) the movant may file a reply to a response within 7 days after service of the response,

but may only address matters raised in the response.

(b) DISPOSITION OF A MOTION FOR A PROCEDURAL ORDER. The district court or BAP may rule on a motion for a procedural order—including a motion under Rule 9006(b) or (c)—at any time without awaiting a response. A party adversely affected by the ruling may move to reconsider, vacate, or modify it within 7 days after the procedural order is served.

(c) ORAL ARGUMENT. A motion will be decided without oral argument unless the district court or BAP orders otherwise.

(d) EMERGENCY MOTION.

(1) *Noting the Emergency*. When a movant requests expedited action on a motion because irreparable harm would occur during the time needed to consider a response, the movant must insert the word "Emergency" before the title of the motion.

(2) *Contents of the Motion*. The emergency motion must

(A) be accompanied by an affidavit setting out the nature of the emergency;

(B) state whether all grounds for it were submitted to the bankruptcy court and, if not, why

the motion should not be remanded for the bankruptcy court to reconsider;

(C) include the e-mail addresses, office addresses, and telephone numbers of moving counsel and, when known, of opposing counsel and any unrepresented parties to the appeal; and

(D) be served as prescribed by Rule 8011.

(3) *Notifying Opposing Parties*. Before filing an emergency motion, the movant must make every practicable effort to notify opposing counsel and any unrepresented parties in time for them to respond. The affidavit accompanying the emergency motion must state when and how notice was given or state why giving it was impracticable.

(e) POWER OF A SINGLE BAP JUDGE TO ENTERTAIN A MOTION.

(1) *Single Judge's Authority*. A BAP judge may act alone on any motion, but may not dismiss or otherwise determine an appeal, deny a motion for leave to appeal, or deny a motion for a stay pending appeal if denial would make the appeal moot.

(2) *Reviewing a Single Judge's Action*. The BAP

may review a single judge's action, either on its own motion or on a party's motion.

(f) FORM OF DOCUMENTS; PAGE LIMITS; NUMBER OF COPIES.

(1) *Format of a Paper Document*. Rule 27(d)(1) F.R.App.P. applies in the district court or BAP to a paper version of a motion, response, or reply.

(2) *Format of an Electronically Filed Document*. A motion, response, or reply filed electronically must comply with the requirements for a paper version regarding covers, line spacing, margins, typeface, and type style. It must also comply with the page limits under paragraph (3).

(3) *Page Limits*. Unless the district court or BAP orders otherwise:

(A) a motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by subdivision (a)(2)(C); and

(B) a reply to a response must not exceed 10 pages.

(4) *Paper Copies*. Paper copies must be provided

only if required by local rule or by an order in a particular case.

(g) INTERVENING IN AN APPEAL. Unless a statute provides otherwise, an entity that seeks to intervene in an appeal pending in the district court or BAP must move for leave to intervene and serve a copy of the motion on the parties to the appeal. The motion or other notice of intervention authorized by statute must be filed within 30 days after the appeal is docketed. It must concisely state the movant's interest, the grounds for intervention, whether intervention was sought in the bankruptcy court, why intervention is being sought at this stage of the proceeding, and why participating as an amicus curiae would not be adequate.

COMMITTEE NOTE

This rule is derived from former Rule 8011 and F.R.App.P. 15(d) and 27. It adopts many of the provisions of the appellate rules that specify the form and page limits of motions and accompanying documents, while also adjusting those requirements for electronic filing. In addition, it prescribes the procedure for seeking to intervene in the district court or BAP.

Subdivision (a) retains much of the content of former Rule 8011(a) regarding the contents of a motion, response, and reply. It also specifies the documents that may accompany a motion. Unlike the former rule, which allowed the filing of separate briefs supporting a motion, subdivision (a) now adopts the practice of F.R.App.P. 27(a) of prohibiting the filing of briefs supporting or responding to a motion. The motion or response itself must include the party's legal arguments.

Subdivision (a)(2)(B) clarifies the procedure for seeking to expedite

an appeal. A motion under this provision seeks to expedite the time for the disposition of the appeal as a whole, whereas an emergency motion—which is addressed by subdivision (d)—typically involves an urgent request for relief short of disposing of the entire appeal (for example, an emergency request for a stay pending appeal to prevent imminent mootness). In appropriate cases—such as when there is an urgent need to resolve the appeal quickly to prevent harm—a party may file a motion to expedite the appeal as an emergency motion.

Subdivision (b) retains the substance of former Rule 8011(b). It authorizes the district court or BAP to act on a motion for a procedural order without awaiting a response to the motion. It specifies that a party seeking reconsideration, vacation, or modification of the order must file a motion within 7 days after service of the order.

Subdivision (c) continues the practice of former Rule 8011(c) and F.R.App.P. 27(e) of dispensing with oral argument of motions in the district court or BAP unless the court orders otherwise.

Subdivision (d), which carries forward the content of former Rule 8011(d), governs emergency motions that the district court or BAP may rule on without awaiting a response when necessary to prevent irreparable harm. A party seeking expedited action on a motion in the district court or BAP must explain the nature of the emergency, whether all grounds in support of the motion were first presented to the bankruptcy court, and, if not, why the district court or BAP should not remand for reconsideration. The moving party must also explain the steps taken to notify opposing counsel and any unrepresented parties in advance of filing the emergency motion and, if they were not notified, why it was impracticable to do so.

Subdivision (e), like former Rule 8011(e) and similar to F.R.App.P. 27(c), authorizes a single BAP judge to rule on certain motions. This authority, however, does not extend to issuing rulings that would dispose of the appeal. For that reason, the rule now prohibits a single BAP judge from denying a motion for a stay pending appeal when the effect of that ruling would be to require dismissal of the appeal as moot. A ruling by a single judge is subject to review by the BAP.

Subdivision (f) incorporates by reference the formatting and appearance requirements of F.R.App.P. 27(d)(1). When paper versions of the listed documents are filed, they must comply with the requirements of the specified rules regarding reproduction, covers, binding, appearance, and format. When these documents are filed electronically, they must comply with the relevant requirements of the specified rules regarding covers and

format. Subdivision (f) also specifies page limits for motions, responses, and replies, which is a matter that former Rule 8011 did not address.

Subdivision (g) clarifies the procedure for seeking to intervene in a proceeding that has been appealed. It is based on F.R.App.P. 15(d), but it also requires the moving party to explain why intervention is being sought at the appellate stage. The former Part VIII rules did not address intervention.

Rule 8014. Briefs

(a) APPELLANT'S BRIEF. The appellant's brief must contain the following under appropriate headings and in the order indicated:

(1) a corporate disclosure statement, if required by Rule 8012;

(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 bankruptcy court's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the district court's or BAP's jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal; and

(D) an assertion that the appeal is from a

final judgment, order, or decree, or information establishing the district court's or BAP's jurisdiction on another basis;

(5) a statement of the issues presented and, for each one, a concise statement of the applicable standard of appellate review;

(6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record;

(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;

(8) the argument, which must contain the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies;

(9) a short conclusion stating the precise relief sought; and

(10) the certificate of compliance, if required by

Rule 8015(a)(7) or (b).

(b) APPELLEE'S BRIEF. The appellee's brief must conform to the requirements of subdivision (a)(1)-(8) and (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 and the applicable standard of appellate review; and

(3) the statement of the case.

(c) REPLY BRIEF. The appellant may file a brief in reply to the appellee's brief. A reply brief must comply with the requirements of subdivision (a)(2)-(3).

(d) STATUTES, RULES, REGULATIONS, OR SIMILAR AUTHORITY. If the court's determination of the issues presented requires the study of the Code or other statutes, rules, regulations, or similar authority, the relevant parts must be set out in the brief or in an addendum.

(e) BRIEFS IN A CASE INVOLVING MULTIPLE APPELLANTS OR APPELLEES. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may

also join in reply briefs.

(f) CITATION OF SUPPLEMENTAL AUTHORITIES. If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before a decision—a party may promptly advise the district or BAP clerk by a signed submission setting forth the citations. The submission, which must be served on the other parties to the appeal, must state the reasons for the supplemental citations, referring either to the pertinent page of a brief or to a point argued orally. The body of the submission must not exceed 350 words. Any response must be made within 7 days after the party is served, unless the court orders otherwise, and must be similarly limited.

COMMITTEE NOTE

This rule is derived from former Rule 8010(a) and (b) and F.R.App.P. 28. Adopting much of the content of Rule 28, it provides greater detail than former Rule 8010 contained regarding appellate briefs.

Subdivision (a) prescribes the content and structure of the appellant's brief. It largely follows former Rule 8010(a)(1), but, to ensure national uniformity, it eliminates the provision authorizing a district court or BAP to alter these requirements. Subdivision (a)(1) provides that when Rule 8012 requires an appellant to file a corporate disclosure statement, it must be placed at the beginning of the appellant's brief. Subdivision (a)(10) is new. It implements the requirement under Rule 8015(a)(7)(C) and (b) for the filing of a certificate of compliance with the limit on the number of words or lines allowed to be in a brief.

Subdivision (b) carries forward the provisions of former Rule 8010(a)(2).

Subdivision (c) is derived from F.R.App.P. 28(c). It authorizes an appellant to file a reply brief, which will generally complete the briefing process.

Subdivision (d) is similar to former Rule 8010(b), but it is reworded to reflect the likelihood that briefs will generally be filed electronically rather than in paper form.

Subdivision (e) mirrors F.R.App.P. 28(i). It authorizes multiple appellants or appellees to join in a single brief. It also allows a party to incorporate by reference portions of another party's brief.

Subdivision (f) adopts the procedures of F.R.App.P. 28(j) with respect to the filing of supplemental authorities with the district court or BAP after a brief has been filed or after oral argument. Unlike the appellate rule, it specifies a period of 7 days for filing a response to a submission of supplemental authorities. The supplemental submission and response must comply with the signature requirements of Rule 8011(e).

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers.

(a) PAPER COPIES OF A BRIEF. If a paper copy of a brief may or must be filed, the following provisions apply:

(1) *Reproduction*.

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original. A glossy finish is acceptable if the original is glossy.

(2) *Cover*. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case as prescribed by Rule 8003(d)(2) or 8004(c)(2);

(D) the nature of the proceeding and the name of the court below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, telephone number, and e-mail address of counsel representing the party for whom the brief is filed.

(3) *Binding*. The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) *Paper Size, Line Spacing, and Margins*. The brief must be on 8½-by-11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) *Typeface*. Either a proportionally spaced or monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain

more than 10½ characters per inch.

(6) *Type Styles*. A brief must be set in plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) *Length*.

(A) *Page limitation*. A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with (B) and (C).

(B) *Type-volume limitation*.

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in item (i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of

citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.

(C) *Certificate of Compliance*.

(i) A brief submitted under subdivision (a)(7)(B) must include a certificate signed by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) The certification requirement is satisfied by a certificate of compliance that conforms substantially to the appropriate

Official Form.

(b) ELECTRONICALLY FILED BRIEFS. A brief filed electronically must comply with subdivision (a), except for (a)(1), (a)(3), and the paper requirement of (a)(4).

(c) PAPER COPIES OF APPENDICES. A paper copy of an appendix must comply with subdivision (a)(1), (2), (3), and (4), with the following exceptions:

(1) An appendix may include a legible photocopy of any document found in the record or of a printed decision.

(2) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½-by-11 inches, and need not lie reasonably flat when opened.

(d) ELECTRONICALLY FILED APPENDICES. An appendix filed electronically must comply with subdivision (a)(2) and (4), except for the paper requirement of (a)(4).

(e) OTHER DOCUMENTS.

(1) *Motion*. Rule 8013(f) governs the form of a motion, response, or reply.

(2) *Paper Copies of Other Documents*. A paper copy of any other document, other than a submission under

Rule 8014(f), must comply with subdivision (a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page together contain the information required by subdivision (a)(2).

(B) Subdivision (a)(7) does not apply.

(3) *Other Documents Filed Electronically*. Any other document filed electronically, other than a submission under Rule 8014(f), must comply with the appearance requirements of paragraph (2).

(f) LOCAL VARIATION. A district court or BAP must accept documents that comply with the applicable requirements of this rule. By local rule or order in a particular case, a district court or BAP may accept documents that do not meet all of the requirements of this rule.

COMMITTEE NOTE

This rule is derived primarily from F.R.App.P. 32. Former Rule 8010(c) prescribed page limits for principal briefs and reply briefs. Those limits are now addressed by subdivision (a)(7) of this rule. In addition, the rule incorporates most of the detail of F.R.App.P. 32 regarding the appearance and format of briefs, appendices, and other documents, along with new provisions that apply when those documents are filed electronically.

Subdivision (a) prescribes the form requirements for briefs that are filed in paper form. It incorporates F.R.App.P. 32(a), except it does not include color requirements for brief covers, it requires the cover of a brief to

include counsel's e-mail address, and cross-references to the appropriate bankruptcy rules are substituted for references to the Federal Rules of Appellate Procedure.

Subdivision (a)(7) decreases the page limits that were permitted by former Rule 8010(c)—from 50 to 30 pages for a principal brief and from 25 to 15 for a reply brief—to achieve consistency with F.R.App.P. 32(a)(7). It also permits the limits on the length of a brief to be measured by a word or line count, as an alternative to a page limit. By adopting the same limits on brief length that the Federal Rules of Appellate Procedure impose, the amendment seeks to prevent a party whose case is eventually appealed to the court of appeals from having to substantially reduce the length of its brief in that court.

Subdivision (b) adapts for briefs that are electronically filed subdivision (a)'s form requirements. With the use of electronic filing, the method of reproduction, method of binding, and use of paper become irrelevant. But information required on the cover, formatting requirements, and limits on brief length remain the same.

Subdivisions (c) and (d) prescribe the form requirements for appendices. Subdivision (c), applicable to paper appendices, is derived from F.R.App.P. 32(b), and subdivision (d) adapts those requirements for electronically filed appendices.

Subdivision (e), which is based on F.R.App.P. 32(c), addresses the form required for documents—in paper form or electronically filed—that these rules do not otherwise cover.

Subdivision (f), like F.R.App.P. 32(e), provides assurance to lawyers and parties that compliance with this rule's form requirements will allow a brief or other document to be accepted by any district court or BAP. A court may, however, by local rule or by order in a particular case choose to accept briefs and documents that do not comply with all of this rule's requirements.

Under Rule 8011(e), the party filing the document or, if represented, its counsel must sign all briefs and other submissions. If the document is filed electronically, an electronic signature must be provided in accordance with Rule 8011(e).

Rule 8016. Cross-Appeals

(a) APPLICABILITY. This rule applies to a case in which a cross-appeal is filed. Rules 8014(a)-(c), 8015(a)(7)(A)-(B), and 8018(a) do not apply to such a case, except as otherwise provided in this rule.

(b) DESIGNATION OF APPELLANT. The party who files a notice of appeal first is the appellant for purposes of this rule and Rules 8018(b) and 8019. If notices are filed on the same day, the plaintiff, petitioner, applicant, or movant in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(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 8014(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 brief must comply with Rule 8014(a), except that the brief need not include a statement of the case 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 8014(a)(2)-(8) and (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 and the applicable standard of appellate review; and

(C) the statement of the case.

(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 8014(a)(2)-(3) and (10) and must be limited to the issues presented by the cross-appeal.

(d) LENGTH.

(1) *Page Limitation*. Unless it complies with paragraphs (2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) *Type-Volume Limitation*.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in subparagraph (A).

(3) *Certificate of Compliance*. A brief submitted either electronically or in paper form under paragraph (2) must comply with Rule 8015(a)(7)(C).

(e) TIME TO SERVE AND FILE A BRIEF. Briefs must be served and filed as follows, unless the district court or BAP by order in a particular case excuses the filing of briefs or specifies different time limits:

(1) the appellant's principal brief, within 30 days after the docketing of notice that the record has been transmitted or is available electronically;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 7 days before scheduled argument unless the district court or BAP, for good cause, allows a later filing.

(f) FAILURE TO FILE ON TIME. If an appellant or appellee fails to file a principal brief on time, or within an extended time authorized by the district court or BAP, the appeal or cross-appeal may be dismissed. Unless the district court or BAP orders otherwise, an appellee who fails to file a responsive brief will not be heard at oral argument on the appeal, and an appellant who fails to file a responsive brief will not be heard at oral argument on the cross-appeal.

COMMITTEE NOTE

This rule is derived from F.R.App.P. 28.1. It governs the timing, content, length, filing, and service of briefs in bankruptcy appeals in which there is a cross-appeal. The former Part VIII rules did not separately address the topic of cross-appeals.

Subdivision (b) prescribes which party is designated the appellant when there is a cross-appeal. Generally, the first to file a notice of appeal will be the appellant.

Subdivision (c) specifies the briefs that the appellant and the appellee may file. Because of the dual role of the parties to the appeal and cross-appeal, each party is permitted to file a principal brief and a response to the opposing party's brief, as well as a reply brief. For the appellee, the principal brief in the cross-appeal and the response in the appeal are combined into a single brief. The appellant, on the other hand, initially files a principal brief in the appeal and later files a response to the appellee's principal brief in the cross-appeal, along with a reply brief in the appeal. The final brief that may be filed is the appellee's reply brief in the cross-appeal.

Subdivision (d), which prescribes page limits for briefs, is adopted from F.R.App.P. 28.1(e). It applies to briefs that are filed electronically, as well as to those filed in paper form. Like Rule 8015(a)(7), it imposes limits measured by either the number of pages or the number of words or lines of text.

Subdivision (e) governs the time for filing briefs in cases in which there is a cross-appeal. It adapts the provisions of F.R.App.P. 28.1(f).

Subdivision (f) authorizes the dismissal of an appeal or cross-appeal if the appellant or cross-appellant fails to timely file a principal brief, and it denies oral argument to a party who fails to file a responsive brief unless the district court or BAP orders otherwise.

Rule 8017. Brief of an Amicus Curiae

(a) WHEN PERMITTED. The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing. On its own motion, and with notice to all parties to an appeal, the district court or BAP may request a brief by an amicus curiae.

(b) MOTION FOR LEAVE TO FILE. The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the appeal.

(c) CONTENTS AND FORM. An amicus brief must comply with Rule 8015. In addition to the requirements of Rule 8015, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 8012. An amicus brief need not comply with Rule 8014, but must include the following:

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

(2) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) unless the amicus curiae is one listed in the first sentence of subdivision (a), a statement that indicates whether:

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

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

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

(5) an argument, which may be preceded by a summary and need not include a statement of the applicable standard of review; and

(6) a certificate of compliance, if required by Rule 8015(a)(7)(C) or 8015(b).

(d) LENGTH. Except by the district court's or BAP's permission, an amicus brief must be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) TIME FOR FILING. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's principal brief is filed. The district court or BAP may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) REPLY BRIEF. Except by the district court's or BAP's permission, an amicus curiae may not file a reply brief.

(g) ORAL ARGUMENT. An amicus curiae may participate in oral argument only with the district court's or BAP's permission.

COMMITTEE NOTE

This rule is derived from F.R.App.P. 29. The former Part VIII rules did not address the participation by an amicus curiae in a bankruptcy appeal.

Subdivision (a) adopts the provisions of F.R.App.P. 29(a). In addition, it authorizes the district court or BAP on its own motion— with notice to the parties—to request the filing of a brief by an amicus curiae.

Subdivisions (b)-(g) adopt F.R.App.P. 29(b)-(g).

Rule 8018. Serving and Filing Briefs; Appendices

(a) TIME TO SERVE AND FILE A BRIEF. The following rules apply unless the district court or BAP by order in a particular case excuses the filing of briefs or specifies different time limits:

(1) The appellant must serve and file a brief within 30 days after the docketing of notice that the record has been transmitted or is available electronically.

(2) The appellee must serve and file a brief within 30 days after service of the appellant's brief.

(3) The appellant may serve and file a reply brief within 14 days after service of the appellee's brief, but a reply brief must be filed at least 7 days before scheduled argument unless the district court or BAP, for good cause, allows a later filing.

(4) If an appellant fails to file a brief on time or within an extended time authorized by the district court or BAP, the appeal may be dismissed. An appellee who fails to file a brief will not be heard at oral argument unless the district court or BAP grants permission.

(b) DUTY TO SERVE AND FILE AN APPENDIX TO THE BRIEF.

(1) *Appellant*. Subject to subdivision (e) and Rule 8009(d), the appellant must serve and file with its principal brief excerpts of the record as an appendix. It must contain the following:

(A) the relevant entries in the bankruptcy docket;

(B) the complaint and answer, or other equivalent filings;

(C) the judgment, order, or decree from which the appeal is taken;

(D) any other orders, pleadings, jury instructions, findings, conclusions, or opinions relevant to the appeal;

(E) the notice of appeal; and

(F) any relevant transcript or portion of it.

(2) *Appellee*. The appellee may also serve and file with its brief an appendix that contains material required to be included by the appellant or relevant to the appeal or cross-appeal, but omitted by the appellant.

(3) *Cross-Appellee*. The appellant as cross-appellee may also serve and file with its response an appendix that contains material relevant to matters raised

initially by the principal brief in the cross-appeal, but omitted by the cross-appellant.

(c) FORMAT OF THE APPENDIX. The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of documents or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, and the like) should be omitted.

(d) EXHIBITS. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume or volumes, suitably indexed.

(e) APPEAL ON THE ORIGINAL RECORD WITHOUT AN APPENDIX. The district court or BAP may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record, with the submission of any relevant parts of the record that the district court or BAP orders the parties to file.

COMMITTEE NOTE

This rule is derived from former Rule 8009 and F.R.App.P. 30 and 31. Like former Rule 8009, it addresses the timing of serving and filing briefs and appendices, as well as the content and format of appendices. Rule 8011 governs the methods of filing and serving briefs and appendices.

The rule retains the bankruptcy practice of permitting the appellee to file its own appendix, rather than requiring the appellant to include in its appendix matters designated by the appellee. Rule 8016 governs the timing of serving and filing briefs when a cross-appeal is taken. This rule's provisions about appendices apply to all appeals, including cross-appeals.

Subdivision (a) retains former Rule 8009's provision that allows the district court or BAP to dispense with briefing or to provide different time periods than this rule specifies. It increases some of the time periods for filing briefs from the periods prescribed by the former rule, while still retaining shorter time periods than some provided by F.R.App.P. 31(a). The time for filing the appellant's brief is increased from 14 to 30 days after the docketing of the notice of the transmission of the record or notice of the availability of the record. That triggering event is equivalent to docketing the appeal under former Rule 8007. Appellate Rule 31(a)(1), by contrast, provides the appellant 40 days after the record is filed to file its brief. The shorter time period for bankruptcy appeals reflects the frequent need for greater expedition in the resolution of bankruptcy appeals, while still providing the appellant more time to prepare its brief than the former rule provided.

Subdivision (a)(2) similarly expands the time period for filing the appellee's brief from 14 to 30 days after the service of the appellant's brief. This period is the same as F.R. App. 31(a)(1) provides.

Subdivision (a)(3) retains the 14-day time period for filing a reply brief that the former rule prescribed, but it qualifies that period to ensure that the final brief is filed at least 7 days before oral argument.

If a district court or BAP has a mediation procedure for bankruptcy appeals, that procedure could affect when briefs must be filed. *See* Rule 8027.

Subdivision (a)(4) is new. Based on F.R.App.P. 31(c), it provides for actions that may be taken—dismissal of the appeal or denial of participation in oral argument—if the appellant or appellee fails to file its brief.

Subdivisions (b) and (c) govern the content and format of the appendix to a brief. Subdivision (b) is similar to former Rule 8009(b), and subdivision (c) is derived from F.R.App.P. 30(d).

Subdivision (d), which addresses the inclusion of exhibits in the appendix, is derived from F.R.App.P. 30(e).

Rule 8019. Oral Argument

(a) PARTY'S STATEMENT. Any party may file, or a district court or BAP may require, a statement explaining why oral argument should, or need not, be permitted.

(b) PRESUMPTION OF ORAL ARGUMENT AND EXCEPTIONS. Oral argument must be allowed in every case unless the district judge—or all the BAP judges assigned to hear the appeal—examine the briefs and record and determine that oral argument is unnecessary because

(1) the appeal is frivolous;

(2) the dispositive issue or issues have been authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(c) NOTICE OF ARGUMENT; POSTPONEMENT. The district court or BAP must advise all parties of the date, time, and place for oral argument, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(d) ORDER AND CONTENTS OF ARGUMENT. The appellant opens and concludes the argument. Counsel must not

read at length from briefs, the record, or authorities.

(e) CROSS-APPEALS AND SEPARATE APPEALS. If there is a cross-appeal, Rule 8016(b) determines which party is the appellant and which is the appellee for the purposes of oral argument. Unless the district court or BAP directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(f) NONAPPEARANCE OF A PARTY. If the appellee fails to appear for argument, the district court or BAP may hear the appellant's argument. If the appellant fails to appear for argument, the district court or BAP may hear the appellee's argument. If neither party appears, the case will be decided on the briefs unless the district court or BAP orders otherwise.

(g) SUBMISSION ON BRIEFS. The parties may agree to submit a case for decision on the briefs, but the district court or BAP may direct that the case be argued.

(h) USE OF PHYSICAL EXHIBITS AT ARGUMENT; REMOVAL. Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the

courtroom unless the district court or BAP directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

COMMITTEE NOTE

This rule generally retains the provisions of former Rule 8012 and adds much of the additional detail of F.R.App.P. 34. By incorporating the more detailed provisions of the appellate rule, Rule 8019 promotes national uniformity regarding oral argument in bankruptcy appeals.

Subdivision (a), like F.R.App.P. 34(a)(1), now allows a party to submit a statement explaining why oral argument is or is not needed. It also authorizes a court to require this statement. Former Rule 8012 only authorized statements explaining why oral argument should be allowed.

Subdivision (b) retains the reasons set forth in former Rule 8012 for the district court or BAP to conclude that oral argument is not needed.

The remainder of this rule adopts the provisions of F.R.App.P. 34(b)-(g), with one exception. Rather than requiring the district court or BAP to hear appellant's argument if the appellee does not appear, subdivision (e) authorizes the district court or BAP to go forward with the argument in the appellee's absence. Should the court decide, however, to postpone the oral argument in that situation, it would be authorized to do so.

Rule 8020. Frivolous Appeal and Other Misconduct

(a) FRIVOLOUS APPEAL—DAMAGES AND COSTS. If the district court or BAP determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

(b) OTHER MISCONDUCT. The district court or BAP may discipline or sanction an attorney or party appearing before it for other misconduct, including failure to comply with any court order. First, however, the court must afford the attorney or party reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

COMMITTEE NOTE

This rule is derived from former Rule 8020 and F.R.App.P. 38 and 46(c). Subdivision (a) permits an award of damages and costs to an appellee for a frivolous appeal. Subdivision (b) permits the district court or BAP to impose on parties as well as their counsel sanctions for misconduct other than taking a frivolous appeal. Failure to comply with a court order, for which sanctions may be imposed, may include a failure to comply with a local court rule.

Rule 8021. Costs

(a) AGAINST WHOM ASSESSED. The following rules apply unless the law provides or the district court or BAP orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment, order, or decree is affirmed, costs are taxed against the appellant;

(3) if a judgment, order, or decree is reversed, costs are taxed against the appellee;

(4) if a judgment, order, or decree is affirmed or reversed in part, modified, or vacated, costs are taxed only as the district court or BAP orders.

(b) COSTS FOR AND AGAINST THE UNITED STATES. Costs for or against the United States, its agency, or its officer may be assessed under subdivision (a) only if authorized by law.

(c) COSTS ON APPEAL TAXABLE IN THE BANKRUPTCY COURT. The following costs on appeal are taxable in the bankruptcy court for the benefit of the party entitled to costs under this rule:

(1) the production of any required copies of a brief,

appendix, exhibit, or the record;

(2) the preparation and transmission of the record;

(3) the reporter's transcript, if needed to determine the appeal;

(4) premiums paid for a supersedeas bond or other bonds to preserve rights pending appeal; and

(5) the fee for filing the notice of appeal.

(d) BILL OF COSTS; OBJECTIONS. A party who wants costs taxed must, within 14 days after entry of judgment on appeal, file with the bankruptcy clerk, with proof of service, an itemized and verified bill of costs. Objections must be filed within 14 days after service of the bill of costs, unless the bankruptcy court extends the time.

COMMITTEE NOTE

This rule is derived from former Rule 8014 and F.R.App.P. 39. It retains the former rule's authorization for taxing appellate costs against the losing party and its specification of the costs that may be taxed. The rule also incorporates some of the additional details regarding the taxing of costs contained in F.R.App.P. 39. Consistent with former Rule 8014, the bankruptcy clerk has the responsibility for taxing all costs. Subdivision (b), derived from F.R.App.P. 39(b), clarifies that additional authority is required for the taxation of costs by or against federal governmental parties.

Rule 8022. Motion for Rehearing.

(a) TIME TO FILE; CONTENTS; RESPONSE; ACTION BY THE DISTRICT COURT OR BAP IF GRANTED.

(1) *Time.* Unless the time is shortened or extended by order or local rule, any motion for rehearing by the district court or BAP must be filed within 14 days after entry of judgment on appeal.

(2) *Contents*. The motion must state with particularity each point of law or fact that the movant believes the district court or BAP has overlooked or misapprehended and must argue in support of the motion. Oral argument is not permitted.

(3) *Response*. Unless the district court or BAP requests, no response to a motion for rehearing is permitted. But ordinarily, rehearing will not be granted in the absence of such a request.

(4) *Action by the District Court or BAP*. If a motion for rehearing is granted, the district court or BAP may do any of the following:

(A) make a final disposition of the appeal without reargument;

(B) restore the case to the calendar for

reargument or resubmission; or

(C) issue any other appropriate order.

(b) FORM OF THE MOTION; LENGTH. The motion must comply in form with Rule 8013(f)(1) and (2). Copies must be served and filed as provided by Rule 8011. Unless the district court or BAP by local rule or order provides otherwise, a motion for rehearing must not exceed 15 pages.

COMMITTEE NOTE

This rule is derived from former Rule 8015 and F.R.App.P. 40. It deletes the provision of former Rule 8015 regarding the time for appeal to the court of appeals because the matter is addressed by F.R.App.P. 6(b)(2)(A).

Rule 8023. Voluntary Dismissal

The clerk of the district court or BAP must dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the district court or BAP.

COMMITTEE NOTE

This rule is derived from former Rule 8001(c) and F.R.App.P. 42. The provision of the former rule regarding dismissal of appeals in the bankruptcy court prior to docketing of the appeal has been deleted. Now that docketing occurs promptly after a notice of appeal is filed, *see* Rules 8003(d) and 8004(c), an appeal likely will not be voluntarily dismissed before docketing.

The rule retains the provision of the former rule that the district or BAP clerk must dismiss an appeal upon the parties' agreement. District courts and BAPs continue to have discretion to dismiss an appeal on an appellant's motion. Nothing in the rule prohibits a district court or BAP from dismissing an appeal for other reasons authorized by law, such as the failure to prosecute an appeal.

Rule 8024. Clerk's Duties on Disposition of the Appeal

(a) JUDGMENT ON APPEAL. The district or BAP clerk must prepare, sign, and enter the judgment after receiving the court's opinion or, if there is no opinion, as the court instructs. Noting the judgment on the docket constitutes entry of judgment.

(b) NOTICE OF A JUDGMENT. Immediately upon the entry of a judgment, the district or BAP clerk must:

(1) transmit a notice of the entry to each party to the appeal, to the United States trustee, and to the bankruptcy clerk, together with a copy of any opinion; and

(2) note the date of the transmission on the docket.

(c) RETURNING ORIGINAL DOCUMENTS. If any original documents were transmitted as the record on appeal, they must be returned to the bankruptcy clerk on disposition of the appeal.

COMMITTEE NOTE

This rule is derived from former Rule 8016, which was adapted from F.R.App.P. 36 and 45(c) and (d). The rule is reworded to reflect that the record often will not be physically transmitted to the district court or BAP and thus there will be no documents to return to the bankruptcy clerk. Other changes to the former rule are stylistic.

Rule 8025. Stay of a District Court or BAP Judgment

(a) AUTOMATIC STAY OF JUDGMENT ON APPEAL. Unless the district court or BAP orders otherwise, its judgment is stayed for 14 days after entry.

(b) STAY PENDING APPEAL TO THE COURT OF APPEALS.

(1) *In General*. On a party's motion and notice to all other parties to the appeal, the district court or BAP may stay its judgment pending an appeal to the court of appeals.

(2) *Time Limit*. The stay must not exceed 30 days after the judgment is entered, except for cause shown.

(3) *Stay Continued*. If, before a stay expires, the party who obtained the stay appeals to the court of appeals, the stay continues until final disposition by the court of appeals.

(4) *Bond or Other Security*. A bond or other security may be required as a condition for granting or continuing a stay of the judgment. A bond or other security may be required if a trustee obtains a stay, but not if a stay is obtained by the United States or its officer or agency or at the direction of any department of the United States government.

(c) AUTOMATIC STAY OF AN ORDER, JUDGMENT, OR DECREE OF A BANKRUPTCY COURT. If the district court or BAP enters a judgment affirming an order, judgment, or decree of the bankruptcy court, a stay of the district court's or BAP's judgment automatically stays the bankruptcy court's order, judgment, or decree for the duration of the appellate stay.

(d) POWER OF A COURT OF APPEALS NOT LIMITED. This rule does not limit the power of a court of appeals or any of its judges to do the following:

(1) stay a judgment pending appeal;

(2) stay proceedings while an appeal is pending;

(3) suspend, modify, restore, vacate, or grant a stay or an injunction while an appeal is pending; or

(4) issue any order appropriate to preserve the status quo or the effectiveness of any judgment to be entered.

COMMITTEE NOTE

This rule is derived from former Rule 8017. Most of the changes to the former rule are stylistic. Subdivision (c) is new. It provides that if a district court or BAP affirms the bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree that is affirmed on appeal is automatically stayed to the same extent as the stay of the appellate judgment.

Rule 8026. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

(a) LOCAL RULES BY CIRCUIT COUNCILS AND DISTRICT COURTS.

(1) *Adopting Local Rules*. A circuit council that has authorized a BAP under 28 U.S.C. § 158(b) may make and amend rules governing the practice and procedure on appeal from a judgment, order, or decree of a bankruptcy court to the BAP. A district court may make and amend rules governing the practice and procedure on appeal from a judgment, order, or decree of a bankruptcy court to the district court. Local rules must be consistent with, but not duplicative of, Acts of Congress and these Part VIII rules. Rule 83 F.R.Civ.P. governs the procedure for making and amending rules to govern appeals.

(2) *Numbering*. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(3) *Limitation on Imposing Requirements of Form*. A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) PROCEDURE WHEN THERE IS NO

CONTROLLING LAW.

(1) *In General*. A district court or BAP may regulate practice in any manner consistent with federal law, applicable federal rules, the Official Forms, and local rules.

(2) *Limitation on Sanctions*. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, applicable federal rules, the Official Forms, or local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

COMMITTEE NOTE

This rule is derived from former Rule 8018. The changes to the former rule are stylistic.

Rule 8027. Notice of a Mediation Procedure

If the district court or BAP has a mediation procedure applicable to bankruptcy appeals, the clerk must notify the parties promptly after docketing the appeal of:

(a) the requirements of the mediation procedure; and

(b) any effect the mediation procedure has on the time to file briefs.

COMMITTEE NOTE

This rule is new. It requires the district or BAP clerk to advise the parties promptly after an appeal is docketed of any court mediation procedure that is applicable to bankruptcy appeals. The notice must state what the mediation requirements are and how the procedure affects the time for filing briefs.

Rule 8028. Suspension of Rules in Part VIII

In the interest of expediting decision or for other cause in a particular case, the district court or BAP, or where appropriate the court of appeals, may suspend the requirements or provisions of the rules in Part VIII, except Rules 8001, 8002, 8003, 8004, 8005, 8006, 8007, 8012, 8020, 8024, 8025, 8026, and 8028.

COMMITTEE NOTE

This rule is derived from former Rule 8019 and F.R.App.P. 2. To promote uniformity of practice and compliance with statutory authority, the rule includes a more extensive list of requirements that may not be suspended than either the former rule or the Federal Rules of Appellate Procedure provide. Rules governing the following matters may not be suspended:

- scope of the rules; definition of "BAP"; method of transmission;
- time for filing a notice of appeal;
- taking an appeal as of right;
- taking an appeal by leave;
- election to have an appeal heard by a district court instead of a BAP;
- certification of direct appeal to a court of appeals;
- stay pending appeal;
- corporate disclosure statement;
- sanctions for frivolous appeals and other misconduct;
- clerk's duties on disposition of an appeal;
- stay of a district court's or BAP's judgment;
- local rules; and
- suspension of the Part VIII rules.

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APPENDIX B-3

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

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

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

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 3A

Application for Individuals to Pay the Filing Fee in Installments 12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: Specify Your Proposed Payment Timetable

1. Which chapter of the Bankruptcy Code are you choosing to file under?

- ❑ Chapter 7 ..... *Fee*: **$306**
- ❑ Chapter 11 ..... *Fee*: **$1,046**
- ❑ Chapter 12 ..... *Fee*: **$246**
- ❑ Chapter 13 ..... *Fee*: **$281**

2. You may apply to pay the filing fee in up to four installments. Fill in the amounts you propose to pay and the dates you plan to pay them. Be sure all dates are business days. Then add the payments you propose to pay.

You must propose to pay the entire fee no later than 120 days after you first file for bankruptcy. If necessary, you may ask the court to extend the deadline to 180 days after you file. In that case, you must explain why you need the extension.

If the court approves your application, the court will set your final payment timetable.

	You propose to pay…	
	$_____	❑ With the filing of the petition ❑ On or before this date..... _____ MM / DD / YYYY
	$_____	On or before this date ..... _____ MM / DD / YYYY
	$_____	On or before this date ..... _____ MM / DD / YYYY
+	$_____	On or before this date ..... _____ MM / DD / YYYY
Total	$_____	◀ Your total must equal the entire fee for the chapter you checked in line 1.

Part 2: Sign Here

By signing here, you state that you are unable to pay the full filing fee at once, that you want to pay the fee in installments, and that you understand that:

- You must pay your entire filing fee before you make any more payments or transfer any more property to an attorney, bankruptcy petition preparer, or anyone else in connection with your bankruptcy case.
- You must pay the entire fee no later than 120 days after you first file for bankruptcy, unless the court extends your deadline to 180 days. Your debts will not be discharged until your entire fee is paid.
- If you do not make any payment when it is due, your bankruptcy case may be dismissed, and your rights in other bankruptcy proceedings may be affected.

Signature of Debtor 1	Signature of Debtor 2	Your attorney's name and signature, if you used one
Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

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

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

Case number (*If known*): _____

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

Order Approving Payment of Filing Fee in Installments

After considering the *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A), the court orders that:

[ ] The debtor(s) may pay the filing fee in installments on the terms proposed in the application.

[ ] The debtor(s) must pay the filing fee according to the following terms:

	You must pay…	**On or before this date…**
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
+	$_____	_____ Month / day / year
Total		

Until the filing fee is paid in full, the debtor(s) must not make any additional payment or transfer any additional property to an attorney or to anyone else for services in connection with this case.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

Official Form 3A

Instructions for the Application for Individuals to Pay the Filing Fee in Installments

United States Bankruptcy Court 12/01/13

How to Fill Out the Application

If you cannot afford to pay the full filing fee when you first file for bankruptcy, you may pay the fee in installments. However, in most cases, you must pay the entire fee within 120 days after you file, and the court must approve your payment timetable. Your debts will not be discharged until you pay your entire fee.

Do not file this form if you can afford to pay your full fee when you file.

If you are filing under chapter 7 and cannot afford to pay the full filing fee at all, you may be qualified to ask the court to waive your filing fee. See *Application to Have Your Chapter 7 Filing Fee Waived* (Official Form 3B).

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out the *Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer* (Official Form 19); include a copy of it in this package.

Things to remember when filling out this form

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

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

COMMITTEE NOTE

This form, which applies only in cases of individual debtors, has been revised as part of the Forms Modernization Project, making the form easier to read and, as a result, likely to generate more complete and accurate responses. Also, the declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 19. That form must be completed and signed by the BPP, and filed with each document for filing prepared by a BPP.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

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

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

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 3B

Application to Have the Chapter 7 Filing Fee Waived

12/13

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

Part 1: Tell the Court About Your Family and Your Family's Income

1. What is the size of your family?

Your family includes you, your spouse, and any dependents listed on *Schedule J: Current Expenditures of Individual Debtor(s)* (Official Form 6J).

_____
Number of people

Check all that apply.

❑ You
❑ Your spouse
❑ Your dependents _____
How many dependents?

2. Fill in your family's average monthly income.

Include your spouse's income if your spouse is living with you, even if your spouse is not filing.

Do not include your spouse's income if you are separated and your spouse is not filing with you.

Do not include non-cash governmental assistance such as food stamps or housing subsidies.

Person in your family	That person's average monthly net income (take-home pay)
You	$_____
Your spouse	+ $_____
Total	$_____

Add your income and your spouse's income or copy line 10 of *Schedule I: Your Income,* if you have already filled it out.

Your family's average monthly net income

3. Do you receive any non-cash governmental assistance not included in your answer on line 2?

❑ No
❑ Yes. Explain. .....

Type of assistance	Monthly dollar value
	$_____

4. Do you expect your family's average monthly net income to increase or decrease by more than 10% during the next 6 months?

❑ No
❑ Yes. Explain. .....

5. Tell the court why you are unable to pay the filing fee in installments within 120 days.

Part 2: Tell the Court About Your Monthly Expenses

6. Estimate your average monthly expenses. $_____ You may use *Schedule J: Your Expenses* to determine your estimation. If you have already filled out *Schedule J,* copy line 22.

7. Do these expenses cover anyone who is not included in your family as reported in line 1?
- ❑ No
- ❑ Yes. Identify who....

8. Does anyone other than you regularly pay any of these expenses?
- ❑ No
- ❑ Yes. Identify who.....

How much does this person regularly pay? $_____ monthly

List any contributions to expenses you have or will list in line 11 of *Schedule I: Your Income.*

9. Do you expect your average monthly expenses to increase or decrease by more than 10% during the next 6 months?
- ❑ No
- ❑ Yes. Explain .....

Part 3: Tell the Court About Your Property

If you have already filled out *Schedule A: Real Property (Official Form 6A)* and *Schedule B: Personal Property (Official Form 6B)*, attach copies to this application and go to Part 4.

10. How much cash do you have?
Examples: Money you have in your wallet, in your home, and on hand when you file this application

Cash: $_____

11. Bank accounts and other deposits of money?
Examples: Checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, and other similar institutions. If you have more than one account with the same institution, list each. Do not include 401(k) and IRA accounts.

	Institution name:	Amount:
Checking account:	_____	$_____
Savings account:	_____	$_____
Other financial accounts:	_____	$_____
Other financial accounts:	_____	$_____

12. Your home? (if you own it outright or are purchasing it)
Examples: House, condominium, manufactured home, or mobile home

_____ Number Street
_____ City State ZIP Code
Current value: $_____
Amount you owe on mortgage and liens: $_____

13. Other real estate?

_____ Number Street
_____ City State ZIP Code
Current value: $_____
Amount you owe on mortgage and liens: $_____

14. The vehicles you own?
Examples: Cars, vans, trucks, sports utility vehicles, motorcycles, tractors, boats

Make: _____
Model: _____
Year: _____
Mileage _____
Current value: $_____
Amount you owe on liens: $_____

Make: _____
Model: _____
Year: _____
Mileage _____
Current value: $_____
Amount you owe on liens: $_____

15. Other assets?

Do not include household items and clothing.

Describe the other assets:

Current value: $_____

Amount you owe on liens: $_____

16. Money or property due you?

Examples: Tax refunds, past due or lump sum alimony, spousal support, child support, maintenance, divorce or property settlements, Social Security benefits, Workers' compensation, personal injury recovery

Who owes you the money or property?	**How much is owed?**
_____	$_____
_____	$_____

Do you believe you will likely receive payment in the next 3 or 4 months?

- ☐ No
- ☐ Yes. Explain:

Part 4: Answer These Additional Questions

17. Have you paid anyone for services for this case, including filling out this application, the bankruptcy filing package, or the schedules?

- ☐ No
- ☐ Yes. **Whom did you pay?**
  - ☐ An attorney
  - ☐ A bankruptcy petition preparer, paralegal, or typing service
  - ☐ Someone else _____

How much did you pay? $_____

18. Have you promised to pay or do you expect to pay someone for services for your bankruptcy case?

- ☐ No
- ☐ Yes. **Whom do you expect to pay?**
  - ☐ An attorney
  - ☐ A bankruptcy petition preparer, paralegal, or typing service
  - ☐ Someone else _____

How much do you expect to pay? $_____

19. Has anyone paid someone on your behalf for services for this case?

- ☐ No
- ☐ Yes. **Who was paid on your behalf?**
  - ☐ An attorney
  - ☐ A bankruptcy petition preparer, paralegal, or typing service
  - ☐ Someone else _____

Who paid?

- ☐ Parent
- ☐ Brother or sister
- ☐ Friend
- ☐ Pastor or clergy
- ☐ Someone else _____

How much did someone else pay? $_____

20. Have you, your spouse, or both of you filed for bankruptcy within the last 8 years?

- ☐ No
- ☐ Yes. District _____ When _____ (MM/DD/YYYY) Case number _____
  District _____ When _____ (MM/DD/YYYY) Case number _____
  District _____ When _____ (MM/DD/YYYY) Case number _____

Part 5: Sign Here

By signing here under penalty of perjury, I declare that I cannot afford to pay the filing fee either in full or in installments. I also declare that the information I provided in this application is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

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

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

Case number _____
(If known)

Order on the Application to Have the Chapter 7 Filing Fee Waived

After considering the debtor's *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 3B), the court orders that the application is:

[ ] Granted. However, the court may order the debtor to pay the fee in the future if developments in administering the bankruptcy case show that the waiver was unwarranted.

[ ] Denied. The debtor must pay the $306 filing fee according to the following terms:

	You must pay…	**On or before this date…**
	$_____.____	_____ Month / day / year
	$_____.____	_____ Month / day / year
	$_____.____	_____ Month / day / year
+	$_____.____	_____ Month / day / year
Total	$ 306.00	

If the debtor would like to propose a different payment timetable, the debtor must file a motion promptly with a payment proposal. The debtor may use *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A) for this purpose. The court will consider it.

The debtor must pay the entire filing fee before making any more payments or transferring any more property to an attorney, bankruptcy petition preparer, or anyone else in connection with the bankruptcy case. The debtor must also pay the entire filing fee to receive a discharge. If the debtor does not make any payment when it is due, the bankruptcy case may be dismissed and the debtor's rights in future bankruptcy cases may be affected.

[ ] Scheduled for hearing.

A hearing to consider the debtor's application will be held

on _____ at ____:____ AM/PM at _____.
Month / day / year Address of courthouse

If the debtor does not appear at this hearing, the court may deny the application.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

Official Form 3B

Instructions for the Application to Have the Chapter 7 Filing Fee Waived

United States Bankruptcy Court 12/01/2013

How to Fill Out the Application

The fee for filing a bankruptcy case under Chapter 7 is $306. If you cannot afford to pay the entire fee now in full or in installments within 120 days, use this form. If you can afford to pay your filing fee in installments, see *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A).

If you file this form, you are asking the court to waive your fee. After reviewing your application, the court may waive your fee, set a hearing for further investigation, or require you to pay the fee in installments or in full.

For your fee to be waived, all of these statements must be true:

- You are filing for bankruptcy under Chapter 7.
- You are an individual.
- The total combined monthly income for your family is less than 150% of the official poverty guideline last published by the U.S. Department of Health and Human Services (DHHS). (For more information about the guidelines, go to http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyResources/PovertyGuidelines.aspx.)
- You cannot afford to pay the fee in installments.

Your family includes you, your spouse, and any dependents listed on *Schedule J*. Your family may be different from your *household*, referenced on *Schedules I* and *J*. Your household may include your unmarried partner and others who live with you and with whom you share income and expenses.

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out *Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer* (Official Form 19); include a copy of it in this package.

If you have already completed the following forms, the information on them may help you when you fill out this application:

- *Schedule A: Real Property* (Official Form 6A)
- *Schedule I: Your Income* (Official Form 6I)
- *Schedule J: Your Expenses* (Official Form J)

Understand the terms used in this form

The *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 3B) uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. For example, if the form asks, "Do you own a car?" the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

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

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

COMMITTEE NOTE

This form, which applies only in cases of individual debtors, has been revised as part of the Forms Modernization Project, making the form easier to read and, as a result, likely to generate more complete and accurate responses. Additionally, in calculating the income that determines the debtor's initial eligibility for a fee waiver, line 2 of the form now directs the debtor to exclude non-cash governmental assistance, such as food stamps and housing subsidies. However, because non-cash governmental assistance may be relevant in evaluating the additional requirement that the debtor be unable to pay the filing fee, the nature and amount of any such assistance is to be reported separately on line 3. Also, the declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 19. That form must be completed and signed by the BPP, and filed with each document for filing prepared by a BPP.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

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

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

Case number _____
(If known)

☐ Check if this is an amended filing

Official Form 6I

Schedule I: Your Income

12/13

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

Part 1: Describe Employment

1. **Fill in your employment information.**

   If you have more than one job, attach a separate page with information about additional employers.

   Include employment information about a non-filing spouse unless you are separated.

   Include part-time, seasonal, or self-employed work.

   Occupation should Include student or homemaker, if it applies.

	Debtor 1	**Debtor 2 or non-filing spouse**
Employment status	Employed Not employed	Employed Not employed
Occupation	_____	_____
Employer's name	_____	_____
Employer's address	_____ Number Street _____ _____ _____ City State ZIP Code	_____ Number Street _____ _____ _____ City State ZIP Code
How long employed there?	_____	_____

Part 2: Give Details About Monthly Income

Estimate monthly income as of the date you file this form. If you have nothing to report for any line, write $0 in the space. Include your non-filing spouse unless you are separated.

If you or your non-filing spouse have more than one employer, combine the information for all employers for that person on the lines below. If you need more space, attach a separate sheet to this form.

		For Debtor 1	**For Debtor 2 or non-filing spouse**
2. **List monthly gross wages, salary, and commissions** (before all payroll deductions). If not paid monthly, calculate what the monthly wage would be.	2.	$_____	$_____
3. **Estimate and list monthly overtime pay, if any.**	3.	+ $_____	+ $_____
4. **Calculate gross income.** Add line 2 + line 3.	4.	$_____	$_____

		For Debtor 1	For Debtor 2 or non-filing spouse	
Copy line 4 here..... ➔	4.	$_____	$_____	
5. **List all payroll deductions:**				
5a. **Payroll taxes and social security payments**	5a.	$_____	$_____	
5b. **Contributions for retirement plans**	5b.	$_____	$_____	
5c. **Required repayments of retirement fund loans**	5c.	$_____	$_____	
5d. **Insurance**	5d.	$_____	$_____	
5e. **Union dues**	5e.	$_____	$_____	
5f. **Other deductions.** Specify: _____	5f.	$_____	$_____	
5g. **Other deductions.** Specify: _____	5g.	$_____	$_____	
5h. **Other deductions.** Specify: _____	5h.	+ $_____	+ $_____	
6. **Add the payroll deductions**. Add lines 5a + 5b + 5c + 5d + 5e +5f + 5g +5h.	6.	$_____	$_____	
7. **Calculate total monthly take-home pay.** Subtract line 6 from line 4.	7.	$_____	$_____	
8. **List all other income regularly received:**				
8a. **Net income from rental property and from operating a business, profession, or farm** Attach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income.	8a.	$_____	$_____	
8b. **Interest and dividends**	8b.	$_____	$_____	
8c. **Family support payments that you, a non-filing spouse, or a dependent regularly receive** Include alimony, spousal support, child support, maintenance, divorce settlement, and property settlement.	8c.	$_____	$_____	
8d. **Unemployment compensation**	8d.	$_____	$_____	
8e. **Social Security**	8e.	$_____	$_____	
8f. **Other government assistance.** Specify: _____	8f.	$_____	$_____	
8g. **Pension or retirement income**	8g.	$_____	$_____	
8h. **Other monthly income.** Specify: _____	8h.	+ $_____	+ $_____	
9. **Add all other income**. Add lines 8a + 8b + 8c + 8d + 8e + 8f +8g + 8h.	9.	$_____	$_____	
10. **Calculate monthly income.** Add line 7 + line 9. Add the entries in line 10 for Debtor 1 and Debtor 2 or non-filing spouse.	10.	$_____ +	$_____ =	$_____

11. **List all contributions to the expenses that you list in *Schedule J* that anyone else makes.**
Include contributions from an unmarried partner, members of your household, your dependents, your roommates, and other friends or relatives**.**
Do not include any amounts already included in lines 2-10 or amounts that are not available to pay expenses listed in *Schedule J*.
Specify: _____ 11. + $_____

12. **Add the amount in last column of line 10 to the amount in line 11.** The result is the combined monthly income. 12. $_____
Write that amount on the *Summary of Schedules* and the *Statistical Summary of Certain Liabilities and Related Data,* if it applies.
Combined monthly income

13. **Do you expect an increase or decrease within the year after you file this form?**
- ☐ No.
- ☐ Yes. Explain: _____

Official Form 6I

Instructions for Schedule I: Your Income

United States Bankruptcy Court 12/01/13

How to fill out Schedule I

In *Schedule I: Your Income* (Official Form 6I), you will give the details about your employment and monthly income as of the date you file this form. If you are married and your spouse is living with you, include information about your spouse even if your spouse is not filing with you. If you are separated and your spouse is not filing with you, do not include information about your spouse.

How to report employment and income

If you have nothing to report for a line, write $0.

In Part 1, line 1, fill in employment information for you and, if appropriate, for a non-filing spouse. If either person has more than one employer, attach a separate page with information about the additional employment.

In Part 2, give details about the monthly income you currently expect to receive. Show all totals as monthly payments, even if income is not received in monthly payments.

If your income is received in another time period, such as daily, weekly, quarterly, annually, or irregularly, calculate how much income would be by month, as described below.

If either you or a non-filing spouse has more than one employer, calculate the monthly amount for each employer separately, and then combine the income information for all employers for that person on lines 2-7.

One easy way to calculate how much income would be per month is to total the payments earned in a year, then divide by 12 to get a monthly figure. For example, if you are paid annually, you would simply divide your annual salary by 12 to get the monthly amount.

Below are other examples of how to calculate monthly amount.

Example for quarterly payments:

If you are paid $15,000 every quarter, figure your monthly income in this way:

$15,000 *income every quarter*
X 4 *pay periods in the year*
$60,000 *total income for the year*

$60,000 (*income for year*) = $5,000 *monthly income*
12 (*number of months in year*)

Example for bi-weekly payments:

If you are paid $2,500 every other week, figure your monthly income in this way:

$2,500 *income every other week*
X 26 *number of pay periods in the year*
$65,000 *total income for the year*

$65,000 (*income for year*) = $5,417 *monthly income*
12 (*number of months in year*)

Example for weekly payment:

If you are paid $1,000 every week, figure your monthly income in this way:

$1,000 *income every week*
X 52 *number of pay periods in the year*
$52,000 *total income for the year*

$52,000 (*income for year*) = $4,333 *monthly income*
12 (*number of months in year*)

Example for irregular payments:

If you are paid $4,000 8 times a year, figure your monthly income in this way:

$4,000 *income a payment*
X 8 *payments a year*
$32,000 *income for the* year

$32,000 (*income for year*) = $2,667 *monthly income*
12 (*number of months in year*)

Example for daily payments:

If you are paid $75 a day and you work about 8 days a month, figure your monthly income in this way:

$75 *income a day*
X 96 *days a year*
$7,200 *total income for the year*

$7,200 (*income for year*) = $600 *monthly income*
12 (*number of months in year*)

or this way:

$75 *income a day*
X 8 *payments a month*
$600 *income for the* month

In Part 2, line 11, fill in amounts that other people provide to pay the expenses you list on *Schedule J: Your Expenses*. For example, if you and a person to whom you are not married deposit the income from both of your jobs into a single bank account and pay all household expenses and you list all your joint household expenses on *Schedule J*, you must list the amounts that person contributes monthly to pay the household expenses on line 11. If you have a roommate and you divide the rent and utilities, do not list the amounts your roommate pays on line 11 if you have listed only your share of those expenses on *Schedule J*. However, if you have listed the cost of the rent and utilities for your entire house or apartment on *Schedule J*, you must list your roommate's contribution to those expenses on *Schedule I*, line 14. Do not list line 11 contributions that you already disclosed on line 5.

Note that the income you report on *Schedule I* may be different from the income you report on other bankruptcy forms. For example, the *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1), *Chapter 11 Statement of Your Current Monthly Income* (Official Form 22B), and the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 22C-1) all use a different definition of income and apply that definition to a different period of time. *Schedule I* asks about the income that you are now receiving, while the other forms ask about income you received in the applicable time period before filing. So the amount of income reported in any of those forms may be different from the amount reported here.

Understand the terms used in this form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

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

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

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

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

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 6J

Schedule J: Your Expenses

12/13

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

Part 1: Describe Your Household

1. **Do you have dependents who live with you?**

   Do not list Debtor 1 and Debtor 2.

   If you are filing jointly and live in separate households, list dependents who live in either household.

❑ No
❑ Yes. Fill out this information.

Each dependent who lives in the household	That person's relationship to Debtor 1 or Debtor 2	That person's age
Person 1		
Person 2		
Person 3		
Person 4		
Person 5		

2. **Do you have dependents who do not live with you?**

   Do not list anyone listed in line 1.

❑ No
❑ Yes. Fill out this information:

Each dependent who does not live in the household	That person's relationship to Debtor 1 or Debtor 2	That person's age
Person 1		
Person 2		

3. **Does anyone else live in your household?**

   Do not list Debtor 1, Debtor 2, and any dependents listed on lines 1 and 2.

   If you are filing jointly and live in separate households, list everyone else who lives in either household.

❑ No
❑ Yes. Fill out this information

Each other person who lives in the household	That person's relationship to Debtor 1 or Debtor 2
Person 1	
Person 2	
Person 3	

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: Estimate Your Ongoing Monthly Expenses

		Column A For all individuals **Your expenses as of the date you file for bankruptcy**	Column B For Chapter 13 ONLY **What your expenses will be if your current plan is confirmed**
4. **The rental or home ownership expenses for your residence.** Include first mortgage payments and any rent for the ground or lot.	4.	$_____	$_____
If not included in line 4:			
4a. Real estate taxes	4a.	$_____	$_____
4b. Property, homeowner's, or renter's insurance	4b.	$_____	$_____
4c. Home maintenance, repair, and upkeep expenses	4c.	$_____	$_____
4d. Homeowner's association or condominium dues	4d.	$_____	$_____
5. **Additional mortgage payments for your residence**, such as home equity loans	5.	$_____	$_____
6. **Utilities:**			
6a. Electricity, heat, natural gas	6a.	$_____	$_____
6b. Water, sewer, garbage collection	6b.	$_____	$_____
6c. Telephone, cell phone, Internet, satellite, and cable services	6c.	$_____	$_____
6d. Other. Specify: _____	6d.	$_____	$_____
7. **Food and housekeeping supplies**	7.	$_____	$_____
8. **Childcare and children's education costs**	8.	$_____	$_____
9. **Clothing, laundry, and dry cleaning**	9.	$_____	$_____
10. **Personal care products and services**	10.	$_____	$_____
11. **Medical and dental expenses**	11.	$_____	$_____
12. **Transportation.** Include gas, maintenance, bus or train fare. Do not include car payments.	12.	$_____	$_____
13. **Entertainment, clubs, recreation, newspapers, magazine, and books**	13.	$_____	$_____
14. **Charitable contributions and religious donations**	14.	$_____	$_____
15. **Insurance.** Do not include insurance deducted from your pay or included in lines 4 or 20.			
15a. Life insurance	15a.	$_____	$_____
15b. Health insurance	15b.	$_____	$_____
15c. Vehicle insurance	15c.	$_____	$_____
15d. Other insurance. Specify:_____	15d.	$_____	$_____
16. **Taxes.** Do not include taxes deducted from your pay or included in lines 4 or 20. Specify: _____	16.	$_____	$_____
17. **Installment or lease payments:**			
17a. Car payments for Vehicle 1	17a.	$_____	$_____
17b. Car payments for Vehicle 2	17b.	$_____	$_____
17c. Student loan payments	17c.	$_____	$_____
17d. Other. Specify:_____	17d.	$_____	$_____
17e. Other. Specify:_____	17e.	$_____	$_____

		Column A For all individuals	*Column B For Chapter 13 ONLY*
		Your expenses as of the date you file for bankruptcy	**What your expenses will be if your current plan is confirmed**
18. **Alimony, maintenance, and support that you pay to others**	18.	$_____	$_____
19. **Other payments you make to support others who do not live with you.** Specify:_____	19.	$_____	$_____
20. **Other real property expenses not included in lines 4 or 5 of this form or on *Schedule I*: *Your Income* (Official Form 6I)**			
20a. Mortgages on other property	20a.	$_____	$_____
20b. Real estate taxes	20b.	$_____	$_____
20c. Property, homeowner's, or renter's insurance	20c.	$_____	$_____
20d. Maintenance, repair, and upkeep expenses	20d.	$_____	$_____
20e. Homeowner's association or condominium dues	20e.	$_____	$_____
21. **Other**. Specify: _____	21.	+ $_____	+ $_____
22. **Your monthly expenses.** Add lines 4 through 21. The result is your monthly expenses.	22.	$_____	$_____
23. **Calculate your monthly net income.**			
23a. Copy line 12 (*your combined monthly income*) from *Schedule I*.	23a.	$_____	$_____
23b. Copy your monthly expenses from line 22 above.	23b.	− $_____	−$_____
23c. Subtract your monthly expenses from your monthly income. The result is your *monthly net income*.	23c.	$_____	$_____

24. **Do you expect an increase or decrease in your expenses within the year after you file this form?**

For example, do you expect to finish paying for your car loan within the year or do you expect your mortgage payment to increase or decrease because of a modification to the terms of your mortgage?

- ☐ No.
- ☐ Yes.

Explain here:

Official Form 6J

Instructions for Schedule J: Your Expenses

United States Bankruptcy Court 12/01/13

How to Fill Out Schedule J

Use Column A of *Schedule J: Your Expenses* (Official Form 6J) to estimate the monthly expenses, as of the date you file for bankruptcy, for you, your dependents, and the other people in your household whose income is included on *Schedule I: Your Income* (Official Form 6I).

If you are filing under chapter 13, you must also complete Column B. In Column B, itemize what your monthly expenses would be under the plan that you are submitting with this schedule or, if no plan is being submitted now, under the most recent plan you previously submitted.

Include your non-filing spouse's expenses unless you are separated. If one of you keeps a separate household, fill out separate *Schedule J* for Debtor 1 and Debtor 2 and write *Debtor 1* or *Debtor 2* at the top of page 1 of the form.

Do not include expenses that other members of your household pay directly from their income if you did not include that income on *Schedule I*. For example, if you have a roommate and you divide the rent and utilities and you have not listed your roommate's contribution to household expenses in line 11 of *Schedule I*, you would list only your share of these expenses on *Schedule J*.

Show all totals as monthly payments. If you have weekly, quarterly, or annual payments, calculate how much you would spend on those items every month.

Do not list as expenses any payments on credit card debts incurred before filing bankruptcy.

Do not include business expenses on this form. You have already accounted for those expenses as part of determining net business income on *Schedule I*.

On line 20, do not include expenses for your residence or for any rental or business property. You have already listed expenses for your residence on lines 4 and 5 of this form. You listed the expenses for your rental and business property as part of the process of determining your net income from that property on *Schedule I* (line 8a).

If you have nothing to report for a line, write $0.

Understand the terms used in this form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.
- Do not list a minor child's full name. Instead, fill in only the child's initials and the full name and address of the child's parent or guardian. For example, write A.B., a minor child (*John Doe, parent, 123 Main St., City, State*). 11 U.S.C. § 112; Fed. R. Bankr. P. 1007(m) and 9037.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

COMMITTEE NOTE

Schedule I: Your Income (Official Form 6I) and *Schedule J: Your Expenses* (Official Form 6J), which apply only in cases of individual debtors, have been revised as part of the Forms Modernization Project, making the forms easier to read and, as a result, likely to generate more complete and accurate responses.

Revised Schedules I and J seek to obtain a full picture of debtor's economic situation—to the extent that debtor receives income or has expenses. The revised forms are intended to avoid the situation that frequently happens with the current forms where debtor lives with and pools assets with other people and the household provides support to dependents who may not be related by blood or marriage to debtor.

The amendments seek to avoid the situation where the expenses listed on Schedule J are for the entire household, but the income listed on Schedule I is only for the debtor. Line 11 on revised Schedule I, now includes contributions made by someone else to the expenses on Schedule J and the debtor is instructed to include contributions from an unmarried partner, members of the debtor's household, dependents, roommates, and other friends or relatives.

As revised, Schedule J asks for expenses at two different points in time in chapter 13 cases—as of the date the debtor files bankruptcy (Column A) and as of the date a proposed 13 plan is confirmed (Column B).

In drafting the form it became apparent that at least some courts are using Schedules I and J in analyzing proposed chapter 13 plans and potential modification of those plans. Sometimes amended Schedules I and J are required when a debtor's financial circumstances change. To avoid a lack of clarity on the form regarding the date to be used in computing expenses, and in order to allow Schedule J to continue to serve the plan feasibility function, the revised form requests information on both time bases in chapter 13 cases.

New lines 1, 2, and 3 on revised Schedule J request information on dependents who live with the debtor, dependents who live separately, and other members of the household. In addition, new line 23 on the form includes a calculation of the debtor's monthly net income.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

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

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

Case number (If known) _____

Check one only as directed in lines 1, 2, 3, or 17:

According to the calculations required by this Statement:

- ❑ 1. There is no presumption of abuse.
- ❑ 2. The presumption of abuse is determined by Form 22A–2.
- ❑ 3. The Means Test does not apply now because of qualified military service but it could apply later.

❑ Check if this is an amended filing

Official Form 22A–1

Chapter 7 Statement of Your Current Monthly Income

12/13

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

Part 1: Identify the Kind of Debts You Have

1. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." Make sure that your answer is consistent with the "Nature of Debts" box on page one of the *Voluntary Petition* (Official Form 1).
   - ❑ No. On the top of this page, check box 1, *There is no presumption of abuse.* ..... Go to Part 5.
   - ❑ Yes ..... Go to Part 2.

Part 2: Determine Whether Military Service Provisions Apply to You

If you are filing this case jointly and any of the exclusions in Part 2 applies to only one of you, the other person should complete a separate *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1) if you believe that this is required by 11 U.S.C. § 707(b)(2)(C).

2. **Are you a disabled veteran** (as defined in 38 U.S.C. § 3741(1))**?**
   - ❑ No. Go to line 3.
   - ❑ Yes. Did you incur debts mostly while you were on active duty or while you were performing a homeland defense activity? 11 U.S.C. § 101(d)(1)); 32 U.S.C. § 901(1)
     - ❑ No. Go to line 3.
     - ❑ Yes. On the top of this page, check box 1, *There is no presumption of abuse.* ..... Go to Part 5.

3. **Are you or have you been a Reservist or member of the National Guard?**
   - ❑ No. Go to Part 3.
   - ❑ Yes. Were you called to active duty or did you perform a homeland defense activity? 10 U.S.C. § 101(d)(1); 32 U.S.C. § 901(1)
     - ❑ No. Go to Part 3.
     - ❑ Yes. Check any one of the following categories that applies:
       - ❑ **I was called to active duty after September 11, 2001**, for at least 90 days and remain on active duty**.**
       - ❑ **I was called to active duty after September 11, 2001,** for at least 90 days and was released from active duty on _____, which is fewer than 540 days before I file this bankruptcy case.
       - ❑ **I am performing a homeland defense activity for at least 90 days.**
       - ❑ **I performed a homeland defense activity for at least 90 days**, ending on _____, which is fewer than 540 days before I file this bankruptcy case.

If you did not check any of these categories, go to Part 3.

If you checked one of the categories, go to the top of this page. Check box 3, *The Means Test does not apply now because of qualified military service but it could apply later;* then go to Part 5. You are not required to fill out the rest of this form during the exclusion period. The *exclusion period* means the time you are on active duty or are performing a homeland defense activity, and for 540 days afterward. 11 U.S.C. § 707(b)(2)(D)(ii). If your exclusion period ends before your case is closed, you may have to file an amended form later.

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 3: Calculate Your Current Monthly Income

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

- ❑ **Not married.** Fill out Column A, lines 5-14.
- ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 5-14.

Married and your spouse is NOT filing with you. You and your spouse are:

- ❑ **Living in the same household and are not legally separated.** Fill out both Columns A and B, lines 5-14.
- ❑ **Living separately or are legally separated**. Fill out Column A, lines 5-14; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

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

	Column A **For you**	*Column B* **Debtor 2 or non-filing spouse**
5. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).	$_____	$_____
6. **Alimony and maintenance payments**	$_____	$_____
7. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Also, include regular contributions from a spouse if Column B is not filled in. Do not include payments you listed on line 6.	$_____	$_____
8. **Net income from operating a business, profession, or farm**		
Gross receipts (before all deductions) $_____		
Ordinary and necessary operating expenses − $_____		
Net monthly income from a business, profession, or farm $_____ **Copy here➔**	$_____	$_____
9. **Net income from rental and other real property**		
Gross receipts (before all deductions) $_____		
Ordinary and necessary operating expenses − $_____		
Net monthly income from rental or other real property $_____ **Copy here➔**	$_____	$_____
10. **Interest, dividends, and royalties**	$_____	$_____
11. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ➔		
For you ..... $_____		
For your spouse ..... $_____		
12. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
13. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 13c.		
13a.	$_____	$_____
13b.	$_____	$_____
13c. Total amounts from separate pages, if any.	+ $_____	+ $_____
14. **Calculate your total current monthly income.** Add lines 5 through 13 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____ **Total current monthly income**

Part 4: Determine Whether the Means Test Applies to You

15. **Calculate your annual income using your total current monthly income from Part 3.** Follow these steps:

15a. Copy your total current monthly income from line 14..... **Copy line 14 here➔** 15a. $_____

Multiply by 12 (the number of months in a year). **x** 12

15b. The result is your annual income for this part of the form. 15b. $_____

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

Fill in the state in which you live. _____

Fill in the number of people in your household. _____

Fill in the median family income for your state and size of household. ..... 16. $_____

To find that information, either go to the Means Test information at http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

17. **How do the lines compare?**

17a. ❑ Line 15b is less than or equal to line 16. On the top of page 1, check box 1, *There is no presumption of abuse.* Go to Part 5.

17b. ❑ Line 15b is more than line 16. On the top of page 1, check box 2, *The presumption of abuse is determined by Form 22A–2*. Go to Part 5 and fill out Form 22A–*2.*

Part 5: Sign Here

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

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

If you checked 17a, do NOT fill out or file Official Form 22A–2, *Chapter 7 Means Test Calculation*.

If you checked line 17b, fill out Official Form 22A–2, *Chapter 7 Means Test Calculation* and file it with this form.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

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

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

Case number (If known) _____

Check one only as directed in lines 40 or 42:

According to the calculations required by this Statement:

❑ 1. There is no presumption of abuse.

❑ 2. There is a presumption of abuse.

❑ Check if this is an amended filing

Official Form 22A–2

Chapter 7 Means Test Calculation

12/13

To fill out this form, you will need your completed copy of Form 22A–1:*Chapter 7 Statement of Your Current Monthly Income (Official Form 22A-1)*.

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

Part 1: Determine Your Adjusted Income

1. **Copy your total current monthly income.** .....**Copy line 14 from Official Form 22A-1 here** ➔ 1. $_____

2. **Did you fill out Column B in Part 3 of Official Form 22A–1?**

   ❑ No. Fill in $0 on line 3d.

   ❑ Yes. Is your spouse filing with you?

      ❑ No. Go to line 3.

      ❑ Yes. Fill in $0 on line 3d.

3. **Adjust your current monthly income by subtracting any part of your spouse's income not used to pay for the household expenses of you or your dependents.** Follow these steps:

   On line 14, Column B of Form 22A–1, was any amount of the income you reported for your spouse NOT regularly used for the household expenses of you or your dependents?

   ❑ No. Fill in 0 on line 3d.

   ❑ Yes. Fill in the information below:

State each purpose for which the income was used For example, the income is used to pay your spouse's tax debt or to support people other than you or your dependents	**Fill in the amount you are subtracting from your spouse's income**
3a.	$_____
3b.	$_____
3c.	+ $_____
3d. **Total.** Add lines 3a, 3b, and 3c.	$_____

Copy total here ➔ 3d. — $_____

4. **Adjust your current monthly income.** Subtract line 3d from line 1. $_____

Part 2: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 5-14. To find the IRS standards, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not deduct any amounts that you subtracted from your spouse's income in line 3 and do not deduct any operating expenses that you subtracted from income in lines 8 and 9 of Form 22A–1.

If your expenses differ from month to month, enter the average expense.

Whenever this part of the form refers to *you*, it means both you and your spouse if Column B of Form 22A–1 is filled in.

5. **The number of people used in determining your deductions from income**
Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household. ☐

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. **Food, clothing, and other items:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

7. **Out-of-pocket health care allowance:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories ─ people who are under 65 and people who are 65 or older ─ because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a.	Out-of-pocket health care allowance per person	$_____		
7b.	Number of people who are under 65	X _____		
7c.	**Subtotal.** Multiply line 7a by line 7b.	$_____	**Copy line 7c here➔**	$_____

People who are 65 years of age or older

7d.	Out-of-pocket health care allowance per person	$_____		
7e.	Number of people who are 65 or older	X _____		
7f.	**Subtotal.** Multiply line 7d by line 7e.	$_____	**Copy line 7f here➔**	+ $_____
7g.	**Total**. Add lines 7c and 7f.		$_____ **Copy total here➔**	7g. $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

Use the U.S. Trustee Program chart to answer the questions in lines 8-9. Go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. $_____

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. 9a. $_____

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of the creditor	Does payment include taxes or insurance?	Average monthly payment
	❑ No ❑ Yes	$_____
	❑ No ❑ Yes	$_____
	❑ No ❑ Yes	+ $_____
9b. Total average monthly payment		$_____

Copy line 9b here → — $_____ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.
Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this amount is less than $0, enter $0. 9c. $_____ **Copy line 9c here** → $_____

10. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing does not accurately compute the amount that applies to you, fill in any additional amount you claim.** $_____

Explain why:

11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.
- ❑ 0. Go to line 14.
- ❑ 1. Go to line 12.
- ❑ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1	**Describe Vehicle 1:**

13a. Ownership or leasing costs using IRS Local Standard — 13a. $_____

13b. Average monthly payment for all debts secured by Vehicle 1.
Do not include installment payments for leased vehicles.

To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	**Average monthly payment**
	$_____

Copy 13b here → — $_____ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this amount is less than $0, enter $0. 13c. $_____ **Copy net Vehicle 1 expense here** → $_____

Vehicle 2	**Describe Vehicle 2:**

13d. Ownership or leasing costs using IRS Local Standard — 13d. $_____

13e. Average monthly payment for all debts secured by Vehicle 2. Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	**Average monthly payment**
	$_____

Copy here → — $_____ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense
Subtract line 13e from 13d. If this amount is less than $0, enter $0. 13f. $_____ **Copy net Vehicle 2 expense here** → $_____

14. **Public transportation expense**: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $_____

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*. $_____

Other Necessary Expenses	In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.	
16. **Taxes:** The total monthly amount that you will actually owe for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes. Do not include real estate, sales, or use taxes.		$_____
17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs. Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings.		$_____
18. **Life insurance:** The total monthly premiums that you pay for your term life insurance. Do not include premiums for insurance on your dependents, for whole life, or for any other form of life insurance.		$_____
19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments. Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35.		$_____
20. **Education:** The total monthly amount that you pay for education that is either required: ■ as a condition for your job, or ■ for your physically or mentally challenged dependent child if no public education is available for similar services.		$_____
21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool. Do not include payments for any elementary or secondary school education.		$_____
22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7. Payments for health insurance or health savings accounts should be listed only in line 25.		$_____
23. **Telecommunication services:** The total monthly amount that you pay for telecommunication services, such as pagers, call waiting, caller identification, special long distance, business internet service, and 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 it is not reimbursed by your employer. Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 8 of *Official Form 22A-1*, or any amount you previously deducted.		+ $_____
24. **Add all of the expenses allowed under the IRS expense allowances.** Add lines 16 through 23.		$_____

Additional Expense Deductions

These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance	$_____		
Disability insurance	$_____		
Health savings account	+ $_____		
Total	$_____	**Copy total here** ➔	$_____

Do you actually spend this total amount?

- ❑ No. How much do you actually spend? $_____
- ❑ Yes

26. **Continued contributions to the care of household or family members.** The 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. $_____

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $_____

By law, the court must keep the nature of these expenses confidential.

28. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 8.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $147* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

* Subject to adjustment on 4/01/13, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find the maximum additional allowance, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 11 U.S.C. § 548(d)(3) and (4). $_____

32. **Add all of the additional expense deductions.** $_____

Add lines 25 through 31.

Deductions for Debt Payment

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

	Average monthly payment
Mortgages on your home	
33a. Copy line 9b here	$_____
Loans on your first two vehicles	
33b. Copy line 13b here.	$_____
33c. Copy line 13e here.	$_____

Name of each creditor for other secured debt	Identify property that secures the debt	Does payment include taxes or insurance?	
33d.		❑ No ❑ Yes	$_____
33e.		❑ No ❑ Yes	$_____
33f.		❑ No ❑ Yes	+ $_____
33g. Total average monthly payment. Add lines 33a through 33f.			$_____

Copy total here ➔ $_____

34. **Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 35.

❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 34, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
		$_____	÷ 60 =	$_____
		$_____	÷ 60 =	$_____
		$_____	÷ 60 =	+ $_____
			Total	$_____

Copy total here ➔ $_____

35. **Do you owe any priority claims — such as a priority tax, child support, or alimony — that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507

- ❑ No. Go to line 36.
- ❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims.	$_____	÷ 60 =	$_____

36. **Are you eligible to file a case under Chapter 13?** 11 U.S.C. § 109(e). For more information, go to www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter13.aspx

- ❑ No. Go to line 37.
- ❑ Yes. Fill in the following information.

Projected monthly plan payment if you were filing under Chapter 13	$_____		
Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. To find this information, go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.	x _____		
Average monthly administrative expense if you were filing under Chapter 13	$_____	**Copy total here** ➔	$_____

37. **Add all of the deductions for debt payment.**
Add lines 33g through 36. $_____

Total Deductions from Income

38. **Add all of the allowed deductions.**

Copy line 24, *All of the expenses allowed under IRS expense allowances*	$_____		
Copy line 32, *All of the additional expense deductions*	$_____		
Copy line 37, *All of the deductions for debt payment*	+ $_____		
Total deductions	$_____	**Copy total here** ➔	$_____

Part 3: Determine Whether There Is a Presumption of Abuse

39. **Calculate monthly disposable income for 60 months**

39a.	Copy line 4, *adjusted current monthly income*	$_____		
39b.	Copy line 38, *Total deductions*	−$_____		
39c.	Monthly disposable income 11 U.S.C. § 707(b)(2) Subtract line 39b from line 39a.	$_____	**Copy line 39c here** ➔	$_____
		For the next 60 months (5 years)	x 60	
39d.	**Total**. Multiply line 39c by 60.		$_____	**Copy line 39d here** ➔ $_____

40. **Find out whether there is a presumption of abuse.** Check the box that applies:

- ❑ **The line 39d is less than $7,025*.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.
- ❑ **The line 39d is more than $11,725*.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.
- ❑ **The line 39d is at least $7,025*, but not more than $11,725*.** Go to line 42.

* Subject to adjustment on 4/01/13, and every 3 years after that for cases filed on or after the date of adjustment.

41. 41a. **Fill in the amount of your total nonpriority unsecured debt.** If you filled out the *Statistical Summary of Certain Liabilities and Related Data* (Official Form 6), you may refer to line 5 at the bottom of that form. $_____

x .25

41b. **25% of your total nonpriority unsecured debt.** 11 U.S.C. § 707(b)(2)(A)(i)(I)
Multiply line 41a by 0.25. $_____ **Copy here➔** $_____

42. **Determine whether the income you have left over after subtracting all allowed deductions is enough to pay 25% of your unsecured, nonpriority debt.**
Check the box that applies:

- ❑ **Line 39d is less than line 41b.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.
- ❑ **Line 39d is equal to or more than line 41b.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

43. **Do you have any special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative?** 11 U.S.C. § 707(b)(2)(B)

- ❑ No. Go to Part 5.
- ❑ Yes. Fill in the following information. All figures should reflect your average monthly expense or income adjustment for each item. You may include expenses you listed in line 25.

  You must give a detailed explanation of the special circumstances that make the expenses or income adjustments necessary and reasonable. You must also give your case trustee documentation of your actual expenses or income adjustments.

Give a detailed explanation of the special circumstances	**Average monthly expense or income adjustment**
	$_____
	$_____
	$_____
	$_____

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

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

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Official Forms 22A–1 and 22A–2

Instructions for the Chapter 7 Statement of Your Current Monthly Income and Means Test Calculation

United States Bankruptcy Court 12/01/13

How to fill out these forms

Official Forms 22A–1 and 22A –2 determine whether your income and expenses create a presumption of abuse that may prevent you from obtaining relief from your debts under chapter 7 of the Bankruptcy Code. Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors a portion of their claims set out in the Bankruptcy Code.

You must file 22A –1, the *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A –1) if you are an individual filing for bankruptcy under chapter 7. This form will determine your current monthly income and compare whether your income is more than the median income for households of the same size in your state. If your income is not above the median, there is no presumption of abuse and you will not have to fill out the second form.

If your income is above the median, you must file the second form, 22A –2, *Chapter 7 Means Test Calculation* (Official Form 22A –2). The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay other debts. If this amount is high enough, it will give rise to a *presumption of abuse*. A presumption of abuse does not mean you are actually trying to abuse the bankruptcy system. Rather, the presumption simply means that you may have enough income that you should not be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

If you cannot obtain relief under chapter 7, you may be eligible to continue under another chapter of the Bankruptcy Code and pay creditors over a period of time.

Read each question carefully. You may not be required to answer every question on this form. For example, your military status may determine whether you must fill out the entire form. The instructions will alert you if you may skip questions.

If you have nothing to report for a line, write $0.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

If you and your spouse are filing together, you and your spouse may file a single statement. However, if an exclusion in Parts 1 or 2 applies to either of you, separate statements may be required. 11 U.S.C. § 707(b)(2)(C).

Understand the terms used in the form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out these forms

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

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

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

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

Case number _____
(If known)

❒ Check if this is an amended filing

Official Form 22B

Chapter 11 Statement of Your Current Monthly Income

12/13

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

Part 1: Calculate Your Current Monthly Income

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

   ❑ **Not married.** Fill out Column A, lines 2-11.

   ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.

   ❑ **Married and your spouse is NOT filing with you.** Fill out Column A, lines 2-11.

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

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

	Column A **For Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation.** Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ↓	$_____	$_____
For you	$_____	
For your spouse	$_____	
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a.	$_____	$_____
10b.	$_____	$_____
10c. Total amounts from separate pages, if any.	+ $_____	+ $_____

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

$_____ + $_____ = $_____

Total current monthly income

Part 2: Sign Here

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

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Official Form 22B

Instructions for the Chapter 11 Statement of Your Current Monthly Income

United States Bankruptcy Court 12/01/13

How to Fill Out this Form

You must file the *Chapter 11 Statement of Your Current Monthly Income* (Official Form 22B) if you are an individual filing for bankruptcy under Chapter 11.

If you have nothing to report for a line, write $0.

Understand the terms used in the form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

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

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

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

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

Case number _____
(If known)

Check as directed in lines 17 and 21:

According to the calculations required by this Statement:

- ❑ 1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).
- ❑ 2. Disposable income is determined under 11 U.S.C. § 1325(b)(3).
- ❑ 3. The commitment period is 3 years.
- ❑ 4. The commitment period is 5 years.

❑ Check if this is an amended filing

Official Form 22C–1

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

12/13

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

Part 1: Calculate Your Average Monthly Income

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

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

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

		Column A **For Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
6. **Net income from rental and other real property**			
Gross receipts (before all deductions)	$_____		
Ordinary and necessary operating expenses	− $_____		
Net monthly income from rental or other real property	$_____	**Copy here** → $_____	$_____
7. **Interest, dividends, and royalties**		$_____	$_____
8. **Unemployment compensation**		$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ↓			
For you	$_____		
For your spouse	$_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.		$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.			
10a.		$_____	$_____
10b.		$_____	$_____
10c. Total amounts from separate pages, if any.		+ $_____	+ $_____
11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.		$_____ +	$_____ = $_____ **Total average monthly income**

Part 2. Determine How to Measure Your Deductions from Income

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

13. **Calculate the marital adjustment.** Check one:

- ❑ You are not married. Fill in 0 in line 13d.
- ❑ You are married and your spouse is filing with you. Fill in 0 in line 13d.
- ❑ You are married and your spouse is not filing with you.

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

  In lines 13a-c, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

  If this adjustment does not apply, enter 0 on line 13d.

13a.	$_____
13b.	$_____
13c.	+ $_____
Total	$_____

Copy here. → 13d. — $_____

14. **Your current monthly income.** Subtract line 13d from line 12. 14. $ _____

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

15a. Copy line 14 here ➔ ..... 15a. $ _____

Multiply line 15a by 12 (the number of months in a year). **x** 12

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

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

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

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

16c. Fill in the median family income for your state and size of household. ..... 16c. $_____

To find that information, either go to the Means Test information at http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court .

17. **How do the lines compare?**

17a. ❑ Line 15b is less than or equal to line 16c. On the top of page 1 of this form, check box 1, *Disposable income is not determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3.** Do NOT fill out Official Form 22C–2: *Calculation of Disposable Income.*

17b. ❑ Line 15b is more than line 16c. On the top of page 1 of this form, check box 2, *Disposable income is determined under 11 U.S.C. § 1325(b)(3).* **Go to Part 3 and fill out Official Form 22C–2: Calculation of Disposable Income.** On line 35 of that form, copy your current monthly income from line 14 above.

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

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

19. **Deduct the marital adjustment if it applies.** If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13d.
If the marital adjustment does not apply, fill in 0 on line 19a. 19a. — $_____

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

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

20a. Copy line 19b.. ..... 20a. $_____

Multiply by 12 (the number of months in a year). **x** 12

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

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

21. **How do the lines compare?**

❑ Line 20b is less than line 20c. On the top of page 1 of this form, check box 3, *The commitment period is 3 years*. Go to Part 4.

❑ Line 20b is more than or equal to line 20c. On the top of page 1 of this form, check box 4, *The commitment period is 5 years*. Go to Part 4.

Part 4: Sign Here

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

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

If you checked 17a, do NOT fill out or file Official Form 22C–2: *Calculation of Disposable Income*.

If you checked 17b, fill out Official Form 22C–2: *Calculation of Disposable Income* and file it with this form. On line 35 of that form, copy your current monthly income from line 14 above.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

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

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

Case number _____
(If known)

☐ Check if this is an amended filing

Official Form 22C–2

Chapter 13 Calculation of Your Disposable Income 12/13

To fill out this form, you will need your completed copy of Form 22C–1*: Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*.

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

Part 1: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 1-11. To find the IRS standards, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

Deduct the expense amounts set out in lines 1-11 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not include any operating expenses that you subtracted from income in lines 5 and 6 of Official Form 22C–1, and do not deduct any amounts that you subtracted from your spouse's income in line 13 of Form 22C–1.

If your expenses differ from month to month, enter the average expense.

Whenever this part of the form refers to *you*, it means both you and your spouse if Column B is filled in.

1. **The number of people used in determining your deductions from income**
   Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household.

National Standards You must use the IRS National Standards to answer the questions in lines 2-3.

2. **Food, clothing, and other items:** Using the number of people you entered in line 1 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

3. **Out-of-pocket health care allowance:** Using the number of people you entered in line 1 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 18.

People who are under 65 years of age			
3a. Out-of-pocket health care allowance per person	$_____		
3b. Number of people who are under 65	X _____		
3c. **Subtotal**. Multiply line 3a by line 3b.	$_____	**Copy line 3c here** ➔	$_____

People who are 65 years of age or older			
3d. Out-of-pocket health care allowance per person	$_____		
3e. Number of people who are 65 or older	X _____		
3f. **Subtotal**. Multiply line 3d by 3e.	$_____	**Copy line 3f here** ➔	+ $_____

3g. **Total**. Add lines 3c and 3f. ..... $_____ **Copy total here** ➔ 3g. $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 5-11.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

Refer to the U.S. Trustee website to answer the questions in lines 4-5. Go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

4. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 1, fill in the dollar amount listed for your county for insurance and operating expenses. $_____

5. **Housing and utilities – Mortgage or rent expenses:**

5a. Using the number of people you entered in line 1, fill in the dollar amount listed for your county for mortgage or rent expenses. $_____

5b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Next divide by 60.

Name of the creditor	**Average monthly payment**
	$_____
	$_____
	+ $_____
5b. Total average monthly payment	$_____

Copy line 5b here ➔ — $_____ Repeat this amount on line 29a.

5c. Net mortgage or rent expense.

Subtract line 5b (*total average monthly payment*) from line 5a (*mortgage or rent expense*). If this number is less than $0, enter $0. $_____ **Copy 5c here** ➔ $_____

6. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing does not accurately compute the amount that applies to you, fill in any additional amount you claim.** $_____

Explain why:

7. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

- ☐ 0. Go to line 10.
- ☐ 1. Go to line 8.
- ☐ 2 or more. Go to line 8.

8. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

9. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:**

9a. Ownership or leasing costs using IRS Local Standard 9a. $_____

9b. Average monthly payment for all debts secured by Vehicle 1.
Do not include costs for leased vehicles.
To calculate the average monthly payment here and on line 9e, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
	$_____

Copy 9b here → − $_____ Repeat this amount on line 29b.

9c. Net Vehicle 1 ownership or lease expense
Subtract line 9b from line 9a. If this number is less than $0, enter $0. 9c. $_____ **Copy net Vehicle 1 expense here** → $_____

Vehicle 2 **Describe Vehicle 2:**

9d. Ownership or leasing costs using IRS Local Standard 9d. $_____

9e. Average monthly payment for all debts secured by Vehicle 2. Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
	$_____

Copy here → − $_____ Repeat this amount on line 29c.

9f. Net Vehicle 2 ownership or lease expense
Subtract line 9e from 9d. If this number is less than $0, enter $0. 9f. $_____ **Copy net Vehicle 2 expense here** → $_____

10. **Public transportation expense**: If you claimed 0 vehicles in line 7, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $_____

11. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 7 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*. $_____

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

12. **Taxes:** The total monthly amount that you actually pay for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. If you expect to receive a tax refund, you must divide the refund by 12 and subtract that number from the total monthly amount you actually pay for taxes.
    Do not include real estate or sales taxes. $_____

13. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.
    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $_____

14. **Life insurance:** The total monthly premiums that you pay for your term life insurance.
    Do not include premiums for insurance on your dependents, for whole life, or for any other form of life insurance. $_____

15. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments.
    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 31. $_____

16. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services. $_____

17. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool.
    Do not include payments for any elementary or secondary school education. $_____

18. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 3.
    Payments for health insurance or health savings accounts should be listed only in line 21. $_____

19. **Telecommunication services:** The total monthly amount that you pay for telecommunication services, such as pagers, call waiting, caller identification, special long distance, business internet service, and 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 it is not reimbursed by your employer.
    Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 5 of *Official Form 22C-1*, or any amount you previously deducted. + _____

20. **Add all of the expenses allowed under the IRS expense allowances.**
    Add lines 2 through 19. $_____

Additional Expense Deductions These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 2-20.

21. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance		$_____	
Disability insurance		$_____	
Health savings account	+	$_____	
Total		$_____	**Copy total here** ➔ ..... $_____

Do you actually spend this total amount?

- ❑ No. How much do you actually spend? $_____
- ❑ Yes

22. **Continuing contributions to the care of household or family members.** The 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. $_____

23. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $_____

By law, the court must keep the nature of these expenses confidential.

24. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 4.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

25. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $147* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 2-19.

* Subject to adjustment on 4/01/13, and every 3 years after that for cases begun on or after the date of adjustment.

26. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find the maximum additional allowance, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

You must show that the additional amount claimed is reasonable and necessary.

27. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 11 U.S.C. § 548(d)(3) and (4). + _____

Do not include any amount more than 15% of your gross monthly income.

28. **Add all of the additional expense deductions.**
Add lines 21 through 27. $_____

Deductions for Debt Payment

29. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 29a through 29g.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

	Average monthly payment
Mortgages on your home	
29a. Copy line 5b here	$_____
Loans on your first two vehicles	
29b. Copy line 9b here.	$_____
29c. Copy line 9e here.	$_____

Name of each creditor for other secured debt	Identify property that secures the debt	Does payment include taxes or insurance?	
29d.		❑ No ❑ Yes	$_____
29e.		❑ No ❑ Yes	$_____
29f.		❑ No ❑ Yes	+ $_____
29g. Total average monthly payment. Add lines 29a through 29f.			$_____

Copy total here ➔ $_____

30. **Are any debts that you listed in line 29 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 31.

❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 29, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
		$_____	÷ 60 =	$_____
		$_____	÷ 60 =	$_____
		$_____	÷ 60 =	+ $_____
			Total	$_____

Copy total here ➔ $_____

31. **Do you owe any priority claims — such as a priority tax, child support, or alimony — that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507

❑ No. Go to line 32.

❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 15.

Total amount of all past-due priority claims. $_____ ÷ 60 = $_____

32. **Projected monthly Chapter 13 plan payment**

$_____

Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. To find this information, go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office

x _____

Average monthly administrative expense

$_____ **Copy total here** → $_____

33. **Add all of the deductions for debt payment.** Add lines 29 through 32. $_____

Total Deductions from Income

34. **Add all of the allowed deductions.**

Copy line 20, *All of the expenses allowed under IRS expense allowances* ..... $_____

Copy line 28, *All of the additional expense deductions* ..... $_____

Copy line 33, *All of the deductions for debt payment* ..... + $_____

Total deductions $_____ **Copy total here** → $_____

Part 2: Determine Your Disposable Income Under 11 U.S.C. § 1325(b)(2)

35. **Copy your total current monthly income from line 14 of Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*.**..... $_____

36. **Fill in any reasonably necessary income you receive for support for dependent children.** The monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I of Form 22C –1, that you received in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child. $_____

37. **Fill in all qualified retirement deductions.** The monthly total of all amounts that your employer withheld from wages as contributions for qualified retirement plans, as specified in § 541(b)(7) plus all required repayments of loans from retirement plans, as specified in § 362(b)(19). $_____

38. **Total of all deductions allowed under 11 U.S.C. § 707(b)(2)(A).** Copy line 34. ..... $_____

39. **Deduction for special circumstances.** If special circumstances justify additional expenses and you have no reasonable alternative, describe the special circumstances and their expenses. You must give your case trustee a detailed explanation of the special circumstances and documentation for the expenses.

Describe the special circumstance	Amount of expense
39a.	$_____
39b.	$_____
39c.	+ $_____
39d. **Total**. Add lines 39a through 39c ..... 39d.	$_____

Copy 39d here → + $_____

40. **Total adjustments.** Add lines 36 through 39d. $_____ **Copy total here** → — $_____

41. **Calculate your monthly disposable income under § 1325(b)(2).** Subtract line 40 from line 35. $_____

Part 3: Change in Income or Expenses

42. **Change in income or expenses.** If the income in Form 22C-1 or the expenses you reported in this form has changed or is virtually certain to change during the 12 months after the date you filed your bankruptcy petition, fill in the information below. For example, if the wages reported increased after you filed your petition, check *22C-1* in the first column, enter line 2 in the second column, explain why the wages increased, fill in when the increase occurred, and fill in the amount of the increase.

Form	Line	Reason for change	Date of change	Increase or decrease?	Amount of change
❑ B22C–1 ❑ B22C –2	____		_____	❑ Increase ❑ Decrease	$_____
❑ B22C–1 ❑ B22C –2	____		_____	❑ Increase ❑ Decrease	$_____
❑ B22C–1 ❑ B22C –2	____		_____	❑ Increase ❑ Decrease	$_____
❑ B22C–1 ❑ B22C –2	____		_____	❑ Increase ❑ Decrease	$_____

Part 4: Sign Here

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

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Official Forms 22C–1 and 22C–2

Instructions for the Chapter 13 Statement of Your Current Monthly Income, Calculation of Commitment Period and Chapter 13 Calculation of Your Disposable Income

United States Bankruptcy Court 12/01/13

How to Fill Out these Forms

Official Forms 22C─1 and 22C─2 determine the period for your payments to creditors, how the amount you may be required to pay to creditors is established, and, in some situations, how much you must pay.

You must file 22C ─1, the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 22C ─1) if you are an individual and you are filing under chapter 13. This form will determine your current monthly income and determine whether your income is below the median income for households of the same size in your state. If your income is not above the median, you will not have to fill out the second form. Form 22C -1 also will determine your applicable commitment period─the time period for making payments to your creditors.

If your income is above the median, you must file the second form, 22C ─2, *Chapter13 Calculation of Your Disposable Income*. The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay unsecured debts. Your chapter 13 plan may be required to provide for payment of this amount toward unsecured debts.

Read each question carefully. You may not be required to answer every question on this form. The instructions will alert you if you may skip questions.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

If you and your spouse are filing together, you and your spouse must file a single statement.

Understand the terms used in these form

These forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. When information is needed about the spouses separately, the forms use *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

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

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

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COMMITTEE NOTE

Official Forms 22A-1, 22A-2, 22C-1, and 22C-2 are new versions of the "means test" forms used by individuals in chapter 7 and 13, formerly Official Forms 22A and 22C. The original forms were substantially revised as part of the Forms Modernization Project. Official Form 22B, used by individuals in chapter 11, has also been revised as part of the project, which was designed so that the individuals completing the forms would do so more accurately and completely.

The revised versions of the means test forms present the relevant information in a format different from the original forms. For chapter 7, former Official Form 22A has been split into two forms: 22A-1 and 22A-2. The first form, Official Form 22A-1, *Chapter 7 Statement of Your Current Monthly Income*, is to be completed by all chapter 7 debtors. It calculates a debtor's current monthly income and compares that calculation to the median income for households of the same size in the debtor's state. The second form, Official Form 22A-2, *Chapter 7 Means Test Calculation*, is to be completed only by those chapter 7 debtors whose income is above the applicable state median.

For chapter 13, there is a similar split of income and expense calculations. All chapter 13 debtors must complete Official Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*, which calculates current monthly income and the plan commitment period. Debtors only need to complete the second form, Official Form 22C-2, *Chapter13 Calculation of Your Disposable Income***,** if their current monthly income exceeds the applicable median. Form 22C-2 calculates disposable income under 11 U.S.C. § 1325(b)(3), through a report of allowed expense deductions.

Line 60 of former Official Form 22C has not been repeated in Official Form 22C-2. This line allowed debtors to list, but not deduct from income, "Other Necessary Expense" items that are not included within the categories specified by the Internal Revenue Service. Because debtors are separately allowed to list—and deduct—any expenses arising from special circumstances, former Line 60 was rarely used.

Form 22C-2 also reflects the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Adopting a forward-looking approach, the Court held in *Lanning* that the calculation of a chapter 13 debtor's projected disposable income under § 1325(b)

required consideration of changes to income or expenses reported elsewhere on former Official Form 22C that, at the time of plan confirmation, had occurred or were virtually certain to occur. Those changes could result in either an increased or decreased projected disposable income. Because only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined by the information provided on Official Form 22C-2, only these debtors are required to provide the information about changes to income and expenses on Official Form 22C-2. Part 3 of Official Form 22C-2 provides for the reporting of those changes.

In reporting changes to income a debtor must indicate whether the amounts reported in Official Form 22C-1—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 Official Form 22C-1 on which the amount to be changed was reported, the reason for the change, the date of its occurrence, whether the change is an increase or decrease of income, and the amount of the change. Similarly, in reporting changes to expenses, a debtor must list changes to the debtor's actual expenditures reported in Part 1 of Official Form C-2 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 1 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.

Unlike former Official Forms 22A and 22C, line 23 of Official Form 22A-2 and line 19 of Official Form 22C-2 permit the deduction of cell phone expenses necessary for the production of income if those expenses have not been reimbursed by the debtor's employer or deducted by the debtor in calculating net self-employment income. The same lines also state that expenses for internet service may be deducted as a telecommunication services expense only if necessary for the production of income. Under IRS guidelines adopted in 2011, expenses for home internet service used for other purposes are included in the Local Standards for Housing and utilities—Insurance and operating expenses.

APPENDIX C

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APPENDIX C

DRAFT MINUTES OF THE MEETING OF MARCH 29 - 30, 2012

The draft minutes will be distributed separately.

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TAB 4A

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: **Honorable Mark R. Kravitz, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

DATE: **May 3, 2012**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 4, 2012 in Dallas at the SMU Dedman School of Law.

The Committee seeks final Standing Committee approval and transmittal to the Judicial Conference of the United States of one proposal: an amendment to Evidence Rule 803(10)—the hearsay exception for absence of public record or entry—to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*.

The Committee also seeks approval of four proposals (three of which are related) for release for public comment. The first is an amendment to Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The other three proposals amend Rules 803(6)-(8)—the hearsay exceptions for business records, absence of business records, and public records—to eliminate an ambiguity uncovered during the restyling project and clarify that the opponent has the burden of showing that the proffered record is untrustworthy.

Complete discussions of these proposals can be found in the draft minutes of the Spring 2012 meeting, attached as an appendix to this Report.

II. Action Items

A. Proposed Amendment to Evidence Rule 803(10)

At its June 2011 meeting, the Standing Committee approved releasing for public comment an amendment to Rule 803(10). Rule 803(10) currently allows the government to prove in a criminal case, through the introduction of a certificate, that a public record does not exist. Under *Melendez-Diaz v. Massachusetts* such a certificate would be "testimonial" within the meaning of the Confrontation Clause, as construed by *Crawford v. Washington*. Therefore, the admission of such certificates (in lieu of testimony) violates the accused's right of confrontation. The proposed amendment to Rule 803(10) addresses the Confrontation Clause problem in the current rule by adding a "notice-and-demand" procedure. In *Melendez-Diaz* the Court stated that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. 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.

At its Spring 2012 meeting, the Committee considered the two comments received on the proposed amendment. The Magistrate Judges' Association favors the proposal. The National Association of Criminal Defense Lawyers ("NACDL") agrees in principle with a notice-and-demand solution, but it has several objections to the proposed amendment. The Committee unanimously voted to amend Rule 803(10) by adopting the language published for public comment, and to transmit the proposed rule to the Standing Committee with the recommendation that it be approved and sent to the Judicial Conference. The proposed Rule and Committee Note are set out in an appendix to this Report.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 803(10) be approved and transmitted to the Judicial Conference of the United States.

B. Proposed Amendment to Evidence Rule 801(d)(1)(B)

After receiving guidance from the Standing Committee at its January 2012 meeting regarding whether to consider further a proposal to amend Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—the Committee considered this matter at its Spring 2012 meeting. With one member abstaining, the Committee approved an amendment to Rule 801(d)(1)(B) and voted to recommend to the Standing Committee that it be released for public comment. The Committee also approved an addition to the Committee Note to emphasize that the amended Rule is not to be used to expand the admissibility of prior consistent statements or to allow the admission of cumulative consistent statements.

The proposal to amend Rule 801(d)(1)(B) originated with Judge Frank W. Bullock, Jr., when he was a member of the Standing Committee. Judge Bullock proposed that Rule 801(d)(1)(B) 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 influence or motive—are also admissible substantively. But other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of faulty recollection—are not admissible under the hearsay exemption, but only for rehabilitation. There are two basic practical problems in distinguishing between substantive and credibility use as applied to prior consistent statements. First, 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 ordinarily adds no real substantive effect to the proponent's case.

At its Spring 2011 meeting, the Committee unanimously agreed that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow. 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 generally. The Committee resolved to consider the amendment further, and also to seek the input of Public Defenders, the Department of Justice, and state court judges on the merits of amending Rule 801(d)(1)(B). Before the Fall 2011 meeting, the Department of Justice submitted a letter favoring the amendment, and the Public Defender submitted a letter opposing the amendment.

At its Fall 2011 meeting, the Committee again considered the proposed amendment and resolved to seek further input. Pursuant to the Committee's recommendation, the Reporter worked with Dr. Timothy Reagan, the FJC representative, to prepare a survey of district judges concerning the need for and merits of the proposed amendment. The proposal was also sent to the ABA Litigation Section, the American College of Trial Lawyers, the NACDL, and other interested groups. And, as noted, the Committee sought guidance from the Standing Committee at its January 2012 meeting.

At its Spring 2012 meeting, the Committee voted unanimously, with one member abstaining, to approve an alternate draft amendment to Rule 801(d)(1)(B) and to recommend to the Standing Committee that it be released for public comment. The Reporter prepared the alternate draft based on a suggestion from a district judge who had responded to the FJC survey. The judge had encouraged the Committee to retain language familiar and comfortable to judges and practitioners, such as the phrase "motive to fabricate." The Committee also approved an addition to the Committee Note to emphasize that the amended Rule is not to be used to expand the admissibility of prior consistent statements or to allow the admission of cumulative consistent statements. The proposed Rule and Committee Note are set out in an appendix to this Report.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 801(d)(1)(B) be approved for release for public comment.

C. Proposed Amendments to Evidence 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. These exceptions originally set out admissibility requirements and then provided that a record that met these requirements, although hearsay, was admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The Rules did not specifically state which party had the burden of showing trustworthiness or untrustworthiness.

The restyling project initially sought to clarify this ambiguity by providing that a record that fit the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information or the method or circumstances of preparation indicate lack of trustworthiness. But this proposal did not go forward 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. Because the proposal would have changed the law in at least one court, it was deemed substantive and therefore outside the scope of the restyling project.

When the Standing Committee approved the Restyled Rules, several members suggested that this Committee consider making the minor substantive change to clarify that the opponent has the burden of showing untrustworthiness. At the Committee's Spring 2011 meeting, however, a majority opposed amending these Rules, concluding that most courts were construing the Rules as they were intended to be read, i.e., placing the burden of proving untrustworthiness on the opponent.

But at the Committee's Spring 2012 meeting, the Reporter informed the Committee that the Texas restyling committee had unanimously concluded that restyled Rules 803(6) and (8) could be interpreted as making substantive changes by placing the burden on the *proponent* of the evidence to show trustworthiness. The Committee voted unanimously, with one member abstaining, to recommend to the Standing Committee that the proposed amendments to Rules 803(6)-(8) be published for public comment. The proposed Rules and Committee Notes are set out in an appendix to this Report.

Recommendation: The Committee recommends that the proposed amendments to Evidence Rules 803(6)-(8) be approved for release for public comment.

III. Information Items

A. Symposium on Rule of Evidence 502

Prior to commencement of the Fall 2012 meeting, the Committee will host a Symposium on Rule 502. The goal of the Symposium is to review the current use of Rule 502 by courts and litigants, and to discuss ways in which Rule 502 can be better known and understood, with the intent of promoting its use as a mechanism for reducing the costs of preproduction privilege review. The Committee has invited a number of distinguished judges, practitioners, and academics to make presentations. The Symposium proceedings will be published in the *Fordham Law Review*.

B. "Continuous Study" of the Evidence Rules

The Committee is responsible for engaging in a "continuous study" of the need for any amendments to the Federal Rules of Evidence. The grounds for possible amendments include (1) a split in authority about the meaning of a rule; (2) a disparity between the text of a rule and the way that the Rule is actually being applied in courts; and (3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Under this standard, the Reporter has raised the following possible amendments for the Committee's consideration: (1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; (2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; (3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; (4) clarifying the business duty requirement in Rule 803(6); and (5) resolving a dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

At the Committee's Spring 2012 meeting, the Reporter introduced one additional area of emerging difficulties in applying the Evidence Rules. Professor Jeffrey Bellin's recent article, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, contends that the increasing admission of electronic present sense impressions based on social media communications signals a departure from the traditional rationale for the present sense impression exception. Professor Bellin proposes that Rule 803(1) be amended to explicitly require corroboration from an equally percipient witness. The Reporter stated that Professor Liesa Ricter has published a rebuttal in which she encourages the Committee to abstain from amending the Evidence Rules while social media communications remain nascent.

The Committee resolved to continue its continuous study of the Evidence Rules without recommending action on any particular possible amendment. The Committee is considering holding a symposium in conjunction with its Fall 2013 meeting to consider the intersection of the Evidence Rules and emerging technologies.

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

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

With the exception of Rule 803(10), nothing in the developing case law appears to mandate an amendment to the Evidence Rules at this time. The Supreme Court is currently considering the case of *Williams v. Illinois,* in which it will address whether an expert witness can testify to the results of a laboratory test where the certificate of the test is not itself admitted at trial. The Court's

decision in *Williams* may have an effect on the application of Rule 703. The Committee will monitor developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

D. Privileges Project

At the Spring 2012 meeting, Professor Kenneth S. Broun, the Committee's consultant on privileges, apprised the Committee of developments in the area of privileges, submitting materials on the marital testimonial privileges and describing the limited and conflicting federal case law on the subject. Professor Broun plans to continue his research with a focus on cases concerning the journalists' privilege and related shield laws. His work for the Committee on privileges is informational. It neither represents the work of the Committee itself nor suggests explicit or implicit approval by the Standing Committee or the Committee.

IV. Minutes of the Spring 2012 Meeting

The Reporter's draft of the minutes of the Committee's April 2012 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2012

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) in a criminal case, a prosecutor who intends to offer a certification 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*, 557 U.S. 305 (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.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

No changes were made to the proposed amendment or Committee Note as they were issued for public comment.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (11-EV-001)

approves the proposed amendment.

The National Association of Criminal Defense Lawyers (11-EV-002) is not opposed in principle to the addition of a notice-and-demand procedure to Rule 803(1). The Association recommends, however, that: 1) the obligation to provide notice be placed on the "government" rather than the prosecutor; 2) the obligation to provide notice should be an objective standard; 3) the notice period should be tied to the government's discovery obligations under Fed. R. Crim. P. 16.

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2012

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 801(d)(1)(B)

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

* * *

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

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

* * *

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

(i) 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; or

(ii) otherwise rehabilitates the declarant's credibility as a witness;

* * *

Committee Note

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide for admissibility of, for example, consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it include consistent statements that would be probative to rebut a charge of faulty recollection. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment provides that prior consistent statements are exempt from the hearsay rule whenever they are admissible to rehabilitate the witness. It extends the argument made in the original Advisory Committee Note to its logical conclusion. As commentators have stated, "[d]istinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning," because "[j]uries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use." Hon. Frank W. Bullock, Jr. and Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla.St. L.Rev. 509, 540 (1997). *See also United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001) ("the line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors").

The amendment does not change the traditional and well-

accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may only be brought before the factfinder if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that do no more than provide cumulative accounts of the witness's prior statements. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that all prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2012

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(6)

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.

* * *

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by - or from information transmitted by - someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another

qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of proving untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2012

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(7)

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.

* * *

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2012

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(8)

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.

* * *

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability and it should be up to the proponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

TAB 4B

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Advisory Committee on Evidence Rules

Minutes of the Meeting of April 3, 2012

Dallas, Texas

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 4, 2012, at the SMU Dedman School of Law, in Dallas, Texas.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. John A. Woodcock, Jr.
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Richard Wesley, Liaison from the Standing Committee
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Hon. Judith H. Wizmur, Liaison from the Bankruptcy Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Timothy Reagan, Esq., Federal Judicial Center
Peter McCabe, Esq., Secretary to the Standing Committee
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office
Dean John B. Attanasio, SMU Dedman School of Law
Professor Jeffrey Bellin, SMU Dedman School of Law
Professor Jeffrey Kahn, SMU Dedman School of Law
Professor Nathan Cortez, SMU Dedman School of Law
Tina Hoang, Law Clerk to Judge Fitzwater
Roger A. Sharpe, Law Clerk to Judge Fitzwater

I. Opening Business

Introductory Matters

Judge Fitzwater, the Chair of the Committee, welcomed the members and thanked Dean Attanasio for hosting the Committee. Dean Attanasio greeted the members and observers, and expressed his thanks for holding the Committee meeting at the law school. He highlighted recent events and distinguished speakers on campus.

Judge Fitzwater observed that the forthcoming edition of the William & Mary Law Review will collect the proceedings of the October 2011 Symposium on the Restyled Federal Rules of Evidence. He encouraged those who were unable to attend the events to obtain a copy of the Symposium edition.

The minutes of the Fall 2011 Committee meeting were approved.

Judge Fitzwater reported on the January meeting of the Standing Committee. He summarized the Committee's report and his presentation to the Standing Committee including the Committee's consideration of Rule 801(d)(1)(B). Several members of the Standing Committee expressed support for the Committee's consideration of Rule 801(d)(1)(B) and none discouraged the Committee's continued work. Judge Fitzwater also updated the Standing Committee on the status of Professor Broun's privileges project. He received and conveyed a clear preference from Judge Kravitz, the Chair of the Standing Committee, that the Committee avoid any role in approving or otherwise placing the Judicial Conference's imprimatur on published work in the area of privileges. Professor Broun expressed his full agreement with this approach, and several members thanked him for his significant and ongoing research. Judge Wesley echoed the thanks given and counseled the Committee to avoid even the slightest appearance of endorsing publications in the area of privileges.

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.*

The Advisory Committee at its Spring 2011 meeting proposed an amendment to Rule 803(10), which currently allows the government to introduce a certificate to prove that a public record does not exist. A certificate of the absence of public record is ordinarily prepared for use in a criminal case, and so under *Melendez-Diaz*, such a certificate would be testimonial — and lower courts after *Melendez-Diaz* have so found. The proposed amendment to Rule 803(10) adds 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. In *Melendez-Diaz*, the Court declared that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. The Advisory Committee's proposed amendment was approved for release for public comment.

At the Spring meeting, the Committee reviewed the comments received on the proposed amendment. Only two comments were received. The Magistrate Judges' Association is in favor of the proposal. The National Association of Criminal Defense Lawyers commented that it agreed in principle with a notice-and-demand solution to the Confrontation problem inherent in Rule 803(10), but it had several objections to the Committee's proposal. The Reporter provided a memorandum for the meeting that considered the NACDL suggestions in detail, and suggested that the proposed changes were unnecessary and in fact several would raise problems in the application of other rules. A member of the Committee observed that the comments submitted were insubstantial and unpersuasive, and that the rule is very much needed. No member expressed support for the alternative recommendations received from the National Association of Criminal Defense Lawyers.

The Committee unanimously decided by voice vote to amend Rule 803(10) by adopting the language published for public comment, and to transmit the matter to the Standing Committee with the recommendation that the proposed amendment be approved and sent to the Judicial Conference. The full text of the proposed amendment and Committee Note provides as follows:

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) in a criminal case, a prosecutor who intends to offer a certification 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,* 557 U.S. 305 (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.

III. Possible Amendment to Rule 801(d)(1)(B)

At the Spring 2011 meeting the Committee considered a proposal to amend Evidence Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise 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 influence or motive — are also admissible substantively. In contrast, other rehabilitative statements — such as those that explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exemption 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, 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 ordinarily adds no real substantive effect to the proponent's case.

At the Spring 2011 meeting the Committee unanimously agreed that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow. 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 generally. Members opined that parties might seek to use the exemption as a means to bolster the credibility of their

witnesses. The Committee at the Spring meeting resolved to consider the amendment further, and also to seek the input of Public Defenders, the Department of Justice, and state court judges on the merits of amending Rule 801(d)(1)(B). Before the Fall 2011 meeting, the Department of Justice submitted a letter in favor of the amendment and the Public Defender submitted a letter opposed to the amendment.

At the Fall 2011 meeting, the Committee again considered the proposed amendment and resolved to seek further input. Pursuant to the Committee's recommendation, the Reporter worked with Dr. Reagan, the FJC representative, to send out a survey to district judges to seek their views on the need for and merits of the proposed amendment. The proposal was also sent to the ABA Litigation Section, the American College of Trial Lawyers, the NACDL, and other interested groups for their views. The Chair also raised the proposal as an information item at the January, 2012 Standing Committee meeting, to seek guidance on whether the amendment was worth pursuing.

As might have been expected from asking the views of so many sources, the responses were mixed. The Standing Committee, in its discussion at the January 2012 meeting, appeared to favor the amendment on the ground that the instruction required under the current rule is impossible for jurors to follow. The lawyers' groups were of two minds — some lawyers agreed with the premise of the amendment and some thought it would increase the use of prior consistent statements and might lead to impermissible bolstering. The majority of judges surveyed appeared to favor the amendment but there was no unanimity.

At the Spring 2012 meeting, Judge Fitzwater queried whether any members, regardless of discussion, planned to vote against a recommendation to the Standing Committee that a proposed amendment be published for public comment. A member indicated opposition to publication because of the momentum generated merely by soliciting public comments. Another member indicated skepticism but encouraged further discussion. The Reporter invited Dr. Reagan to summarize the responses to the email questionnaire, which the Federal Judicial Center sent to district judges in January 2012.

Dr. Reagan observed that there was support for the feeling that jurors find the instruction difficult. The survey showed substantial support for the idea that the proposed amendment to Rule 801(d)(1)(B) would have a positive practical effect, but also some support for the empirical prediction that the amendment would lead to an increase in prior consistent statements coming into evidence. Two rebuttals to this concern–that more prior consistent statements would be good or that Rule 403 would mitigate any trend toward increased admission of prior consistent statements–received lukewarm support.

The Committee discussed whether to use the word "rehabilitates" as opposed to "supports" credibility if the rule were to be proposed. The Committee ultimately determined that the word "rehabilitates" was preferable because "supports" might be read too broadly to admit almost any prior consistent statement, and it could mean that a consistent statement might be admitted under the rule even though the declarant's credibility had ever been attacked — an expansion that the Committee rejected.

The Reporter then introduced an alternate draft of the rule, which was developed after distributing the agenda materials based on a suggestion from a respondent to the FJC questionnaire. The survey respondent had encouraged the Committee to retain language familiar and comfortable to judges and practitioners, such as the phrase "motive to fabricate." The Reporter welcomed this suggestion as did several members.

A member suggested that the better way to treat prior consistent statements would be to provide that none of them are admissible for their truth, i.e., to abrogate Rule 801(d)(1)(B). Such a result would alleviate the problem of giving incomprehensible jury instructions. The member suggested that there was no reason why prior consistent statements should ever be exempt from the hearsay rule.

The Reporter responded that the hearsay rule exists as a safeguard against admitting testimonial evidence not subject to cross-examination, but that in the cases of both prior consistent and prior inconsistent testimony, the declarant is present and subject to cross examination. Thus, there is every reason to admit prior consistent statements for their truth and the only real concern is to prohibit impermissible bolstering and unnecessary padding of a witness's credibility. Thus, the proposal to abrogate Rule 801(d)(1)(B) cut against the theory of and the reason for the hearsay rule. The Reporter also noted that the Committee had never proposed an amendment that would completely remove one of the initial rules from the Federal Rules of Evidence — thus the proposal was fairly radical and needed to be substantially supported.

The Public Defender reiterated concerns that more prior consistent statements would be admitted than have been in the past. She expressed concerns about "evidence shaping" and the incentive to package prior statements in an effort to shore up a witness's performance on the stand. She explained the common scenario of child witnesses "falling apart" in sexual abuse cases, and suggested that the amended rule may incentivize the prosecution to introduce the reports of child assessment interviews (at which the defendant is obviously not present). There may be an effort to build up "insurance in case the witness crumbles on the stand." A liaison responded that rulemaking should not be based on an assumption that lawyers will violate their professional responsibilities.

The DOJ representative stated that Rule 801(d)(1)(B) is particularly impervious to a limiting instruction, and used as an example *United States v. Frazier*, 469 F.3d 85, 88 (3d Cir. 2006). She repeated a consensus view that there can be no intellectually honest way to distinguish between accepting a prior consistent statement for the purpose of assessing credibility and accepting it substantively. She resisted any notion that the Department might want to have more prior statements come in or win a tactical advantage through a rules amendment.

Several members noted the temptation to bolster, but ultimately agreed that a rule change would have no effect on the prohibition against bolstering.

A member expressed concern that the cure may be worse than the problem and that any issue could be cured up front through the pretrial conference. Another member mentioned the risk of unintended consequences, noting the significant number of respondents to the survey who believe

that more evidence of prior consistent statements will be admitted.

A member concluded that while the amendment might have a disproportionate impact on the criminal defendant, the change should be pursued. The member stated that the distinction between substantive and rehabilitative evidence in prior consistent statements is "mind numbing" for a jury and thus adds to the burdens of jurors. From the judicial perspective, prior consistent statements are typically cumulative and are almost always considered harmless error. The member remarked that the rule would bring much-needed clarity and uniformity to the circuit courts of appeal. The member also expressed a strong preference for the updated draft that included familiar language, but also encouraged the Reporter to bolster the accompanying note to emphasize the importance of applying Rule 403. Other members agreed that the updated draft was a step forward and that the note should be fortified, with a particular emphasis on the danger of admitting cumulative evidence.

After this extensive discussion, the Committee approved the proposed amendment to Rule 801(d)(1)(B) (as revised), and voted to recommend to the Standing Committee that it be released for public comment. One Committee member abstained. The Committee also agreed with an addition to the Committee Note emphasizing that the Rule is not to be used to expand the admissibility of prior consistent statements or to allow cumulative consistent statements to be admitted.

What follows is the full text of the proposed amendment to Rule 801(d)(1)(B), and the Committee Note, both as approved by the Committee with the recommendation that they be released for public comment:

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

* * *

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

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

* * *

(B) is consistent with the declarant's testimony and
(i) 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; or
(ii) otherwise rehabilitates the declarant's credibility as a witness;

* * *

Committee Note

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the

opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide for admissibility of, for example, consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it include consistent statements that would be probative to rebut a charge of faulty recollection. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment provides that prior consistent statements are exempt from the hearsay rule whenever they are admissible to rehabilitate the witness. It extends the argument made in the original Advisory Committee Note to its logical conclusion. As commentators have stated, "[d]istinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning," because "[j]uries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use." Hon. Frank W. Bullock, Jr. and Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla.St. L.Rev. 509, 540 (1997). *See also United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001) ("the line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors").

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may only be brought before the factfinder if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that do no more than provide cumulative accounts of the witness's prior statements. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that all prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

IV. Possible Amendment 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 original 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.

But at the Spring 2011 Advisory Committee meeting, a majority of Committee members was opposed to any amendment to the trustworthiness language of Rules 803(6)-(8). Members stated that any problem in the application of the rule was caused by a few wayward cases; that parties understand that the burden of proving untrustworthiness is on the opponent; and that the restyling did nothing to change that basic understanding.

At the Spring 2012 meeting, the Reporter informed the Committee that the Texas restyling committee was unanimously of the view that the restyled Rule 803(6) and (8) could be interpreted as making a substantive change to the Rule: by putting the burden on the *proponent* of the evidence to show trustworthiness. In light of this report from the Texas restyling committee, the Reporter suggested that the Committee might wish to discuss whether the previously proposed amendment to Rules 803(6) and (8) should be reconsidered.

At the meeting, several members expressed support for the amendments to clarify that the opponent has the burden of showing that the proffered record is untrustworthy. The Public Defender expressed concern that it may be difficult to access the information needed to demonstrate that the record at issue is untrustworthy. But other members responded that the restyled rule may be read to constitute a substantive change even where none was intended. Several members dismissed the suggestion that the restyling worked a substantive change upon these rules, but they agreed that a

clarifying amendment would be helpful.

The Committee unanimously decided by voice vote, with one abstention, to recommend to the Standing Committee that the proposed amendments to Rules 803(6)-(8) be published for public comment.

What follows are the proposed amendments to Rules 803(6)-(8), together with the Committee Notes, as approved by the Committee with the recommendation that they be released for public comment.

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.

* * *

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by - or from information transmitted by - someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of proving untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

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.

*** * ***

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

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.

*** * ***

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability and it should be up to the proponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

V. "Continuous Study" of the Evidence Rules

The Procedures for the Standing Committee require the Evidence Rules Committee to engage in a "continuous study" of the need for any amendment to the Rules. At the Chair's request, the Reporter prepared a memorandum setting forth the history of the studies that have already been undertaken by the Advisory Committee, and providing some suggestions of possible amendments for consideration by the Committee. The grounds for a possible amendment included: 1) a split in authority about the meaning of an Evidence Rule; 2) a disparity between the text of a rule and the way that the rule is actually being applied in courts; 3) difficulties in applying a rule, as indicated by courts, practitioners, or academic commentators.

Possible amendments raised by the Reporter included: 1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; 2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; 3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; 4) clarifying the business duty requirement in Rule 803(6); and 5) resolving the dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

At the meeting, the Reporter introduced one additional area of emerging difficulties in applying the evidence rules. Professor Jeffrey Bellin's recent article, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, contends that the increasing admission of electronic present sense impressions based on social media communications signals a departure from the traditional rationale for the present sense impression exception. Professor Bellin proposes that Rule 803(1) be amended to explicitly require corroboration from an equally percipient witness. The Reporter stated that Professor Liesa Ricter has published a rebuttal that rejects Professor Bellin's proposal and encourages the Committee to abstain from tinkering with the evidence rules while social media communications remain nascent.

The Committee resolved to continue its continuous study of the Evidence Rules without recommending action on any particular possible amendment. The Chair suggested that the Committee hold a symposium in the Fall of 2013 to consider the intersection of the evidence rules and emerging technologies. The members expressed strong support and briefly discussed prospective panelists and topics.

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), the proposed amendment published for public comment in August 2011 — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The Reporter observed that the Supreme Court is currently considering the case of *Williams v. Illinois*, in which it will address whether an expert witness can testify to the results of a lab test where the certificate of the test is not itself admitted at trial. The Court's decision in *Williams* may have an effect on the application of Rule 703. Currently the lower courts are allowing experts to testify on the basis of testimonial hearsay where 1) the hearsay itself is not admitted into evidence, and 2) the expert is testifying to her own opinion and is not just testifying to the opinion of the underlying expert who rendered the testimonial hearsay.

At the meeting, the Reporter also noted that some recent lower court decisions have found autopsy reports to be testimonial when prepared with the participation of law enforcement — though this might not raise a rulemaking problem because, if a law enforcement report is prepared for purposes of litigation, it is inadmissible under Rule 803(8)(A).

The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Symposium on Rule 502

The Committee is planning a symposium on Rule 502. The goal of the symposium is to review the current use of Rule 502 by courts and litigants, and to discuss ways in which Rule 502 can be better known and understood, so that it can fulfil its original promise — to reduce the cost of preproduction privilege review. The symposium will take place on October 5, 2012 before the Committee's Fall meeting in Charleston. The Committee has already invited a number of distinguished judges, practitioners and academics to make presentations at the symposium. The proceedings of the symposium will be published in Fordham Law Review.

At the Spring 2012 meeting the Committee discussed the goals of the symposium and whether other participants should be invited. A member noted the need to energize the application of Rule 502. The Reporter observed that the developing case law tended to focus on the reasonableness of steps taken to prevent inadvertent disclosure and subject matter waiver.

The Reporter noted that Judge John M. Facciola plans to participate and he invited suggestions from the members for other symposium panelists. One member suggested Arizona Vice Chief Justice Andrew D. Hurwitz. The Committee resolved to continue discussion of potential panelists leading up to the symposium.

VIII. Privilege Project

At the Spring meeting Professor Broun, the Committee's consultant on privileges, submitted materials on the marital testimonial privileges and described the limited and conflicting federal case law on the subject. This submission is part of Professor Broun's continuing project to develop an article on the federal common law of privileges. Professor Broun's work, when it is published, will neither represent the work of the Committee nor suggest explicit nor implicit approval by the Standing Committee or the Advisory Committee. Committee members expressed gratitude to Professor Broun for keeping the Committee apprised of developments in the area of privileges.

Professor Broun stated that he planned to continue his research with a focus on cases concerning the journalists' privilege and related shield laws.

VII. Next Meeting

The Fall 2012 meeting of the Committee is scheduled for Friday October 5 in Charleston — to take place after the Symposium on Rule 502.

Respectfully submitted,

Benjamin Robinson
Daniel J. Capra

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
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EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: May 8, 2012

TO: Judge Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 12, 2012, in Washington, DC. The Committee gave final approval to proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1 and to Form 4. The Committee approved for publication proposed amendments to Appellate Rule 6. The Committee removed one item (concerning introductions in briefs) from its study agenda; reached consensus on an approach to another item (concerning amicus filings by Indian tribes); and discussed various other agenda items.

Part II of this Report discusses the proposed amendments for which the Committee seeks final approval. Part II.A discusses the proposed amendments to Rules 13, 14, and 24, which relate to appeals from the United States Tax Court. Part II.B covers the proposed amendments to Rules 28 and 28.1, concerning the required contents of briefs. Part II.C summarizes the proposed amendments to Form 4, concerning appeals in forma pauperis ("IFP"). Part III of this Report discusses the proposed amendments to Rule 6 (concerning bankruptcy appeals), which the Committee seeks approval to publish for comment. Part IV discusses other matters.

The Committee has scheduled its next meeting for September 27 and 28, 2012, in Philadelphia.

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 for final approval

The Committee presents the following proposals for final approval.

A. Proposed amendments to Rules 13, 14, and 24

The proposed amendments to Rules 13, 14, and 24 concern appeals from the United States Tax Court. The proposed amendments to Rules 13 and 14 revise those rules to address permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). The Committee developed these proposals in consultation with the Tax Court and with the Tax Division of the Department of Justice. The proposed amendment to Rule 24 grows out of a suggestion by the Tax Court that Rule 24(b)'s reference to the Tax Court be revised to remove a possible source of confusion concerning the Tax Court's legal status.

1. Text of proposed amendments and Committee Notes

The Committee recommends final approval of the proposed amendments to Rules 13, 14, and 24, as set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee did not make any changes to the proposed amendments to Rules 13, 14, and 24 after publication. (It received no comments on these proposed amendments.)

B. Proposed amendments to Rules 28 and 28.1

The proposed amendment to Rule 28 revises Rule 28(a)'s list of the contents of the appellant's brief by removing the requirement of separate statements of the case and of the facts, and makes conforming changes to Rule 28(b) (concerning the appellee's brief). The proposed amendment to Rule 28.1 makes conforming changes to Rule 28.1 (concerning cross-appeals).

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

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

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) consolidates subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." The proposed new Rule 28(a)(6) allows the lawyer to present the factual and procedural history chronologically, but also provides flexibility to depart from chronological ordering. Conforming changes renumber Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10), revise Rule 28(b)'s discussion of the appellee's brief, and revise Rule 28.1's discussion of briefing on cross-appeals.

1. Text of proposed amendments and Committee Notes

The Committee recommends final approval of the proposed amendments to Rules 28 and 28.1 as set out in the enclosure to this report.

2. Changes made after publication and comment

The comments that the Committee received on the proposed amendments to Rules 28 and 28.1 are described in the enclosure to this report. Four of the six sets of comments supported the proposed amendments' goal. Among those supportive comments, two sets of comments proposed drafting changes; a number of those proposals sprang from a concern that deletion of some of the current language of Rule 28(a)(6) could be problematic. At its spring meeting, the Committee carefully reviewed both the concerns expressed by the two commenters who argued against the proposed amendments and also the suggestions submitted by the two commenters who proffered alternative language for the amendments. A detailed account of the Committee's discussions can be found in the draft minutes of the Committee meeting. To address the concerns expressed by the commenters, the Committee revised the text of proposed Rule 28(a)(6) and added a new paragraph to the Committee Note.

As published, proposed Rule 28(a)(6) referred to "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))." In response to commenters' concerns that this language omitted to mention procedural history, the Committee revised the proposed Rule to refer to "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." The Committee hopes that the amended Rule's reference to "the relevant procedural history" – rather than to "the course of proceedings" – will discourage the unnecessary detail with which some briefs currently describe the procedural history of the case. The Committee added a second paragraph to the Committee Note to Rule 28(a) that describes the contents of the statement of the case and that notes the permissibility of including subheadings. The latter point responds to one commenter's concern that judges and clerks need a way to locate quickly, in the brief, a description of the rulings presented for review. The Committee also added, in the Committee

Note, a reference to Supreme Court Rule 24.1(g), on which the amended Rule text is loosely modeled.

C. Proposed amendments to Form 4

The proposed amendments to Form 4 concern applications to proceed IFP on appeal. 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 for seeking 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. P. 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.

1. Text of proposed amendments

The Committee recommends final approval of the proposed amendments to Form 4 as set out in the enclosure to this report.

2. Changes made after publication and comment

The single comment received on the proposed amendments to Form 4 is summarized in the enclosure to this report. The comment – from the National Association of Criminal Defense Lawyers ("NACDL") – suggests a revision to the Form's discussion of inmate account statements. The Committee decided not to incorporate this comment into the current proposed amendments, but has added it to the Committee's study agenda as a new item. Further detail on this matter can be found in the draft minutes of the Committee's spring meeting.

III. Action item for publication (proposed amendments to Rule 6)

As discussed in the report of the Bankruptcy Rules Committee, that Committee is seeking approval to publish for comment proposed amendments to Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP"). In tandem with that project, the Appellate Rules Committee seeks permission to publish for comment proposed amendments to Appellate Rule 6 (concerning appeals to the court of appeals in a bankruptcy case).

The proposed amendments to Appellate Rule 6 (which are set out in the enclosure to this report) would update that Rule's cross-references to the Bankruptcy Part VIII Rules; would amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling; would add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2); and would revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

The Appellate Rules do not currently address in explicit terms the topic of permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). At the time that Section 158(d)(2) came into being as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the Appellate Rules Committee decided that no immediate action was necessary with respect to the Appellate Rules, because BAPCPA put in place interim procedures for administering the new direct appeals mechanism. Some of those interim procedures were subsequently displaced by the 2008 addition of subdivision (f) in Bankruptcy Rule 8001. The Committee now considers it worthwhile to specify in more detail the way in which the Appellate Rules apply to direct appeals under Section 158(d)(2), and the Bankruptcy Rules Committee's Part VIII project provides an opportune context in which to obtain input and guidance on this question.

Proposed Appellate Rule 6(c) would treat the record on direct appeals differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or BAP. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal, because in the appeals covered by Rule 6(b) the appellate record will already have been compiled for purposes of the appeal to the district court or the BAP. In the context of a direct appeal, the record will generally require compilation from scratch. The closest model for the compilation and transmission of the bankruptcy court record would appear to be the rules chosen by the Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, proposed Rule 6(c) incorporates the relevant Part VIII rules by reference while making some adjustments to account for the particularities of direct appeals to the court of appeals.

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules as they currently exist were drafted on the assumption that the record on appeal would be available only in paper form. Reflecting the fact that the bankruptcy courts are ahead of other federal courts in making the transition to electronic filing, the proposed Part VIII Rules are drafted with a contrary presumption in mind: The default principle under those Rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee's goal is to adopt language that can accommodate the various ways in which the lower-court record could be made available to the court of appeals – e.g., in paper form; or in electronic files that can be sent to the court of appeals; or by means of electronic links. Adopting such language seems generally advisable in the light of the shift to electronic filing; and such language seems particularly salient in the case of proposed Rule 6(c) because that Rule will incorporate by reference the Part VIII Rules that deal with the record on appeal.

The Committee considered a number of possible ways to allude to the provision of the record on appeal by the lower court to the court of appeals. Those deliberations are described in the draft minutes of the Committee's spring 2012 meeting. The Committee determined that neither "transmit" nor "furnish" nor "provide" captured the range of methods for making the record available; in particular, none of these terms encompassed the provision of a set of electronic links by which to access the documents in the record. After extensive discussions, the Committee decided to refer to the lower-court clerk's "making the record available to" the court of appeals. This language describes the action in question with the requisite clarity while also leaving room for developments in technology and practice. The Committee welcomes the Standing Committee's thoughts on this choice, as well as the reactions of the Bankruptcy Rules Committee and of the Subcommittee, chaired by Judge Gorsuch, that has been formed to consider this and similar questions of terminology relating to electronic filing.

One other linguistic question bears mention. As noted above, the proposed amendments would revise Rule 6(b)(2)(A)(ii) to remove an ambiguity arising from the 1998 restyling of the Appellate Rules. Specifically, for reasons explained at further length in the Committee Note, the proposed amendment would remove Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree"; the amended Rule would refer instead to challenging "the alteration or amendment of a judgment, order, or decree." The amended Rule would state:

> If a party intends to challenge the order disposing of [a tolling] motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

Professor Kimble advised the Committee that, in the second sentence, "It" should replace "The notice or amended notice." The Committee carefully discussed Professor Kimble's advice during both its fall 2011 and spring 2012 meetings, and decided not to adopt this suggestion. Committee members believe that the longer phrase is clearer; that clarity and specificity are particularly key for rules that govern the taking of an appeal; and that this is especially true in

the context of bankruptcy appeals given that so many debtors are pro se. These concerns over access to court for unrepresented debtors led the Committee to conclude that this question is one of substance rather than style.

IV. Information Items

The Committee reached consensus on an approach to the proposal that Appellate Rule 29 be amended to treat federally recognized Native American tribes the same as states for purposes of the provisions that authorize states to make amicus filings as of right and that exempt states from Rule 29's authorship-and-funding disclosure requirement. The Committee reviewed its research concerning this proposal. Based on a report by the Federal Judicial Center ("FJC") showing that most tribal amicus filings occur in the Eighth, Ninth, and Tenth Circuits, the Committee first consulted the Chief Judges of those circuits for their circuits' views on the proposal. The responses varied: The Ninth Circuit supports adoption of a national rule authorizing tribal amicus filings, the Tenth Circuit opposes adoption of such a national rule, and judges in the Eighth Circuit have voiced a variety of views. More recently, the Committee consulted the Chief Judges of the remaining circuits for their circuits' views on a proposal that would treat both tribes and municipalities the same as states for purposes of amicus filings. Among the responses received so far from those circuits, Committee members found it noteworthy that while the First Circuit seemed supportive of the inclusion of tribes on the list of entities that can make amicus filings as of right, that circuit also expressed concern that expanding that list could heighten the risk that amicus filings could give rise to recusal issues (especially if the expanded list included municipalities).

During the Committee's discussions of the tribal-amicus issue, members expressed various points of view. A number of Committee members argued that dignity concerns weighed in favor of adding tribes to the list of entities that can make amicus filings as of right. Other Committee members wondered whether the proposed amendment is needed – because the FJC's study indicated that tribes' requests to make amicus filings are generally granted – and argued that if tribes were added to the list of exempt filers, municipalities should be added as well. Most recently, in the light of the possibility that expanding the list of exempt filers could heighten the risk of recusal issues, concerns were voiced about the wisdom of adopting a national rule amendment at the present time. Instead, the Committee decided to maintain this item on its agenda and to revisit it in five years. In the meantime, the Committee asked me to write to the Chief Judges of each circuit to report on the Committee's discussions of this issue and to explain that the Committee thinks the issue warrants serious consideration. Although the letter will not urge the circuits to consider adopting local rules on the issue, if any circuits do decide to adopt a local rule, a few years of experience under such a local provision could inform the Committee's later discussions.

The Committee removed from its agenda an item relating to introductions in briefs. During the Committee's discussions of the proposed amendment to Rule 28(a) concerning the statement of the case, it had been suggested that Rule 28(a) might usefully be amended to take account of the possibility of including an introduction in the brief. Members noted that – if the currently proposed amendment to Rule 28(a) is adopted – Rule 28(a)(6) will be sufficiently

flexible to permit the inclusion of an introduction as part of the statement of the case, and that experienced lawyers sometimes include an introduction either as the first substantive item in the brief or as part of the statement of the case. Some members argued that mentioning an introduction in the text of the Rule would helpfully alert inexperienced lawyers to the possibility of including an introduction. Others worried that it would be difficult to draft Rule text that would indicate the appropriate contents of an introduction, and that it would not be useful to encourage the proliferation of poorly drafted introductions. A member suggested that it might be useful to wait and see how practice develops under amended Rule 28(a)(6) before giving any further consideration to the question of introductions. Based on this discussion, the Committee decided to remove the item concerning introductions from its agenda for the present.

The Committee discussed a number of new or existing agenda items. Over the summer, further study will be conducted concerning a proposal to amend the Appellate Rules to address redaction and sealing of appellate filings. The issue of sealed filings intersects with past and ongoing discussions in several other Judicial Conference committees. In the light of the varying approaches that circuits currently take to sealed filings on appeal, the Committee intends to consider whether it would be appropriate to try to adopt a national rule on the subject or whether the issue could be addressed through alternative means. The Committee held an initial discussion of a proposal to lengthen Appellate Rule 4(b)'s 14-day deadline for appeals by criminal defendants; participants noted that it would be useful to consult the Criminal Rules Committee for its views on the proposal and to obtain further detail concerning the Appellate Rules Committee's prior discussion of a similar proposal (which it considered and rejected roughly a decade ago). Members suggested two new topics for consideration: first, whether it would be useful to clarify appeal bond practices under Civil Rule 62 and Appellate Rule 8; and second, whether the Committee should revisit the way that length limits are specified in Rule 35's treatment of petitions for rehearing en banc (a topic that would also encompass Rule 40's treatment of petitions for panel rehearing).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE**

TITLE III. ~~REVIEW OF A DECISION OF~~ APPEALS FROM THE UNITED STATES TAX COURT

Rule 13. ~~Review of a Decision of~~ Appeals from the Tax Court

(a) ~~How Obtained; Time for Filing Notice of Appeal~~ Appeal as of Right.

(1) **How Obtained; Time for Filing a Notice of Appeal.**

~~(1) Review of a decision of~~ (A) An appeal as of right from the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

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

~~(2)~~ (B) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.

~~(b)~~ (2) Notice of Appeal; How Filed. The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

~~(c)~~ (3) Contents of the Notice of Appeal; Service; Effect of Filing and Service. Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

~~(d)~~ (4) The Record on Appeal; Forwarding; Filing.

~~(1)~~ (A) Except as otherwise provided under Tax Court rules for the transcript of proceedings,

the ~~An~~ appeal ~~from the Tax Court~~ is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. ~~References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk.~~

~~(2)~~ (B) If an appeal ~~from a Tax Court decision~~ is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

(b) Appeal by Permission. An appeal by permission is governed by Rule 5.

Committee Note

Rules 13 and 14 are amended to address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rules 13 and 14 do not currently address such appeals; instead, those Rules address only appeals as of right from the Tax Court. The existing Rule 13 – governing appeals as of right – is revised and becomes Rule 13(a). New subdivision (b) provides that Rule 5 governs appeals by permission. The definition of district court and district clerk in current subdivision (d)(1) is deleted; definitions are now addressed in Rule 14. The caption of Title III is amended to reflect the broadened application of this Title.

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

No comments were received on the proposed amendment to Rule 13.

Rule 14. Applicability of Other Rules to ~~the Review of a~~ Appeals from the Tax Court ~~Decision~~

All provisions of these rules, except Rules ~~4-9~~ 4, 6-9, 15-20, and 22-23, apply to ~~the review of a~~ appeals from the Tax Court ~~decision~~. References in any applicable rule (other than Rule 24(a)) to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

Committee Note

Rule 13 currently addresses appeals as of right from the Tax Court, and Rule 14 currently addresses the applicability of the Appellate Rules to such appeals. Rule 13 is amended to add a new subdivision (b) treating permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rule 14 is amended to address the applicability of the Appellate Rules to both appeals as of right and appeals by permission. Because the latter are governed by Rule 5, that rule is deleted from Rule 14's list of inapplicable provisions. Rule 14 is amended to define the terms “district court” and “district clerk” in applicable rules (excluding Rule 24(a)) to include the Tax Court and its clerk. Rule 24(a) is excluded from this definition because motions to appeal from the Tax Court in forma pauperis are governed by Rule 24(b), not Rule 24(a).

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

No comments were received on the proposed amendment to Rule 14.

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain

an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court – before or after the notice of appeal is filed – certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) **Notice of District Court's Denial.** The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) **Motion in the Court of Appeals.** A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the

notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) Leave to Proceed in Forma Pauperis <u>on Appeal from the United States Tax Court or</u> on Appeal or Review of an Administrative-Agency Proceeding. ~~When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a~~ <u>A</u> party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1)<u>:</u>

<u>(1) in an appeal from the United States Tax Court; and</u>

<u>(2) when an appeal or review of a proceeding before an administrative agency, board, commission, or officer proceeds directly in the court of appeals</u>.

(c) Leave to Use Original Record. A party allowed to proceed on appeal in forma pauperis may request that the

appeal be heard on the original record without reproducing any part.

Committee Note

Rule 24(b) currently refers to review of proceedings "before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court)." Experience suggests that Rule 24(b) contributes to confusion by fostering the impression that the Tax Court is an executive branch agency rather than a court. (As a general example of that confusion, appellate courts have returned Tax Court records to the Internal Revenue Service, believing the Tax Court to be part of that agency.) To remove this possible source of confusion, the quoted parenthetical is deleted from subdivision (b) and appeals from the Tax Court are separately listed in subdivision (b)'s heading and in new subdivision (b)(1).

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

No comments were received on the proposed amendment to Rule 24.

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 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, describing the relevant procedural history, 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," much like Supreme Court Rule 24.1(g) (which 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...."). 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).

The statement of the case should describe the nature of the case, which includes (1) the facts relevant to the issues submitted for review; (2) those aspects of the case's procedural history that are necessary to understand the posture of the appeal or are relevant to the issues submitted for review; and (3) the rulings presented for review. The statement should be concise, and can include subheadings, particularly for the purpose of highlighting the rulings presented for review.

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.

CHANGES MADE AFTER PUBLICATION AND COMMENT

After publication and comment, the Committee made one change to the text of the proposal and two changes to the Committee Note.

During the comment period, concerns were raised that the deletion of current Rule 28(a)(6)'s reference to "the nature of the case, the course of proceedings, and the disposition below" might lead readers to conclude that those items may no longer be included in the statement of the case. The Committee rejected that concern with respect to the "nature of the case" and the "disposition below," because the Rule as published would naturally be read to permit continued inclusion of those items in the statement of the case. The Committee adhered to its view that the deletion of "course of proceedings" is useful because that phrase tends to elicit unnecessary detail; but to address the commenters' concerns, the Committee added, to the revised Rule text, the phrase "describing the relevant procedural history."

The Committee augmented the Note to Rule 28(a) in two respects. It added a reference to Supreme Court Rule 24.1(g), upon which the proposed revision to Rule 28(a)(6) is modeled. And it added – as a second paragraph in the Note – a discussion of the contents of the statement of the case.

SUMMARY OF PUBLIC COMMENTS

The following comments were received on the jointly published proposals to amend Rules 28 and 28.1.

Judge Jon O. Newman. In an email to Judge Sutton, Judge Newman argued that there is no reason to amend Rule 28. He noted that the Second Circuit's Clerk sought the views of her colleagues in other circuits and learned that they had not noticed any confusion on the part of lawyers concerning the statement of the case. Judge Newman stated that the statements of the case and of the facts should remain separate because "[j]udges should not have to comb through one consolidated statement that sets forth all the facts in great detail, often several pages, to find the key procedural step – what ruling (or

rulings) the lower court made." He urged that if the statements of the case and of the facts were to be consolidated, the rule should "at least allow any circuit to maintain the current separation by a local rule."

11-AP-001: M. Elizabeth Egbers. M. Elizabeth Egbers, of Becker Gallagher Legal Publishing, Inc., in Cincinnati, Ohio, wrote in opposition to the proposed amendments. She stated that the amendments are unneeded, and she predicted that they will inconvenience lawyers, engender confusion, and require changes to local court rules and checklists.

11-AP-002: Jack Schisler. Jack Schisler, the Fayetteville Chief of the Arkansas Federal Defender Organization, wrote to support the proposed amendments, stating that they will "streamline the process."

11-AP-003: The National Association of Criminal Defense Lawyers. Peter Goldberger wrote on behalf of the National Association of Criminal Defense Lawyers ("NACDL") to express general support for the proposed amendments and to suggest two revisions to them.

One such proposed revision concerned the use of the word "relevant." NACDL argued that the term "relevant" in proposed Rule 28(a)(6) might lead lawyers to think that the statement of the case must contain "all the facts pertinent [to] an argument." NACDL suggested revising the Committee Note "to make clear that a brief overview of the facts may be sufficient in the Statement, where additional necessary details are set forth in the Argument portion of the brief, showing how the issues raised and argument ... arise[] out of the factual history of the case."

NACDL's other suggestion concerned the proposal's elimination of the words "briefly indicating the nature of the case, the course of proceedings, and the disposition below." NACDL was concerned that the elimination of this language might be taken to imply "that these basic 'facts' are not appropriate for inclusion in an appellate brief." NACDL's comments suggested that it would prefer that this language not be deleted from the Rule text; failing that, NACDL argued that "at least the Note should be amended" to forestall such an implication. NACDL proposed the following language: "a concise statement setting forth the nature of the case, the essential procedural history (including reference to the rulings presented for review), and the key facts giving rise to the claims or charges as well as those relevant to the issues submitted for review …."

11-AP-004: The ABA Council of Appellate Lawyers. Steven Finell wrote on behalf of the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association's Judicial Division. The Council supported the goals of the proposed amendments, noting that combining the statements of the case and of the facts will reduce confusion and redundancy, and observing that this consolidation is "favored by a substantial majority of experienced appellate lawyers who responded to our survey." However, the Council believed that the amendments as drafted will mislead attorneys, and it submitted a different proposed formulation.

The Council warned against the deletion of current Rule 28(a)(6)'s reference to "the nature of the case." The Council observed that it is useful for the brief to state the nature of the case (e.g., a medical malpractice action), and feared that deleting this wording would "at least arguably" ban lawyers from describing the nature of the case (because "the preamble of Rule 28(a) states that a 'brief must contain' the contents prescribed by the numbered subdivisions 'in the order indicated'").

The Council also warned against deleting the reference to "the course of proceedings." The Council argued that a well-drafted rule would not "banish *all* procedural history" but rather would "make clear that procedural history should be limited to that which is necessary to inform the court of the posture of the case and give context to the issues presented for review."

The Council objected on style grounds to the phrase "a concise statement of the case setting out the facts relevant to the issues submitted for review" because "setting out the facts" is a verb construction that contrasts with noun constructions elsewhere in Rule 28(a).

The Council viewed the phrase "identifying the rulings presented for review" as undesirable because "identifying" could mean providing page cites, docket numbers, or titles and dates of rulings, "*none* of which is what the rule intends."

The Council proposed "amending Rule 28(e) to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief," rather than "only in the statement of facts."

Finally, the Council suggested "amending Rule 28 to caution parties against repeating the same material in more than one of the sections of the brief that precede the summary of argument."

11-AP-005: DRI. Henry M. Sneath wrote on behalf of DRI–The Voice of the Defense Bar. DRI supports the proposed amendments because they will "allow[] the brief to present the factual and procedural history chronologically and eliminate[] any overlap or repetition between the two sections."

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, describing the relevant procedural history, 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.

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the text of the proposed amendment to Rule 28.1 after publication and comment. The Committee revised

a quotation in the Committee Note to Rule 28.1(c) to conform to the changes (described above) to the text of proposed Rule 28(a)(6).

SUMMARY OF PUBLIC COMMENTS

The comments received on the jointly published proposals to amend Rules 28 and 28.1 are described above. None of those comments related specifically to the proposed amendments to Rule 28.1.

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 <u>for the past two years</u>, 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: _____

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the proposed amendments to Form 4 after publication and comment.

SUMMARY OF PUBLIC COMMENTS

The following comment was received on the proposal to amend Form 4.

11-AP-003: The National Association of Criminal Defense Lawyers. Peter Goldberger wrote on behalf of the National Association of Criminal Defense Lawyers ("NACDL") to propose a modification of one aspect of the published amendment to Form 4. The relevant portion of the proposed amendment, as published, would clarify that an institutional-account statement must be filed by a prisoner "seeking to appeal a judgment in a civil action or proceeding" in forma pauperis. NACDL suggested that the quoted language "be clarified to reflect more accurately the coverage of the Prison Litigation Reform Act, by adding '(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255).'" The Committee decided not to incorporate this change into the currently proposed amendment, but has added it to its study agenda as a separate item.

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

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

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

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). ~~But there are 3 exceptions~~, but with these qualifications:

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

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; ~~and~~

(C) when the appeal is from a bankruptcy appellate panel, ~~the term~~ "district court," as used in any applicable rule, means "appellate panel~~.~~"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

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

(A) Motion for r~~R~~ehearing.

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree – but before disposition of the motion for rehearing – becomes effective when the order disposing of the motion for rehearing is entered.

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then ~~requires~~ the party, in

compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The r~~R~~ecord on a~~A~~ppeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and ~~sent~~ made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within

14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

• the redesignated record as provided above;

• the proceedings in the district court or bankruptcy appellate panel; and

• a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) ~~Forwarding~~ Making the rRecord Available.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and ~~send~~ promptly make it available ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk. ~~Unless directed to do so by a party or the circuit clerk~~ If the clerk makes the record available in paper

form, the clerk will not send ~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and ~~forward the record~~ make it available. When the record is made available in paper form, t~~T~~he court of appeals may provide by rule or order that a certified copy of the docket entries be ~~sent~~ made available in place of the redesignated record~~;~~ ~~b~~. But any party may request at any time during the pendency of the appeal that the redesignated record be ~~sent~~ made available.

(D) Filing the r<u>R</u>ecord. ~~Upon receiving the record – or a certified copy of the docket entries sent in place of the redesignated record – the circuit clerk must file it and immediately notify all parties of the filing date~~ <u>When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date</u>.

<u>(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).</u>

<u>(1) Applicability of Other Rules.</u> <u>These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:</u>

<u>(A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-12, 13-20, 22-23, and 24(b) do not apply;</u>

<u>(B) as used in any applicable rule, "district court" or "district clerk" includes – to the extent appropriate – a bankruptcy court or bankruptcy appellate panel or its clerk; and</u>

(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).

(2) Additional Rules. In addition, the following rules apply:

(A) **The Record on Appeal.** Bankruptcy Rule 8009 governs the record on appeal.

(B) **Making the Record Available.** Bankruptcy Rule 8010 governs completing the record and making it available.

(C) **Stays Pending Appeal.** Bankruptcy Rule 8007 applies to stays pending appeal.

(D) **Duties of the Circuit Clerk.** When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(E) **Filing a Representation Statement**. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, the attorney who sought permission must file a statement with the

circuit clerk naming the parties that the attorney represents on appeal.

Committee Note

Subdivision (b)(1). Subdivision (b)(1) is updated to reflect the renumbering of 28 U.S.C. § 158(d) as 28 U.S.C. § 158(d)(1). Subdivision (b)(1)(A) is updated to reflect the renumbering of Rule 12(b) as Rule 12(c). New subdivision (b)(1)(D) provides that references in Rule 12.1 to the "district court" include – as appropriate – a bankruptcy court or bankruptcy appellate panel.

Subdivision (b)(2). Subdivision (b)(2)(A)(i) is amended to refer to Bankruptcy Rule 8022 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal …." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal …." The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

Subdivision (b)(2)(B)(i) is amended to refer to Rule 8009 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(B)(i), (b)(2)(C), and (b)(2)(D) are amended to reflect the fact that the record sometimes will be made available electronically.

Subdivision (b)(2)(D) sets the duties of the circuit clerk when the record has been made available. Because the record may be made available in electronic form, subdivision (b)(2)(D) does not direct the clerk to "file" the record. Rather, it directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c). New subdivision (c) is added to govern permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). For further provisions governing such direct appeals, see Bankruptcy Rule 8006.

Subdivision (c)(1). Subdivision (c)(1) provides for the general applicability of the Federal Rules of Appellate Procedure, with specified exceptions, to appeals covered by subdivision (c) and makes necessary word adjustments.

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is governed by Bankruptcy Rule 8009. Subdivision (c)(2)(B) provides that the record shall be made available as stated in Bankruptcy Rule 8010. Subdivision (c)(2)(C) provides that Bankruptcy Rule 8007 applies to stays pending appeal; in addition, Appellate Rule 8(b) applies to sureties on bonds provided in connection with stays pending appeal.

Subdivision (c)(2)(D), like subdivision (b)(2)(D), directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c)(2)(E) is modeled on Rule 12(b), with appropriate adjustments.

TAB 5B

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Advisory Committee on Appellate Rules
Table of Agenda Items — May 2012

FRAP Item	Proposal	Source	Current Status
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
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-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 Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
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 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee
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 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee
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

FRAP Item	Proposal	Source	Current Status
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 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12
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 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee
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-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 Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 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 Discussed and retained on agenda 10/11
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 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Awaiting initial discussion
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11

FRAP Item	Proposal	Source	Current Status
11-AP-E	Consider amendment to FRAP 4(b)	Roger I. Roots, Esq.	Discussed and retained on agenda 04/12
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Awaiting initial discussion
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Awaiting initial discussion
12-AP-C	Consider amending Rule 28(e) to require pinpoint citations to the appendix or record throughout briefs	Steven Finell, Esq., on behalf of the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association's Judicial Division	Awaiting initial discussion
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Awaiting initial discussion
12-AP-E	Consider treatment of length limits for petitions for rehearing en banc under Rule 35	Professor Neal K. Katyal	Awaiting initial discussion

TAB 5C

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Minutes of Spring 2012 Meeting of
Advisory Committee on Appellate Rules
April 12, 2012
Washington, D.C.

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 12, 2012, at 9:00 a.m. at the Administrative Office of the United States Courts in Washington, D.C. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Professor Neal K. Katyal, Mr. Kevin C. Newsom, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Staff Director and Senior Counselor to the Attorney General, and Mr. H. Thomas Byron III, Civil Division, U.S. Department of Justice ("DOJ"), were present representing the Solicitor General. Also present were Ralph W. Johnson III, Counsel to Senator Chuck Grassley (the Ranking Member of the Senate Judiciary Committee); Judge Jeremy Fogel, Director of the Federal Judicial Center ("FJC"); Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Jonathan C. Rose, Rules Committee Officer in the Administrative Office ("AO"); Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees; Julie Wilson, Attorney Advisor in the AO; Mr. Leonard Green, liaison from the appellate clerks; Ms. Marie Leary from the FJC; Holly Sellers, Attorney Advisor in the AO; Julie Yap, Supreme Court Fellow assigned to the AO; Milena Sanchez de Boado, Supreme Court Fellow assigned to the FJC; Michael Duggan, Supreme Court Fellow assigned to the Supreme Court; Judge Fausto Martin de Sanctis, a Visiting Foreign Judicial Fellow at the FJC; and Dr. Roger I. Roots. Professor Daniel R. Coquillette, Reporter for the Standing Committee, participated by telephone.

Judge Sutton welcomed the meeting participants. He introduced one of the Committee's new members, Professor Katyal, who replaces former Committee member Maureen Mahoney. Professor Katyal served as Acting Solicitor General of the United States, and now is both a partner at Hogan Lovells and a professor at Georgetown University. Judge Sutton also informed the Committee that Mr. Letter – long an indispensable member of the Committee – has been promoted to Appellate Staff Director of the Civil Division of the DOJ, and is also serving as Senior Counselor to the Attorney General. Mr. Letter introduced Mr. Byron – his colleague from the Appellate Staff of the Civil Division of the DOJ – who has long experience working on matters relating to the Appellate Rules Committee's agenda, and who was a classmate of Justice Eid.

During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rose, Mr. Robinson, and the

AO staff for their preparations for and participation in the meeting.

II. Approval of Minutes of October 2011 Meeting

A motion was made and seconded to approve the minutes of the Committee's October 2011 meeting. The motion passed by voice vote without dissent.

III. Report on January 2012 Meeting of Standing Committee

Judge Sutton summarized relevant events at the Standing Committee's January 2012 meeting. The meeting included a very interesting panel presentation on class actions. Also at the meeting, Judge Kravitz appointed Judge Gorsuch to chair a Subcommittee that will consider the choice of language in the national Rules to describe activities relating to electronic filing and service; Professor Struve will serve as the subcommittee's reporter. It seems likely that the Subcommittee will consider, among other things, the language that the Appellate Rules Committee proposes for Appellate Rule 6's treatment of the record in bankruptcy appeals.

Judge Sutton noted that, on December 1, 2011, the amendments to Appellate Rules 4 and 40 and to 28 U.S.C. § 2107 took effect. He observed that Mr. Johnson's work on the amendment to Section 2107 was invaluable. The process of amending Section 2107 was challenging because Congress's agenda was so full.

IV. Action Items

A. For final approval

1. Item No. 08-AP-G (FRAP Form 4)

Judge Sutton invited the Reporter to introduce this item, which concerns proposed amendments to Form 4 (relating to applications to proceed in forma pauperis ("IFP")). The proposed amendments will remove the current Form's requirement that the applicant provide detailed information concerning the applicant's expenditures for legal and other services in connection with the case. In addition, the amendments make technical changes to incorporate amendments that were approved by the Judicial Conference in fall 1997 but were not transmitted to Congress. During the public comment period, the Committee received only one comment on Form 4. This comment – from the National Association of Criminal Defense Lawyers ("NACDL") – focused on an aspect of the technical changes approved in fall 1997. The current Form 4 directs "prisoner[s]" to attach an institutional account statement to their IFP applications. The proposed amendment, as published, would specify that this requirement applies only to prisoners who are "seeking to appeal a judgment in a civil action or proceeding"; this more specific language tracks the wording in 28 U.S.C. § 1915(a)(2) (a provision added to Section 1915 by the Prison Litigation Reform Act ("PLRA")). NACDL suggests that Form 4 should further specify that the requirement of the institutional-account statement applies to prisoners "seeking to appeal a judgment in a civil action or proceeding (not including a decision in a

habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)."

The Reporter observed that the premise of NACDL's suggestion appears to be accurate, though there are a few doctrinal complexities. Caselaw in all twelve of the relevant circuits states that the PLRA's provisions concerning IFP litigation do not apply to state-prisoner habeas petitions under 28 U.S.C. § 2254. Seven circuits have, likewise, held the PLRA's IFP provisions inapplicable to federal-prisoner proceedings under 28 U.S.C. § 2255. Similarly, holdings in five circuits and dicta in two other circuits state that the PLRA's IFP provisions do not apply to habeas proceedings under 28 U.S.C. § 2241. An additional issue concerns how to categorize mandamus petitions arising in connection with habeas or Section 2255 proceedings. Caselaw in some circuits provides that the applicability of the PLRA's IFP provisions to mandamus petitions depends on whether the underlying proceeding is one to which those provisions would apply, but some cases suggest other possible approaches.

The Reporter stated that the caselaw refusing to apply the PLRA's IFP provisions to habeas and Section 2255 proceedings advances persuasive arguments for that refusal. Applying those provisions to such proceedings would run counter to the tradition of access to court for habeas petitioners. Moreover, the PLRA was directed toward suits challenging prison conditions, and habeas suits are not generally the proper vehicle for such challenges. And the Antiterrorism and Effective Death Penalty Act ("AEDPA"), enacted within days of the PLRA, addresses habeas and Section 2255 litigation (and specifically addresses the issue of successive petitions).

The Reporter suggested that though the doctrinal premise of NACDL's suggestion appears sound, there are reasons to consider the proposal further before deciding whether to adopt it. The change proposed by NACDL might itself cause confusion for some applicants. For example, if an IFP applicant (erroneously or not) styled a challenge to prison conditions as a habeas petition, NACDL's proposed language would suggest to that applicant that he or she need not provide an institutional-account statement – yet that suggestion would likely be inaccurate. Admittedly, a litigant's confusion as to the nature of his or her suit is likely to have been dispelled by the trial judge prior to the time that the litigant attempts to take an appeal. But it bears noting that some district courts use a form – promulgated by the AO – that tracks Form 4 quite closely. In addition, the Supreme Court's rules direct the use of Form 4 in connection with applications to proceed IFP in the Supreme Court. Accordingly, the Reporter suggested that the Committee approve the amendments to Form 4 as published and add NACDL's suggestion to the Committee's agenda as a new item.

An appellate judge member noted that the relevant language of Form 4 as reflected in the published amendments had been fully considered in the rulemaking process in 1997. A motion was made to approve the amendments as published and to place NACDL's suggestion on the study agenda. The motion was seconded and passed by voice vote without dissent.

2. Item No. 08-AP-M (FRAP 13, 14, and 24 / tax appeals)

Judge Sutton invited the Reporter to present this item, which concerns certain amendments relating to appeals in tax cases. The proposed amendments to Rules 13 and 14 will update those Rules to take account of permissive interlocutory appeals from the United States Tax Court under 26 U.S.C. § 7482(a)(2). Those amendments were developed in consultation with the Tax Court and the DOJ's Tax Division. In the course of those discussions, the Tax Court proposed a further amendment to Rule 24 (concerning applications to proceed IFP); that amendment revises Rule 24(b) to reflect the Tax Court's status as a court rather than an agency.

No comments were received on these proposed amendments. The Reporter suggested that the Committee approve them as published. A motion was made and seconded to approve the amendments to Rules 13, 14, and 24 as published. The motion passed by voice vote without dissent.

3. Item No. 10-AP-B (FRAP 28 & 28.1 / statement of the case)

Judge Sutton introduced this item, which concerns proposed amendments to Rule 28's list of the required contents of briefs (as well as a conforming amendment to Rule 28.1 concerning cross-appeals). During the comment period, only two commenters argued that the amendments should be abandoned; the other commenters agreed with the general purpose of the amendments. Judge Sutton noted that it makes sense to amend the rules so that briefs can present matters chronologically. However, some commenters expressed concern that the removal of some of Rule 28(a)(6)'s current language might be taken to suggest that the matters referred to in the deleted language can no longer be included in the brief.

Judge Sutton observed that the agenda materials proffered three options for the Committee's consideration. One approach would augment the Committee Note to address the commenters' concerns. Another approach would revise the amendment to the Rule text. And a third approach would simply revert to a different option previously considered by the Committee – namely, reversing the order of current Rules 28(a)(6) and 28(a)(7). That third approach has some appeal, but on the other hand there is much to recommend an approach that would bring Rule 28 into closer parallel with the Supreme Court's analogous rule. Lawyers have not had trouble understanding the requirements of the Supreme Court's rule. Judge Sutton recalled that a former attorney member of the Committee had argued in favor of keeping the Rule text relatively spare, in order to preserve flexibility for lawyers in drafting briefs. He observed that some of the specificity that commentators had proposed for the Rule text might be counterproductive; for example, a requirement that the brief specify the key facts giving rise to the claim would not make sense in the context of an appeal that concerns a purely procedural issue. Judge Sutton noted that Judge Newman had expressed the view that no amendment was needed, and also that Judge Newman had pointed out that judges and clerks want a place in the brief, with a heading, where they can quickly look to identify the rulings that are being appealed.

An attorney member observed that there are two different sorts of lawyers to consider; experienced appellate lawyers prefer flexibility, and for them, a simpler rule is better. Less-experienced lawyers may need a provision that spells things out. This member recalled that

Professor Coquillette had stated that matters of substance should not be addressed in the Notes. Mr. Letter agreed that if the Committee wishes to specify more detail, that detail should go in the Rule text rather than the Note. Some lawyers handle appeals only occasionally; and rules pamphlets usually do not include Committee Notes. Mr. Letter reiterated that it is important for briefs to be helpful to judges, and he noted that he has heard judges complain that briefs are not meeting this standard. He asked what the judge members of the Committee thought. An appellate judge member stated that he did not share Judge Newman's concern, and that he favored approving the proposal as published. Another appellate judge member agreed that the proposal should be approved as published; in his view, statements of the case under the existing Rule 28 are not helpful.

Judge Sutton asked whether it is inappropriate for a Committee Note to explain the intent of the amendment in the context of the prior rule – for example by explaining that the removal of a specific textual reference to a certain component is not meant to outlaw inclusion of that component. An attorney member questioned what aspects of the proposed augmented Committee Note would be substantive. The one change that he could see as possibly substantive would be the removal of a reference to the "course of proceedings"; the other changes seemed more like reordering and clarifying the present rule. He asked whether omission of any reference to procedural history might cause briefs to omit something that is important for understanding; but he noted that it would be almost impossible to indicate the "rulings presented for review" without discussing the relevant procedural history.

Turning to specific drafting issues, an attorney member questioned whether it is really appropriate to use the term "concise" in the proposed provision that combines the former Rules 28(a)(6) and 28(a)(7). He suggested deleting "concise." Judge Sutton observed that there is little risk that briefs will end up being too short, but he agreed that the use of the term "concise," coupled with the removal of references to specific components in a brief, might lead to an overly minimalist approach. An appellate judge member disagreed, predicting that there is no risk of undue minimalism in briefs; another appellate judge member concurred in this view. A participant asked whether the inclusion of the word "concise" in amended Rule 28(a)(6) would suggest – by negative implication – that other portions of the brief need not be concise. Members responded that similar words are employed in a number of the subsections of Rule 28(a).

The attorney member also stated that he understood a commentator's concern about the published rule's use of the term "relevant" as centering on the fact that the published language refers to "*the* facts relevant to the issues submitted for review" – that is to say, the use of the word "the" might cause a reader to conclude that facts not mentioned in the statement may not be relied upon in the brief. He noted, on the other hand, that such an argument is not strong and that similar language appears in the Supreme Court's rule.

With respect to the question of procedural history, participants recalled that the Committee's motivation for proposing to delete Rule 28(a)(6)'s reference to "the course of proceedings" had been a concern that briefs discuss the procedural history in inordinate detail.

Judge Sutton asked whether this concern could be addressed by referring, in the Rule text, to "the relevant procedural history." An appellate judge member stressed that procedural history is important, but only as to the issues presented in the appeal. Judge Sutton agreed with a member's earlier observation that lawyers are likely to mention the procedural history when describing the rulings presented for review.

Judge Sutton asked for Committee members' views on the published proposal's use of the term "identifying" in the phrase "identifying the rulings presented for review." Would it be better to say "describing the rulings presented for review"? An appellate judge member stated that "identifying" was useful because it is likely to prompt a more concise description.

Judge Sutton asked Professor Coquillette for his views on the proposed augmented Committee Note. Professor Coquillette stated that he was concerned by the inclusion of detail in that version of the Committee Note, because some lawyers use rule books that do not include Notes. The Standing Committee prefers to avoid placing in the Committee Note anything that actually changes the operation of the Rule. A member asked whether the augmented Note changed the operation of the Rule or whether it merely directed readers not to draw a negative inference based on the changes made to the Rule. Professor Coquillette responded that the augmented Note language fell in a gray area and was not an obvious abuse of the Note. An attorney member stated that Professor Coquillette's guidance made him wary of placing in a Note something that could be placed in the Rule text. Judge Sutton asked whether the Note can be used, not to modify the Rule text, but rather to address a possible negative inference that might be drawn by a reader who was comparing the amended Rule text to the previous version of the Rule. Professor Coquillette responded that that could be a valid use of a Note.

An attorney member suggested that the question of whether the Rule should mention procedural history was potentially significant; by contrast, he suggested, the Rule need not mention the nature of the case because the components of the brief (e.g., the statement of the issues) will make clear the nature of the case. This member noted that the Committee cannot predict how lawyers will respond to the deletion, from Rule 28(a)(6), of the reference to "the course of proceedings." He suggested that it might be useful to include a phrase such as "any procedural history necessary to understand the posture of the appeal or the issues submitted for review." He asked whether participants could think of a more concise substitute for that language. Judge Sutton responded that his concern about that language would not solely relate to its unwieldiness; he would also be concerned that the language could lead brief-writers to be over-inclusive. However, he added that he did not feel strongly about this, and that the main goals of the amendments, in his view, were to provide that the statements of the case and the facts could proceed in chronological order and to give flexibility to lawyers in drafting their briefs. He asked participants whether they would suggest adding language to the proposed Rule text. Mr. Byron asked whether one might add to the Rule a reference to "relevant" procedural history and leave the detailed explanation to the Committee Note. An appellate judge member suggested that "necessary" is a more limiting word than "relevant." Judge Sutton observed that the proposed Rule would continue to use the word "concise" to modify "statement of the case."

Judge Sutton suggested that there appeared to be an emerging consensus that the best way to address the commentators' concerns was to augment the Committee Note, but that it would be useful to amend the Rule text to refer to the relevant (or necessary) procedural history.

The Committee returned to this item after lunch; during lunch, the Reporter produced a revised draft that reflected the Committee's discussions prior to lunch. The revised draft would amend Rule 28(a)(6) to refer to "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." A member suggested a conforming change to the Committee Note. A motion was made to approve the revised draft (as circulated at the meeting), subject to the change to the Committee Note. The motion was seconded and passed by voice vote without dissent.

B. For publication: Item No. 09-AP-C (FRAP 6 / direct bankruptcy appeals) and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

Judge Sutton invited the Reporter to introduce these items, which concern proposed amendments to Appellate Rule 6 concerning bankruptcy appeals. The Reporter observed that the proposed amendments to Rule 6 have been developed jointly with the Bankruptcy Rules Committee, in the context of that Committee's discussions of proposed revisions to Part VIII of the Bankruptcy Rules. As part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Congress created an avenue for direct permissive appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Initially those appeals were governed by interim procedures contained within BAPCPA, but some of those procedures have subsequently been displaced by an amendment to the Bankruptcy Rules, and it now seems worthwhile to amend Appellate Rule 6 to address the topic.

The Reporter noted that the Committee had already discussed the proposed amendments to Rule 6 in some detail at its fall 2011 meeting. She observed that several aspects of the proposed amendments seemed uncontroversial. The proposals would amend Rule 6's title, slightly restyle the Rule, update cross-references within the Rule, account for new Appellate Rule 12.1 (concerning indicative rulings), remove an ambiguity in Rule 6(b)(2), and add a new Rule 6(c) concerning permissive direct appeals. The Reporter observed that the draft Part VIII rules were included in the Committee's agenda materials and predicted that the Bankruptcy Rules Committee would welcome any suggestions that Appellate Rules Committee members might have on the Part VIII draft.

The Reporter suggested that one of the most significant decisions still facing the Committee was whether to attempt to tackle, in the proposed amendments to Rule 6, the question of the terminology that should describe the treatment of a record that is in electronic form. The Rule 6 draft presented to the Committee in fall 2011 had attempted to account for the shift to electronic records by using the term "transmit" (instead of "forward" or "send") to refer to the treatment of both electronic and paper records and using the term "send" to refer to the treatment of paper records. Members had quickly noted flaws in this approach, and the discussion during

and after the fall 2011 meeting had focused on the possibility of using either the term "furnish" or the term "provide."

The Committee's spring agenda materials presented two versions of the proposed amendments to Rule 6. The first version showed the terms "furnish" and "provide" as bracketed alternatives in each place where the Rule discussed the provision of the record to the court of appeals. If this alternative were to be adopted, the Committee would face further choices concerning whether to specify in the text of Rule 6(b) what acts constitute "furnishing" or "providing"; or whether to add in Rules 6(b) and 6(c) provisions inviting the courts of appeals to adopt local rules concerning the mode of provision of the record; or whether to place the detailed discussion of that issue in the Committee Note. The second alternative version made no attempt to update the terminology used to describe the treatment of the record, except where updating was absolutely necessary; this approach would leave for another day the question of the terminology that the Appellate Rules should employ to account for records (and other documents) in electronic form.

Judge Sutton recalled that, when the Committee discussed the question of word choice, it had focused on the fact that a record could be provided to the court of appeals in paper form, or as one or more electronic records, or in the form of links that enable a user to access the record in electronic form; the difficulty arose concerning the choice of a term that would encompass the third of these possibilities. Judge Sutton noted that the Appellate Rules Committee has commenced a project concerning possible amendments to the Appellate Rules, generally, in the light of the shift to electronic filing; but that project may not proceed as quickly as the proposed amendments to Appellate Rule 6. He observed that even when the shift to electronic filing is complete, the courts will still need to handle paper filings by some litigants. Professor Coquillette predicted that the Standing Committee would need to undertake a project, involving all the advisory committees, concerning the implications of the shift to electronic filing. Because technology is developing so rapidly, that will require some serious study and coordination.

Returning to the question of terminology, Judge Sutton stated that he did not think either "furnish" or "provide" fully addressed the question that had been troubling the Committee. An attorney member stated that he was indifferent as between "furnish" and "provide"; in his view, the key was to include a sentence defining the meaning of the term that was chosen. An appellate judge suggested that "transmit" was a good choice.

After further discussion, Mr. Green suggested a different word choice: Rather than referring to the lower-court clerk's "furnishing" or "providing" the record to the court of appeals, the rule could direct the lower-court clerk to "make the record available" to the court of appeals, and could direct the circuit clerk to "obtain" the record. An attorney member agreed that Mr. Green's proposed language would address his concern about instances in which access to the record is provided by means of electronic links. Professor Coquillette observed that it would be better not to include Rule text that invites local rulemaking. Judge Sutton suggested that it could make sense to modify the first alternative shown in the agenda materials as suggested by Mr. Green. An attorney member agreed that that was a promising approach.

Next, the Reporter sought the Committee's views on a point previously discussed by the Committee at its fall 2011 meeting. Proposed Rule 6(b)(2), as amended, would provide that "[i]f a party intends to challenge the order disposing of [a tolling] motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal." The next sentence, as shown in the Committee's fall 2011 agenda materials, read: "The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion." At the fall 2011 meeting, the Committee discussed Professor Kimble's advice that "The notice or amended notice" in this second sentence should be replaced by "It." Some members believed that the longer formulation was clearer. After the fall meeting, Professor Kimble reviewed the Rule 6 draft and continued to maintain strongly that this was purely a question of style and that "It" was preferable. Thus, the Reporter asked the Committee to consider the issue once again.

A participant asked whether the issue could be addressed by using the formulation "That notice ..."; but the Reporter responded that referring only to a "notice" might cause confusion by omitting reference to an amended notice. Mr. Letter observed that the concern over confusion arises because a reader might wonder whether "It" referred to the notice (or amended notice) of appeal or to the order disposing of the tolling motion. The Reporter agreed that this accurately described the concern. She noted that a litigant would have to be relatively confused in order to take "It" to refer to the order rather than the notice of appeal, but she observed that the Committee often worries (when drafting) about litigants who are easily confused. And she noted that such concerns are heightened with respect to provisions that concern potentially jurisdictional deadlines. A participant suggested that the problem under discussion arose because the proposed amendment adds a period in the midst of what previously had been a single sentence, and he wondered whether a solution could be found by removing the period and merging the two sentences into one. Another participant responded that the resulting single sentence would be quite complex. A member asked whether the problem could be avoided by revising the second sentence to use an active rather than passive formulation ("The party must file ..."); that would make it less likely that a reader would believe "it" referred to a court order. A participant stated that the difference in length between the longer and shorter formulations was small, and that if there is a nontrivial chance that the shorter formulation might confuse some readers, he favored the longer formulation. A district judge member observed that bankruptcy proceedings often involve pro se debtors, and that for those litigants it is best for the rules to be very specific. An attorney member stated that he favored the longer formulation; an appellate judge member agreed. Professor Coquillette observed that the question was whether the choice was substantive or purely one of style. The Reporter suggested that the district judge member's concern about access to courts for pro se debtors sounded like a substantive concern. A motion was made to retain the longer formulation on the ground that the difference was one of substance rather than style; the motion was seconded and passed by voice vote without opposition.

The Committee next turned to the text of proposed Rules 6(b)(2)(D) and 6(c)(2)(D). As shown in the agenda materials, those provisions direct the circuit clerk to note on the docket the fact that the lower-court clerk has furnished the record, and the provisions state that "The date

noted on the docket serves as the filing date of the record for purposes of [these Rules] [Rules 28.1(f), 30(b)(1), 31(a)(1), and 44]." Judge Sutton suggested that general wording was preferable in this instance. The Reporter asked whether that would counsel in favor of ending the relevant sentence after "the record" – or whether truncating the sentence in that way might lead to unanticipated effects if the revised Rule is taken to define the record's filing date for purposes of, for example, a local rule. On the other hand, a participant suggested that if the provision defines the filing date "for purposes of these Rules," this wording might lead readers to wonder whether that definition in Rule 6 modifies the treatment of the record's filing date under Rule 12(c) (which will continue to apply to non-bankruptcy appeals). The Reporter noted that if the Committee chose to truncate the sentence after "the record," it could seek input (during the comment period) on whether that would create problems in any area of practice; on the other hand, she observed, this would be a relatively detailed point on which to seek specific comment. A district judge member stated that he expected that the definition in Rule 6 could technically affect provisions in local rules, but he also stated that he did not think this would cause a problem because, in practice, the same definition would likely be used anyway. Judge Sutton suggested that it would make sense to truncate the sentence after "the record" for purposes of publication, and that it would be useful to solicit comment on that choice. For example, he suggested, it would be very useful to learn what bankruptcy clerks think about the question.

After lunch, the Committee considered a revised draft of the Rule 6 proposal – prepared and circulated during lunch – that incorporated the Committee's discussions during the morning session. An attorney member suggested some conforming changes to the Committee Note. Mr. Byron asked whether the proposal would be circulated to the Bankruptcy Rules Committee for its views; the Reporter stated that it would be circulated to the Bankruptcy Rules Committee and also to the Standing Committee's subcommittee that will consider questions of terminology relating to electronic filing. Mr. Robinson suggested a wording change to the revised Rule 6 draft; members concurred in the change.

A motion was made to approve the revised language circulated to the Committee members, with Mr. Robinson's change to the Rule text and with the revisions a member had suggested to the Committee Note. The motion was seconded and passed by voice vote without dissent.

V. Discussion Items

A. Item No. 09-AP-B (definition of "state" and Indian tribes)

Judge Sutton invited Justice Eid to introduce this issue, which concerns a proposal that Appellate Rule 29 be revised to treat federally recognized Native American tribes the same as states for purpose of amicus filings.

Justice Eid reminded the Committee that this item came to the Committee at the suggestion of Daniel Rey-Bear, who asked the Committee to consider adding Indian tribes to the list of entities that can file amicus briefs as of right. The Committee received letters in support

of Mr. Rey-Bear's proposal from a number of groups. The Committee further benefited from a report by Ms. Leary, who examined the frequency of tribal amicus filings and the rate at which leave to file was granted. Ms. Leary found that most such filings occur in the Eighth, Ninth, and Tenth Circuits and that leave to file is typically granted. At the Committee's request, Judge Sutton wrote to the Chief Judges of those three circuits to ask for those circuits' views on the adoption of a local or national rule authorizing filings as of right by tribal amici. The three circuits' responses varied, with the Ninth Circuit expressing support for a national rule, the Tenth Circuit expressing a contrary view, and the Eighth Circuit evincing mixed views. More recently, Judge Sutton wrote to the Chief Judges of the remaining circuits to solicit their views on a possible rule change that would add both tribes and municipalities to the list of entities that can file amicus briefs as of right. Among the circuits that have thus far responded to that letter, the views have been mixed. The Eleventh Circuit appears ambivalent; the First Circuit is more supportive of the idea of authorizing amicus filings by tribes, but also expresses concern about the possible effects of the change on recusal issues (especially if municipalities are included along with tribes); the Seventh Circuit has not expressed a view and does not receive many amicus filings from tribes.

Justice Eid observed that in the Committee's previous discussions, participants have expressed varying views. Justice Eid favors the proposal and views it as a question of dignity for tribes. She noted that she had practiced in the field of federal Indian law, that she lives in a state where two large tribes are located, and that her husband practices federal Indian law. She observed that some participants in the discussion had asked whether the inclusion of tribes on the list of those who can file amicus briefs as of right would place the Committee on a slippery slope by leading to requests to include other types of entities. Participants had suggested, for example, that if the Rule is amended to treat tribes the same as states then the expanded category should include municipalities as well as tribes. Participants had also asked what, if anything, the addition of tribes to the list would suggest about tribal sovereignty generally. Justice Eid suggested that, at this point, the Committee may wish to consider whether it has done all the research that can be done on this issue. Perhaps the Committee could ask Judge Sutton to write to the circuits, summarizing the Committee's research and discussions and leaving the question, for the moment, to each circuit for treatment on a local basis.

Judge Sutton observed that one reason the Committee's discussions expanded to encompass municipalities as well as states was that the Supreme Court's rule authorizes amicus filings (without court permission or party consent) by municipalities but not tribes. He noted that, if municipalities as well as tribes were added to the list of entities that can make amicus filings as of right, the change would not correlate with sovereignty issues because municipalities are not sovereign. Thus far, he observed, there did not appear to be support for adding foreign governments to the list. He noted that, when the Standing Committee has previously discussed this item, participants expressed varying views. Among the responses that the Committee has received thus far from the circuits, a negative response has been received from the Tenth Circuit; and the First Circuit has expressed concern about recusal issues (though that concern arose more with respect to the possible inclusion of municipalities). An attorney member asked whether the Committee knows what, exactly, the recusal practices are in each circuit. Mr. Letter responded

that the practices vary from circuit to circuit, but that he can think of instances when a request to file an amicus brief has been denied because of a recusal issue, and other instances in which a judge has recused from a case because of an amicus filing.

Judge Sutton asked whether – as an interim approach – Committee members favored writing to the circuits to report on the Committee's discussions to date. The letter would explain that the Committee thinks the issue warrants serious consideration but that the Committee is not sure that now is the time to adopt a national rule change on this issue, and that the Committee plans to revisit the issue in five years. A member stated that this approach sounds right to him, and that he would be very concerned about proceeding with a national rule in the light of the possible recusal issues mentioned by the First Circuit. Mr. Letter noted that the DOJ urges that the Committee consult tribes for their views on this issue. The DOJ, he stated, favors the proposed national rule change for tribes but not for municipalities; the DOJ considers this to be an issue relating to sovereignty and believes that the change would not burden the courts because tribes' requests to file amicus briefs are usually granted. On the other hand, Mr. Letter observed, the Committee's discussions have raised some very real practical considerations. The DOJ would not oppose a proposal that would allow circuits to study the issue and adopt a local rule on the subject if they would like. An appellate judge member expressed support for the approach suggested by Judge Sutton; another appellate judge member agreed. Professor Coquillette observed that, in the past, other committees have dealt with some issues in a similar way.

Mr. Letter suggested that Judge Sutton's letter should note that there is substantial support, within the Committee, for the proposal. Judge Sutton suggested that the letter could say that all members of the Committee believe that the proposal implicates serious dignity issues and think that the proposal warrants serious consideration. Mr. Letter asked whether the letter should say that the Committee believes that the idea of a local rule on the subject is worthy of consideration. Judge Sutton responded that it would be problematic to set a precedent of urging circuits to adopt local rules. A district judge member predicted that a letter from Judge Sutton, representing the sense of the Committee, would usefully generate discussion in circuits where the judges have not previously considered the issue.

A motion was made in support of the proposal that Judge Sutton write to the Chief Judges of each circuit. The motion was seconded and passed by voice vote without opposition. Judge Sutton promised to circulate a draft letter to the Committee members for their feedback during the spring.

B. Item No. 10-AP-I (redactions in briefs)

Judge Sutton invited Judge Dow to report on this item, which concerns a proposal by Paul Levy of Public Citizen Litigation Group that the Committee consider questions relating to the sealing or redaction of appellate briefs. Judge Dow summarized the variety of approaches among the circuits. In some circuits there is a presumption that documents that were sealed below remain sealed on appeal. In the Seventh Circuit (and to some extent, apparently, the Third Circuit) there is a presumption that documents will be unsealed on appeal, so that a party must

file a motion if it wants to maintain sealing on appeal. The Federal Circuit and the D.C. Circuit direct the attorneys to review the sealed portions of the record and identify the portions that need not remain sealed on appeal.

Judge Dow observed that it may make sense to distinguish, for purposes of the treatment of sealing, between materials exchanged in discovery and materials that become part of the court record. It would be useful, he noted, to consult the circuit clerks in selected circuits – perhaps the Seventh Circuit, the D.C. Circuit, the Federal Circuit, and a circuit in which items sealed below presumptively remain sealed on appeal. He observed that evolutions in technology will affect these issues; relevant questions include, for example, how the Next Generation CM/ECF software will address sealing. He also noted that there may be differences in the approaches that one would adopt in civil and criminal cases. An overarching question, Judge Dow suggested, is whether a national rule would be appropriate, given that the circuits currently take at least three different approaches to sealing on appeal.

Judge Dow noted that Mr. Letter had volunteered to work with him and the Reporter on this project. Judge Sutton thanked Judge Dow for his work.

C. Item No. 11-AP-B (FRAP 28 / introductions in briefs)

Judge Sutton invited the Reporter to introduce this item, which concerns whether Rule 28 should be amended to mention the possibility of including introductions in briefs. This question dovetails with the Committee's earlier discussions – in connection with the pending proposal concerning the statement of the case – about the different constituencies that use the Rules. Experienced appellate litigators are well aware that they can include introductions in their briefs, and they do so to good effect. The question might be whether to amend the Rule to provide guidance for young lawyers or other lawyers with less appellate experience. A former Committee member had pointed out to the Committee that the proposed amendment concerning the statement of the case would make Rule 28(a)(6) flexible enough to permit a lawyer to include an introduction as part of the statement of the case. On the other hand, the flexibility provided by amended Rule 28(a)(6) would not serve the function of giving notice to less-experienced lawyers. Some participants in the discussion have questioned whether it would be practicable to provide guidance, in the Rule text, concerning the nature and function of the introduction. One possibility that had been floated – providing guidance in the Committee Note – would appear to run afoul of the principle, discussed earlier in the day, that Committee Notes should not be used for the purpose of providing advice to lawyers.

Judge Sutton observed that it would be hard to devise a rule that specifies what an introduction should do, and how to distinguish the introduction from the summary of argument. Professor Coquillette noted that traditionally, neither Rules nor Notes include advice for practitioners. An attorney member suggested that one would not necessarily wish to place the introduction within the statement of the case. On the other hand, if and when the proposed amendments to Rule 28(a)(6) take effect, that Rule will give lawyers flexibility in drafting the statement of the case – which diminishes the reasons to amend the Rules specifically to address

the topic of introductions. A member noted that a bad introduction is worse than no introduction.

Mr. Byron suggested that the Committee Note to the pending amendments to Rule 28(a) could be revised to include a discussion of introductions. The Note could state that an introduction is not prohibited under the Rules and can be included either as the first item in the brief or in the statement of the case. (Mr. Byron noted that in his own practice he has alternated between those two placements for the introduction, depending on the circumstances of the case.) Judge Sutton noted that the benefit of mentioning those considerations in the Note would be to inform lawyers about the topic; the risk would be that this information would encourage the inclusion of poorly written introductions. A participant observed that – because the Standing Committee has the ability to make changes to Committee Notes when proposed amendments are presented to it for approval – one could be confident that the language of the Committee Note would be reviewed by the Standing Committee.

An appellate judge member said that introductions are helpful but not indispensable. Another appellate judge member noted that if the Rules invited the inclusion of introductions, they might elicit introductions that are similar to arguments to a jury. A member suggested that it might be preferable to wait and see how practice develops under the pending amendments to Rule 28(a). An attorney member stated that he would oppose adding language to the Rule 28(a) Committee Note to mention introductions.

A motion was made to remove this item from the Committee's agenda for the present. The motion was seconded and passed by voice vote without opposition.

VI. Additional Old Business and New Business

A. Item No. 11-AP-E (FRAP 4(b) / criminal appeal deadlines)

Judge Sutton invited the Reporter to introduce this item, which concerned a suggestion by Dr. Roger Roots that Appellate Rule 4(b) be amended to accord criminal defendants the same 30-day appeal period that applies to government appeals in criminal cases. The Reporter suggested that it would be difficult to argue that the difference between the defendant's and the government's appeal time is unconstitutional. A more significant question is whether the current 14-day appeal time period poses a hardship for defendants. Another question arises from the fact that the appeal times in Rule 4 depend on the categorization of the appeal as civil or criminal; at the margins, there is the possibility that the differential in appeal times between civil and criminal cases could give rise to difficulties if there is uncertainty over how to categorize a particular appeal. A third question is whether there should be symmetry between the appeal times that apply to the opposing parties in a given type of case.

As to the question of hardship, the Reporter suggested a few considerations. Fourteen days is a short period, and it is shorter than the period for civil appeals. The notice of appeal is a simple document. In some cases there may be challenges involved in identifying colorable

issues for appeal, or difficult strategic questions where a defendant has received a lower sentence than he or she might receive if re-sentenced; but setting such instances aside, ordinarily the decision whether to appeal should not be a difficult one. Additionally, some safeguards exist. In cases where there is a difficulty the defendant can seek an extension of the time to appeal under Rule 4(b)(4). At sentencing, the district court must advise the defendant of his or her right to take an appeal, and if the defendant requests, the clerk will file the notice of appeal on the defendant's behalf. When an incarcerated defendant files the notice of appeal himself or herself, Rule 4(c)'s inmate-filing provision would apply. These features, the Reporter suggested, might alleviate possible hardships. But she noted her lack of experience in criminal law; those with such experience are better situated to assess this question.

With respect to the question of categorization, it turns out that, at the margins, there are some cases that may be difficult to categorize as civil or criminal. If a defendant errs by viewing the case as criminal when it is actually civil, then the harm would be that the defendant files a notice of appeal earlier than is actually necessary. A defendant who is aware of a difficult categorization question and is unsure whether the case counts as civil or criminal can protect himself or herself by filing within the deadline set by Rule 4(b). But a litigant who wrongly assumes that a case is civil when it is actually criminal could lose his or her appeal rights by filing too late. The Reporter observed that this concern had surfaced a decade ago, when the Committee last discussed a proposal to lengthen Rule 4(b)'s appeal deadline for criminal defendants.

As to the question of symmetry between litigants, the Reporter observed that there is an attraction to the idea that if one litigant receives additional time to appeal, their opponent should also have the benefit of the longer period. That principle is applied in Appellate Rule 4(a), which provides additional time to all litigants when one of the litigants is a United States government entity. Perhaps counterbalancing that, there are a number of asymmetries in criminal practice – such as asymmetries in discovery and asymmetries in rights to take an appeal.

The Reporter observed that if the Committee were to be interested in proceeding with this item, it would be important to consult the Criminal Rules Committee. Moreover, if one were to amend Rule 4(b) on grounds of symmetry, that might also raise a question about Civil Rule 12(a) (which provides federal government defendants with additional time to respond to the complaint).

A member stated that he was unpersuaded by the constitutional arguments and the arguments concerning symmetry. However, he suggested that it would be useful for the Committee to obtain data that would bear on the hardship argument. How often do criminal defendants fail to take an appeal, and why? For example, are appeals foregone for strategic reasons or are they forfeited due to lawyer incompetence? This member noted that there might be an alternative approach to protecting appeal rights; one could adopt a system in which the default is that there will be an appeal, and leave it up to the litigant to opt out if he or she does not wish to take an appeal.

Mr. Byron reported that he had discussed this item with Mr. Letter prior to the meeting; Mr. Letter had discussed the issue of hardship with a friend who is a federal public defender in the District of Columbia, who reported that in the experience of that office this typically is not a problem. Most criminal defendants who wish to file appeals tend to do so expeditiously. A district judge member stated that he would have no objection to a rule that gave criminal defendants 30 days to appeal. He observed, though, that all criminal defendants are represented by counsel unless they decide, after a waiver, that they don't want a lawyer. And by the time of sentencing, the defendant and the lawyer have already had time (often, a lot of time) to consider possible issues of trial error. So the only issues that would arise shortly before the appeal deadline would relate to possible sentencing error. And, as noted, the judge informs the defendant at sentencing concerning the right to take an appeal. In sum, this member stated, he did not see the 14-day appeal time period posing a problem in his district; but, he suggested, a 30-day appeal time period could be useful if the defendant needs to think through a tricky sentencing issue. On the other hand, he noted, the latter sort of difficulty can be addressed under the current rules if the judge grants a request to extend the appeal time.

An attorney member asked why it is important to require the defendant to decide within 14 days whether to appeal; what events, this member wondered, turn on the date on which the defendant's appeal time runs out? A district judge member queried whether the timing had any implications for speedy trial requirements. The attorney member asked whether the expiration of the time to appeal would have implications for the timing of a remand to custody, or whether there is any similar systemic interest in getting the defendant's punishment started sooner rather than later. The district judge member responded that he did not think so; he observed that the question of whether the defendant can stay out on bond after sentencing is governed by statute. He noted that in a given circuit, the timing of the notice of appeal might affect the appellate briefing schedule.

Mr. Byron observed that the DOJ has an interest in the speedy resolution of criminal cases. Even the government's appeal time period in criminal cases, he noted, is shorter than the government's appeal time period in civil cases. An attorney member asked why one would not adopt a system in which the 14-day appeal time period applied to both sides in criminal cases; the government could file protective notices of appeal and then withdraw the notices if it decided not to appeal. Another member responded that there would be serious costs to a system that required the government to file a notice of appeal before it had had time to fully consider whether it wished to take an appeal. This member observed that to the public, the government's filing of a notice of appeal is not treated as merely an administrative act; it would be counter-productive if the government either had to decide whether to appeal within a very short time period or else withdraw a protective notice of appeal that it had previously filed. The attorney member who raised the question about applying the 14-day period to both sides suggested that if the 14-day deadline would impose those sorts of costs on the government, it was worth considering whether that deadline imposes similar costs on the defendant. The other member responded that he viewed those costs as asymmetric; when a criminal defendant files a notice of appeal it does not trigger the same sorts of public, institutional concerns that arise when the government files a notice of appeal.

An appellate judge stated that, in his experience, defendants in the Eleventh Circuit are not denied the right to an appeal due to a late notice. If the defendant asked his lawyer to file the notice and the lawyer did not do so, then the court of appeals sends the case back to the district court for resentencing and the entry of a new judgment. He suggested that the Committee should be cautious about altering a time period that is so long-established.

Returning to the fact that the Committee had considered a similar proposal a decade earlier, Judge Sutton asked who had submitted the proposal on that earlier occasion. An attorney member asked what reasons had been given for the Committee's rejection of that prior proposal. Mr. Byron agreed to provide the Committee with the materials that Mr. Letter had submitted to the Committee in connection with that earlier discussion. The Reporter noted that she would locate the initial proposal that triggered the earlier discussion, and that she would update the Criminal Rules Committee Chair and Reporters concerning the Committee's discussion. By consensus, the Committee decided to retain this item on its study agenda. Judge Sutton thanked Dr. Roots for raising this issue with the Committee.

B. Other possible items for consideration by the Committee

Judge Sutton invited Committee members to suggest items for the Committee's consideration.

An attorney member suggested that it might be useful to clarify practice under Appellate Rule 8 and Civil Rule 62 concerning procedures for appeal bonds. The bonding process unfolds quickly and can be confusing. For example, Civil Rule 62(b) provides that "[o]n appropriate terms" the court may stay execution of a judgment pending disposition of a postjudgment motion, while Civil Rule 62(d) discusses the obtaining of a supersedeas bond to secure a stay of the judgment pending appeal. So there are two different episodes as to which security is an issue, and the would-be appellant will likely need to provide security both with respect to the time period when the postjudgment motions are pending and then also with respect to the time period of the appeal. Moreover, a would-be appellant, he observed, might not always get a bond; it might use a letter of credit, or let the other side hold a check, or pay the other side a sum of money. So the way that bonding occurs in practice will depend on what method is both cost-effective for the would-be appellant and satisfactory to the prospective appellee. Perhaps there is no reason to amend the Rules to reflect the variety of actual practices, but even an experienced practitioner can find the process opaque. An amendment to the Rules might bring greater order to this area of practice. The Reporter stated that she would consult Professor Cooper in order to determine when the Civil Rules Committee had last considered the question. The attorney member noted that in some state court systems the amount of the bond is specified by law (for example, a provision might set the bond at a certain percentage of the judgment); by contrast, he observed, in federal litigation no provision specifies the amount of the bond and thus the issue sometimes ends up getting litigated.

A member asked why Rule 35(b)(2) sets the length limit for a petition for rehearing en banc in pages rather than words. The Reporter undertook to investigate this question.

VII. Other Information Items

A. *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012)

Judge Sutton invited Mr. Newsom to introduce this item, which concerns the Supreme Court's recent decision in *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012). In this 8-1 decision, the Court held that 28 U.S.C. § 2253(c)(3)'s requirement that a certificate of appealability ("COA") indicate which issue or issues meet the statutory test for issuance of a COA is not a jurisdictional requirement. Thus, the COA's failure to include that specification did not deprive the court of appeals of jurisdiction.

Mr. Newsom reviewed for the Committee the structure of Section 2253(c). Section 2253(c)(1) provides that "[u]nless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals" in a habeas or Section 2255 proceeding. Everyone recognizes that this provision sets a jurisdictional requirement because it meets the clear statement test set out in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). Section 2253(c)(2) states that the COA "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." That provision was not squarely at issue in *Gonzalez*. And then Section 2253(c)(3) states that the COA "shall indicate which specific issue or issues satisfy the showing required by" Section 2253(c)(2).

Mr. Gonzalez's federal habeas petition raised a Sixth Amendment issue. The district court denied the petition as untimely. Gonzalez sought a COA on both the timeliness issue and the underlying Sixth Amendment issue. A court of appeals judge granted the COA, mentioning timeliness but not the Sixth Amendment issue. The question was whether the COA's failure to mention the Sixth Amendment issue (as required by Section 2253(c)(3)) deprived the court of appeals of jurisdiction. The state first raised this issue in response to Gonzalez's petition for certiorari.

The Supreme Court – contrasting Section 2253(c)(3)'s wording with that of Section 2253(c)(1) – held that Section 2253(c)(3)'s requirement is mandatory but not jurisdictional. Justice Scalia, writing in dissent, argued that the relationship between Sections 2253(c)(3) and 2253(c)(1) was similar to the relationship between Appellate Rules 3 and 4. Rule 4 sets the deadline for filing the notice of appeal, and Rule 3 specifies the contents of the notice of appeal. In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), the Court held that Rule 3 – the content provision – was jurisdictional because of its relationship to Rule 4's jurisdictional deadline. In response, the Court stated that *Torres* presented a different question; in part, the Court observed that it had relied on the Committee Note to Rule 3.

One question raised by this case is whether the approach that the *Gonzalez* Court took to Section 2253(c) signals a retrenchment from the *Torres* rule. Another question is whether the *Gonzalez* Court's approach will affect the courts' views on whether Appellate Rule 4(a)(4)'s requirement of a "timely" tolling motion is jurisdictional.

B. D.C. Circuit Rule 35(a)

Judge Sutton invited the Reporter to introduce this topic, which was drawn to the Committee's attention by Mr. Letter. Mr. Letter pointed out that D.C. Circuit Rule 35(a) alters the time to seek rehearing. For criminal appeals, it lengthens the time from 14 days to 45 days, and for civil appeals in cases involving no federal parties, it lengthens the time from 14 to 30 days. Two other circuits also have rules that lengthen the time to seek rehearing to some extent. For appeals generally (other than civil appeals in cases involving federal parties), Eleventh Circuit Rule 35-2 lengthens the time period from 14 days to 21 days while Federal Circuit Rule 40(e) lengthens the time period from 14 days to 30 days. Perhaps these circuits feel that lengthening these deadlines will lead parties to be more judicious in their decision whether to seek rehearing; or perhaps these circuits prefer to avoid the need to resolve motions to extend the time to seek rehearing. At least two circuits (the Fourth and Fifth Circuits) have local rules that suggest a reluctance to extend the time to seek rehearing.

Mr. Byron explained that the DOJ has an interest in uniformity, because inter-circuit variations can pose pitfalls for those who practice in multiple circuits. A longer period for seeking rehearing would have the benefit of removing the need to seek extension of that period by motion. On the other hand, he said, the DOJ does not have a strong position on this issue and it defers to the views of judges and circuit clerks, who have to deal with these issues more directly. An appellate judge member observed that the Eleventh Circuit is willing to grant extension motions if there is a reason for the motion, and that the Eleventh Circuit's local rules include a provision stating that an attorney is not obligated to seek rehearing, and that lawyers should think before filing a petition for rehearing. Judge Sutton observed that some circuits might wish to expedite the time from the filing of an appeal to decision of the appeal. The Fourth and Eleventh Circuits, for example, are known to dispose of appeals swiftly. He asked whether the question of deadlines for seeking rehearing is one that implicates issues specific to local circuit culture, and he questioned whether judges would favor a rule that required national uniformity on this issue. An attorney member suggested that the question of time to disposition might not be affected by deadlines for seeking rehearing, because it depends on how one counts the time to disposition. Mr. Green observed that the usual calculus looks at the time when the case is finally disposed of after the disposition of any timely petition for rehearing. An appellate judge member suggested that there was no reason for the Committee to take action on the question of deadlines for seeking rehearing.

By consensus, the Committee decided not to add this item to its study agenda.

VIII. Date and Location of Fall 2012 Meeting

Judge Sutton reminded the Committee that it will next meet in Philadelphia, Pennsylvania on September 27 and 28, 2012.

IX. Adjournment

The Committee adjourned at 2:30 p.m. on April 12, 2012.

Respectfully submitted,

Catherine T. Struve
Reporter

TAB 6A

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MEMORANDUM

To: **Hon. Mark R. Kravitz, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Reena Raggi, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **May 17, 2012**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on April 22-23, 2012, in San Francisco, California, and took action on a number of proposals. The Draft Minutes are attached.

This report presents two action items. The Committee recommends that:

(1) a proposed amendment to Rule 11 (advice regarding immigration consequences of guilty plea), previously published for public comment, be approved as amended and transmitted to the Judicial Conference, and

(2) proposed amendments to Rules 5(d) and 58 (advice regarding consular notification at initial appearance), previously transmitted to the Supreme Court and returned, be approved as amended.

The report also includes information items concerning the proposed amendments to Rules 12 and 34, which were published for public comment and are being studied further by the Committee, as well as proposed amendments to Rules 6 and 16, which the Committee has decided not to pursue.

II. Action Items

A. Rule 11 (advice re immigration consequences of guilty plea)

Following publication, the Advisory Committee decided to maintain the language of the proposed amendment to Rule 11 as drafted, but adopted several changes in the Committee Note that respond to issues raised in the public comments. The Advisory Committee now recommends that the Standing Committee approve the amendment to Rule 11 and transmit it to the Judicial Conference.

1. <u>The purpose of the proposed amendment</u>

In light of the Supreme Court's ineffective assistance of counsel decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Advisory Committee concluded that a judicial warning regarding possible immigration consequences should be required as a uniform practice at the plea allocution. *Padilla* held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment. The Court stated that in light of changes in immigration law "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S.Ct. at 1480 (footnote omitted). It also noted that "because of its close connection to the criminal process," deportation as a consequence of conviction is "uniquely difficult to classify as either a direct or a collateral consequence" of a plea. *Id*. at 1482. The Committee concluded that the Supreme Court's decision provides an appropriate basis for adding advice concerning immigration consequences to the required colloquy under Rule 11, leaving the question whether

to provide advice concerning other adverse collateral consequences to the discretion of the district courts.

In the Committee's initial deliberations, a minority of members opposed the amendment on the grounds that it was unwise and unnecessary to add further requirements to the already lengthy plea colloquy now required under Rule 11. *Padilla* was based solely on the constitutional duty of defense counsel, and it did not speak to the duty of judges. The list of matters that must be addressed in the plea colloquy is already lengthy, and these members expressed concern that adding immigration consequences would open the door to future amendments. This could eventually turn a plea colloquy into a minefield for a judge and expand litigation challenges to pleas despite the rule's harmless error provision.

A majority of the Committee concluded, however, that deportation is qualitatively different from the other collateral consequences that may follow from a guilty plea, and it therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy. Although *Padilla* speaks only to the duty of defense counsel to warn a defendant about immigration consequences, the Supreme Court's recognition of the distinctive nature of such consequences also supports requiring a judicial warning. This would be consistent with the practice of the Department of Justice, which now advises prosecutors to include a discussion of those consequences in plea agreements. Thus, judges should warn a defendant who pleads guilty that the plea could implicate his or her right to remain in the United States or to become a U.S. citizen.

The proposed amendment mandates a generic warning rather than specific advice concerning the defendant's individual situation. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship. In drafting its proposal, the Committee was cognizant of the complexity of immigration law, which likely will be subject to legislative changes. Accordingly, the Committee's proposal uses non-technical language that is designed to be understood by lay persons and will avoid the need to amend the rule if there are legislative changes altering more specific terms of art.

2. <u>The public comments</u>

Six written comments were received. Only one comment disagreed with the decision to add advice concerning possible immigration consequences to the plea colloquy; it recommended that the amendment be withdrawn or at least substantially narrowed.

The remaining comments–which came from immigration specialists, a federal defender, and the National Association of Criminal Defense Lawyers–agreed with the concept of amending Rule 11 to add advice concerning immigration consequences. Two comments supported the amendment as published. Two other comments suggested modifications to the Committee Note. The final comment, from the National Association of Criminal Defense Lawyers, urged the Advisory Committee to withdraw the amendment and pursue a different strategy, placing the burden of providing warnings and advice at the plea colloquy upon the prosecution, rather than the court.

3. The Advisory Committee's recommendation

After publication, the Rule 11 Subcommittee and the Advisory Committee both reconsidered the foundational question whether Rule 11 should be amended to require advice concerning immigration consequences in all plea colloquies. Members considered prior concerns about lengthening the plea colloquy, as well as the argument that not all defendants are aliens and conscientious judges do not need a rule to require them to give warnings in appropriate cases. After hearing the report of the Rule 11 Subcommittee and full discussion, the Advisory Committee reiterated its support for adding immigration consequences to the plea colloquy. A majority of the Committee agreed that the immigration consequences covered by the proposed amendment–removal from the U.S. and denial of citizenship and reentry–are qualitatively different than other collateral consequences, and that they warrant inclusion in the plea colloquy. As the Supreme Court noted in *Padilla*, "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S.Ct. at 1480 (footnote omitted). Although the Supreme Court's decision does not require the proposed amendment, it does provide an appropriate basis for distinguishing advice concerning immigration consequences from other collateral consequences.

There was also support for the requirement that the court provide the general statement of possible immigration consequences in every case. Members emphasized that immigration consequences are an issue in nearly one half of all criminal cases. In fiscal year 2011, 48% of defendants for whom sentencing data were available were non-citizens.[1] Moreover, as

[1]U. S. Sentencing Commission, 2011 Sourcebook of Federal Sentencing Statistics, Table 9, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table09.pdf .

emphasized in several of the public comments, attempts to determine the immigration status of individual defendants could raise self-incrimination issues.

The Advisory Committee accepted the Rule 11 Subcommittee's recommendation to make several small modifications in the Committee Note to address concerns raised in the public comments. The changes emphasize that the court should provide only a general statement that there may be immigration consequences of conviction, and not seek to give specific advice concerning a defendant's individual situation. The National Immigration Project argued persuasively that it is neither appropriate nor feasible for judges to give individualized advice, and it provided examples of cases in which courts gave erroneous advice. See 11-CR-005 at 2 n.2. Moreover, attempts to elicit information that would provide the basis for individual advice could raise self-incrimination concerns.

The Committee Note as published and the changes recommended by the Subcommittee are shown below:

> **Subdivision (b)(1)(O).** The amendment requires the court to include a general statement ~~concerning the potential~~ that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.
>
> For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.
>
> The amendment mandates a generic warning, ~~and does not require the judge to provide~~ not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without ~~first~~ attempting to determine the defendant's citizenship.

By a vote of nine in favor and three opposed, the Advisory Committee agreed to adopt the proposed changes in the Committee Note, and to transmit the proposed amendment to the

Standing Committee with the recommendation that it be approved and sent to the Judicial Conference.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 11 be approved as amended and transmitted to the Judicial Conference.

Rule 11. Pleas.

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); ~~and~~

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and~~.~~

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

CHANGES MADE AFTER PUBLICATION

The Committee Note was revised to make it clear that the court is to give a general statement that there may be immigration consequences, not specific advice concerning a defendant's individual situation.

PUBLIC COMMENTS

11-CR-001. Judge Hayden Head (SD TX). Judge Head opposed the amendment and suggested that it be withdrawn or narrowed. He emphasized that "Rule 11 has served well by wisely excluding collateral consequences." No amendment addressing immigration consequences in the plea colloquy is required because the Supreme Court's decision in *Padilla v. Kentucky*, 130 U.S. 1473 (2010), addressed the duty of counsel, not the courts. However, if the Committee does choose to proceed with the amendment, it should be revised to narrow its scope to the facts of *Padilla*, which concerned a person with a documented right to be in the United States.

11-CR-002. **Jack Schisler, Fayetteville Chief of the Arkansas Federal Defender Organization.** Mr. Schisler supported the proposed amendment. It is "good practice" to include this information, a practice that is now followed in the Western District of Arkansas. He saw no harm in the admonition being given to all defendants.

11-CR-004. The Federal Magistrate Judges Association. FMJA endorsed the proposed amendment.

11-CR-005. Sejal Zota and Dan Kesselbrenner of the National Immigration Project of the National Lawyers Guild. The National Immigration Project proposed changes to the Committee Note to clarify that the court should neither attempt to provide specific advice to individual defendants nor to determine their citizenship, as well as additional notes regarding the appointment of immigration counsel and the withdrawal of pleas if the defendant was not advised of immigration consequences.

Peter Goldberger of the National Association of Criminal Defense Lawyers (NACDL) (11-CR-009). NACDL suggested that the Committee withdraw the current proposal and develop an alternative proposal that would place the burden on the prosecutor to "make an affirmative and well informed representation as to what

immigration consequences will likely flow from conviction on the tendered plea" when the government's records indicate that the defendant is not a citizen.

11-CR-011. Alina Das, co-director of the Immigrant Rights Clinic at NYU School of Law. Ms. Das suggested that the Committee Note be amended to refer to or draw from two online reports co-authored by the Clinic and the Immigrant Defense Project.

B. Rule 5 (providing that non-citizen defendants in felony cases be advised at initial appearance regarding consular notification)

Rule 58 (providing that non-citizen defendants in petty offense and misdemeanor cases be advised at initial appearance regarding consular notification)

1. The purpose of the amendments

These parallel amendments were proposed by the Assistant Attorney General Lanny Breuer, who explained the relationship between the proposed rules and the treaty obligations of the United States. The Vienna Convention on Consular Relations is a multilateral treaty that sets forth basic obligations that a country has towards foreign nationals arrested within its jurisdiction. In order to facilitate the provision of consular assistance, Article 36 provides that detained foreign nationals must be advised of the opportunity to contact the consulate of their home country. Additionally, many bilateral agreements also require consular notification.

There has been substantial litigation over the manner in which Article 36 is to be implemented, whether the Vienna Convention creates rights that may be invoked by individuals in a judicial proceeding, and whether any possible remedy exists for defendants not appropriately notified of possible consular access at an early stage of a criminal prosecution. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Supreme Court rejected a claim that suppression of evidence was an appropriate remedy for failure to inform a non-citizen defendant of his ability to have the consulate from his country of nationality notified of his arrest and detention. The United States argued that the Vienna Convention does not create an enforceable individual right, but the Supreme Court did not rule on the preliminary question of whether the Vienna Convention creates an individual right, holding that regardless of the answer to that question, suppression of evidence is not an appropriate remedy for any violation.

General Breuer explained that notwithstanding the Justice Department's position that the Vienna Convention does not create an enforceable individual right, the executive has created policies and taken substantial measures to ensure that the United States fulfills its international obligations to other signatory states with regard to the Article 36 consular provisions. For example, the Justice Department has issued regulations that establish a uniform procedure for consular notification when non-citizens are arrested and detained by officers of the Department. See 28 CFR § 50.5. The Department of State has also undertaken multiple measures. It placed on a public website "Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them," which includes 24-hour contact telephone numbers that law enforcement officers can use to obtain advice and assistance. The Department of State published a Consular Notification and Access booklet, a Consular Notification Pocket Card for police use that has a model Vienna Convention consular notice, and a wall poster containing the consular notification in many languages that police can post in their facilities. The State Department regularly provides training about ensuring compliance. When a law enforcement authority fails to give notice to the consulate of a detained foreign national, the United States is committed to immediately informing the consulate, addressing the situation to the extent possible, and preventing a reoccurrence.

Assistant Attorney General Breuer urged that in addition to the measures already taken by the Departments of Justice and State, Rules 5 and 58 should be amended "to provide an additional assurance that the Vienna Convention obligations are satisfied." He characterized the proposed amendments as "responsible procedural means for further fulfilling the obligations of the United States under the Convention, without stepping into important questions of substantive rights that the Court has reserved for a later day."

2. The procedural history of the proposed amendments

At its meeting in April 2010, the Advisory Committee agreed to recommend to the Standing Committee that proposed amendments to Rules 5 and 58 be published for public comment.[2] The Standing Committee approved the amendments for publication in August 2010. After a review of the public comments at its April meeting in 2011, the Advisory Committee voted to forward the amendments to the Standing Committee without change with the recommendation that they be approved and transmitted to the Judicial Conference.

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[2]The proposed amendments submitted to the Supreme Court included not only a change to Rule 5(d) providing for consular notice, but also a change to Rule 5(c) to clarify where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition treaty. The Supreme Court has transmitted the proposed amendment to Rule 5(c) to Congress.

The proposed amendments to Rules 5 and 58 were approved by the Standing Committee and the Judicial Conference in 2011, and subsequently transmitted to the Supreme Court.

In April 2012, the Supreme Court returned the Rule 5(d) and Rule 58 amendments to the Advisory Committee for further consideration.[3]

3. The Advisory Committee's recommendation

At its April 2012 meeting, the Advisory Committee discussed possible concerns that the proposed rules could be construed (1) to intrude on executive discretion in conducting foreign affairs both generally and specifically as it pertains to deciding how to carry out treaty obligations, and (2) to confer on persons other than the sovereign signatories to treaties, specifically, criminal defendants, rights to demand compliance with treaty provisions.

Representatives of the Department of Justice informed the Committee that they had conferred with counterparts at the Department of State, and the Departments jointly proposed some changes to the proposed rule amendments to alleviate these concerns.

After extended discussion, the Committee concluded that Rules 5(d) and 58 should be

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[3]The proposed amendment to Rule 5(d) submitted to the Supreme Court and returned by it provided in pertinent part:

> **(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:
>
> * * * * *
>
> (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.

The proposed amendment to Rule 58(b)(2) contained parallel language. The Supreme Court did not return the proposed amendment to Rule 5(c), which it transmitted to Congress.

amended to address the questions of consular notification, but that the amendments should be redrafted. Revisions to the text were approved unanimously, on the understanding that the language would have to be reviewed by the Standing Committee's style consultant, and that the Reporters would review the Committee Notes to determine whether any changes should be made in light of the return by the Supreme Court and the revised language. The final language for both the rule and committee note would be circulated electronically for Committee approval.

Following the meeting, revised rules and committee notes were circulated electronically to all members of the Advisory Committee, and they received unanimous approval.

As now amended, the proposed rules require the court to inform non-citizen defendants at their initial appearance that (1) they may request that a consular officer from their country of nationality be notified of their arrest, and (2) in some cases international treaties and agreements require consular notification without a defendant's request. The proposed rule does not, however, address the question whether treaty provisions requiring consular notification may be invoked by individual defendants in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36 of the Vienna Convention. More particularly, the proposed rule does not itself create any such rights or remedies.

Although the changes in the text of the proposed rules and committee notes were intended to clarify but not alter the effect of the proposed amendments, members noted at the April meeting that given the return from the Supreme Court it might be appropriate to republish for additional public comment.

Recommendation–The Advisory Committee recommends that the proposed amendments to Rules 5 and 58 be approved as amended.

Rule 5. Initial Appearance

* * * * *

(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~~

(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:

(i) that the defendant may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested; and

(ii) that even without the defendant's request, consular notification may be required by a treaty or other international agreement.

* * * * *

Committee Note

Subdivision (d)(1)(F). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice. See 28 C.F.R. § 50.5 (requiring consular notification advice to arrested foreign nationals by Department of Justice arresting officers).

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action.

At the time of this amendment, many questions remain unresolved by the courts 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. More particularly, it does not create any such rights or remedies.

CHANGES MADE FOLLOWING PUBLICATION

Following the return of the proposed amendment by the Supreme Court, the rule and note were revised to clarify the advice to be provided and the limited purpose of the amendment. Note language was added referencing the regulations requiring arresting officers to provide consular notification without delay, and stating that the amendment does not create rights and remedies for any violation of the Vienna Convention.

PUBLIC COMMENTS CONCERNING RULE 5(d)

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agreed with the amendment in principle, but suggested amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing.

10-CR-002. Federal Magistrate Judges Association. FMJA (1) expressed some reservations about imposing upon courts the executive function of giving consular notification, and (2) noted that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

"(b) Pretrial Procedure.

* * * * *

(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:

(i) that the defendant may request that an attorney for the government or a federal law

enforcement officer notify a consular officer from the defendant's country of nationality that the defendant has been arrested; and

(ii) that even without the defendant's request, consular notification may be required by a treaty or other international agreement.

COMMITTEE NOTE

Section (b)(2)(H) Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice. See 28 C.F.R. § 50.5 (requiring consular notification advice to arrested foreign nationals by Department of Justice arresting officers).

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that our treaty obligations are fulfilled, and to create a judicial record of that action.

At the time of this amendment, many questions remain unresolved by the courts 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. More particularly, it does not create any such rights or remedies.

CHANGES MADE FOLLOWING PUBLICATION

Following the return of the proposed amendment by the Supreme Court, the rule and note were revised to clarify the advice to be provided and the limited purpose of the amendment. Note language was added referencing the regulations requiring arresting officers to provide consular notification without delay, and stating that the amendment does not create rights and remedies for any violation of the Vienna Convention.

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 suggested amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing.

10-CR-002. Federal Magistrate Judges Association. FMJA (1) expressed some reservations about imposing upon courts the executive function of giving consular notification, and (2) noted that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

III. Information Items

A. Rules 12 and 34

Proposed amendments to Rule 12 and conforming changes to Rule 34 were published for public comment in August 2011, and numerous submissions were received, including detailed objections and suggestions from defense bar organizations. The Reporters prepared an extensive memorandum, totaling more than 80 pages, analyzing the comments and discussing possible changes in the amendments as published.

The Rule 12 Subcommittee concluded that the concerns raised by the public comments should be considered at a face-to-face meeting, which was held in conjunction with the full Committee's April meeting in San Francisco.

The half-day meeting in San Francisco was very productive, and the Subcommittee expects to complete its work over the summer and present its recommendation at the Advisory Committee's October meeting.

B. Rule 6

The Advisory Committee decided not to proceed with Attorney General Eric Holder's proposal to amend Rule 6(e) to establish procedures for the disclosure of historically significant grand jury materials. The Attorney General proposed an amendment that would (1) allow district courts to permit disclosure, in appropriate circumstances and subject to required procedures, of archival grand jury materials of great historical significance, and (2) provide a temporal end point for the presumption of secrecy of grand jury materials that had become part of the National Archives.

A subcommittee, chaired by Judge John Keenan, held two lengthy teleconferences to discuss the Attorney General's proposal and reviewed written and oral comments from (1) Public Citizen Litigation Group (which litigated cases on behalf of historians seeking access to grand jury materials), (2) District Judge D. Lowell Jensen (former chair of the Advisory Committee on Criminal Rules), (3) former Attorney General and District Judge Michael Mukasey, and (4) former U.S. Attorneys for the Southern District of New York, Robert Fiske (a former member of the Advisory Committee) and Otto Obermaier. Further, the Reporters prepared a research memorandum exploring general principles governing the relationship between the court and the grand jury, precedents relating to inherent judicial authority to disclose grand jury material, and background materials regarding past amendments to Rule 6(e). At the close of the second teleconference, all members of the Subcommittee–other than those representing the Department of Justice–voted to recommend that the Committee not pursue the proposed amendment.

After a report from the Rule 6 Subcommittee, discussion among the full Committee revealed consensus that in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority, and that it would be premature to set out standards for the release of historical grand jury materials in a national rule. Representatives of the Department of Justice thanked the Committee for its careful consideration of the Attorney General's suggestion.

C. Rule 16

The Committee discussed correspondence from Judge Christina Reiss of the District of Vermont suggesting that Rule 16(a) be amended to require pretrial disclosure of all of a defendant's prior statements. Discussion revealed a consensus among members that no serious problem exists warranting the proposed amendment, which could produce unintended, adverse consequences in cases involving long-term investigations into large-scale criminal organizations.

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 22-23, San Francisco, California

I. ATTENDANCE AND PRELIMINARY MATTERS

The Criminal Rules Advisory Committee ("Committee") met in San Francisco, California on April 22-23, 2012. The following persons were in attendance:

Judge Reena Raggi, Chair
Rachel Brill, Esq.
Carol A. Brook, Esq.
Leo P. Cunningham, Esq.
Kathleen Felton, Esq.
Judge Morrison C. England, Jr.
Chief Justice David E. Gilbertson (by telephone)
James N. Hatten, Esq.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Judge Donald W. Molloy
Judge Timothy R. Rice
Jonathan Wroblewski, Esq.
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Reporter

Judge Mark R. Kravitz, Chair of the Committee on Rules of Practice and Procedure (Standing Committee)
Judge Marilyn L. Huff, Standing Committee Liaison

The following persons were absent:

Assistant Attorney General Lanny A. Breuer

The following persons were present to support the Committee:

Andrea L. Kuperman, Esq. (by telephone)
Laural L. Hooper, Esq.
Peter G. McCabe, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.

The following individuals were also present:

Andrew D. Goldsmith, Esq.
(on Tuesday, April 23, 2012, on behalf of the Department of Justice)

Peter Goldberger, Esq.
(on behalf of the National Association of Criminal Defense Lawyers)

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi welcomed the members and, on behalf of the entire Committee, thanked Judge Richard C. Tallman, the Committee's previous Chair, for arranging the meeting at the James R. Browning United States Courthouse in San Francisco.

B. Review and Approval of Minutes of October 2011 Meeting

A motion to approve the minutes of the October 2011 Committee meeting in St. Louis, Missouri, having been moved and seconded,

The Committee unanimously approved the October 2011 meeting minutes by voice vote.

C. Other Opening Business

The members indicated their review of the Draft Minutes of the January 2012 Meeting of the Standing Committee and the Report of the September 2011 Proceedings of the Judicial Conference.

III. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Judicial Conference

Judge Raggi reported that the following proposed amendments, approved by the Judicial Conference, were likely also to be approved by the Supreme Court and transmitted to Congress before May 1, 2012, whereupon they would take effect on December 1, 2012, unless Congress acts to the contrary:

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.

2. Rule 15. Depositions. Proposed amendment authorizing deposition in foreign countries when the defendant is not physically present if the court makes 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.

3. Rule 37. Indicative Rulings. Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant belief because appeal has been docketed.

Judge Raggi reported that the following proposed amendment was approved by the Judicial Conference at its March 2012 meeting, and would be transmitted to the Supreme Court for review this fall, as part of a larger package of proposed Rules amendments:

1. Rule 16. Proposed technical and conforming amendment clarifying protection of government work product.

B. Proposed Amendments Recommitted by the Supreme Court for Further Consideration

Judge Raggi informed members that two proposed rule amendments had been recommitted by the Supreme Court for further consideration:

1. Rule 5(d). Initial Appearance. Proposed amendment providing that in felony 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.

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.

At the meeting, Judge Raggi identified possible concerns that the proposed amended rules could be construed (1) to intrude on executive discretion in conducting foreign affairs both generally and specifically as it pertains to deciding how to carry out treaty obligations, and (2) to confer on persons other than the sovereign signatories to treaties, specifically, criminal defendants, rights to demand compliance with treaty provisions.

Ms. Felton and Mr. Wroblewski stated that, on behalf of the Justice Department, they had conferred with counterparts at the Department of State, and the departments now jointly proposed some changes to the proposed rule amendments to alleviate concerns such as those identified by Judge Raggi.

After extended discussions, the Committee agreed that Rules 5(d) and 58 should still be amended to address the questions of consular notification, but that the amendments should be redrafted as illustrated in the following version of Rule 5. Judge Raggi noted that, as redrafted, the amendments are a substantive departure from what was published and that it might be prudent to republish them. Judge Raggi further noted that this language would have to be

reviewed by the Standing Committee's style consultant, and that the Reporters would review the Committee Notes to determine whether any changes should be made in light of the return by the Supreme Court and the new language approved by the Committee. She stated that the Reporters would circulate the final language (with any style changes) as well as the accompanying Committee Notes for approval before submission to the Standing Committee.

Rule 5. Initial Appearance

* * * * *

(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:

* * * * *

(F) if the defendant is held in custody and is not a United States citizen:

(i) that the defendant may request that an attorney for the government or a federal law enforcement officer notify a consular officer from the defendant's country of nationality that the defendant has been arrested; and

(ii) that in the absence of a defendant's request, consular notification may nevertheless be required by treaty or other international agreement.

* * * * *

A motion being made and seconded,

With the proviso that final language after restyling and any accompanying changes to the Committee Notes would be circulated for final approval, the Committee unanimously decided by voice vote to adopt the proposed amendments to Rules 5(d) and 58 and to transmit the matter to the Standing Committee.

C. Proposed Amendments Approved by the Standing Committee for Publication in August 2011

Judge Raggi reported that the following proposed amendments had been published for notice and public comment with the approval of the Standing Committee:

1. Rule 11. Advice re Immigration Consequences of Guilty Plea.

Judge Raggi reported that the August 2011 publication of the Committee's proposal to amend Rule 11 had prompted six written comments. Judge Rice, Chair of the Rule 11 Subcommittee, stated that the subcommittee had reviewed and discussed these comments at

length. A majority continued to endorse the language of the proposed amendment as published. In discussion among the full Committee, some members voiced concern that the amendment shifts a burden that belongs to defense counsel onto the court, creates a "slippery slope" for expanding Rule 11 procedures in ways that distract from the key trial rights being waived, and is overbroad. A majority nevertheless remained of the view that deportation is qualitatively different from other collateral consequences that may follow from a guilty plea and, therefore, should be included on the list of matters that must be discussed during a plea colloquy. Mr. Wroblewski stated that the Department of Justice supported the proposed amendment as published and had already begun to instruct its prosecutors to include appropriate language in plea agreements concerning the collateral immigration consequences of a guilty plea.

Members agreed that the Committee Note should be modified to address certain concerns raised in the public comments. The Reporters were asked to add language emphasizing that courts should use general statements rather than targeted advice to inform defendants that there may be immigration consequences from conviction.

The full text of the proposed amendment and revisions to the Committee Note follow:

Rule 11. Pleas.

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); ~~and~~

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and~~.~~

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

* * * * *

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

A motion being made and seconded,

The Committee decided, with nine votes in favor and three opposed, to amend Rule 11 by adopting the language published for public comment with the Reporters' suggested revisions to the Committee Note, and to transmit the matter to the Standing Committee with the recommendation that the proposed amendment be approved and sent to the Judicial Conference.

2. Rule 12(b). Clarifying Motions that Must Be Made Before Trial; Addresses Consequences of Motion; Provides Rule 52 Does Not Apply To Consideration Of Untimely Motion.

3. Rule 34, Arresting Judgment: Conforming Changes To Implement Amendment to Rule 12.

Judge Raggi reported that the proposed amendment to Rule 12 and the conforming changes to Rule 34 were published for public comment in August 2011, and that numerous submissions were received, including detailed objections and suggestions from defense bar organizations. Judge England, Chair of the Rule 12 Subcommittee, reported that, after a lengthy teleconference, subcommittee members unanimously determined that the concerns raised by the public comments should be considered at a face-to-face meeting, which would be held in conjunction with the full Committee's April meeting in San Francisco. To assist the subcommittee, Professors Beale and King prepared a comprehensive memorandum analyzing the history of the proposed amendment, the relevant law, and each comment received. Judge England and several members praised the Reporters' substantial research and thanked them for their analytical support.

Judge England informed members that the subcommittee would continue to work on the matter over the summer and expected to present its recommendation to the Committee at its fall meeting.

D. Proposed Amendment Referred for Review by Subcommittee

1. Rule 6. Grand Jury Secrecy.

Judge Keenan, Chair of the Rule 6 Subcommittee, reported on its review of Attorney General Eric Holder's October 18, 2011 proposal to amend Rule 6(e) to establish procedures for the disclosure of historically significant grand jury materials. The amendment (as proposed by the Department of Justice) would (1) allow district courts to permit disclosure, in appropriate circumstances, of archival grand jury materials of great historical significance, and (2) provide a temporal end point for grand jury materials that had become part of the National Archives.

Judge Keenan stated that the subcommittee had held two lengthy teleconferences to discuss the Attorney General's proposal. It also reviewed written and oral comments from (1) Public Citizen Litigation Group (PCLG) (which litigated *In re Kutler* and other cases on behalf of historians seeking access to grand jury materials), (2) District Judge D. Lowell Jensen (former chair of the Advisory Committee on Criminal Rules), (3) former Attorney General and District Judge Michael Mukasey, and (4) former U.S. Attorneys for the Southern District of New York, Robert Fiske (a former member of the Advisory Committee) and Otto Obermaier. Further, the Reporters prepared a research memorandum exploring general principles governing the relationship between the court and the grand jury, precedents relating to inherent judicial authority to disclose grand jury material, and background materials to the Committee's past amendments to Rule 6(e). Judge Keenan reported that, at the close of the second teleconference, all members of the subcommittee–other than those representing the Department of Justice–voted to recommend that the Committee not pursue the proposed amendment.

Discussion among the full Committee revealed consensus that, in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority, and that it would be premature to set out standards for the release of historical grand jury materials in a national rule.

Judge Raggi summarized a telephone conversation she had with Counsel for the Archivist of the United States, the Chief Administrator for the National Archives and Records Administration (NARA), and a supporter of the proposed rule. She explained that a rule amendment providing for a presumption that grand jury materials would be disclosed after a specified number of years—seventy-five in the case of the proposal—would significantly recalibrate the balance that had long been applied to grand jury proceedings, which presumed that proceedings would forever remain secret absent an extraordinary showing in a particular case. Judge Raggi explained that the Committee might not be inclined to effect such a historic change by a procedural rule, particularly in the absence of a strong showing of need. Judge Keenan added that subcommittee members generally agreed that NARA should not become the gatekeeper for grand jury materials. Several members agreed that no real problem exists that presently warrants a rule amendment.

Mr. Wroblewski thanked Judge Keenan and the subcommittee members for the careful consideration given to the Attorney General's suggestion. He explained that the Department will continue to object to requests for disclosure based on Supreme Court precedent that the Department interprets as establishing a rule that rejects district judges' assertions of inherent authority to release historically significant grand jury materials. Mr. Wroblewski made clear, however, that the Department does think the prudent policy is to permit release under appropriate circumstances.

Judge Kravitz observed that Congress may weigh in on this issue, which also counsels against pursuing further action by rule.

A motion being made and seconded,

The Committee unanimously decided by voice vote to take no further action on the proposal and to remove it from the Committee's agenda.

IV. NEW PROPOSALS FOR DISCUSSION

A. Rule 16 (a)(1)(A)-(C), Pretrial Disclosure of Defendant's Statements

The Committee discussed correspondence from Judge Christina Reiss of the District of Vermont suggesting that Rule 16(a) be amended to require pretrial disclosure of a broader range of defendants' prior statements. Discussion revealed consensus among members that no serious problem exists warranting the proposed amendment, which could produce unintended, adverse consequences in cases involving long-term investigations into large-scale criminal organizations.

A motion being made and seconded,

The Committee unanimously decided by voice vote to take no further action on the proposal and to remove it from the Committee's agenda.

V. INFORMATION ITEMS

A. Report of the Rules Committee Support Office and Status Report on Legislation Affecting Criminal Rules

1. Mr. Robinson reported on recent congressional hearings concerning the prosecution of the late Alaska Senator Ted Stevens and the court-ordered investigation into possible prosecutorial misconduct. He advised that legislation introduced by Senator Murkowski would expand prosecutorial disclosure obligations.

2. Judge Raggi reported on the progress of the Federal Judicial Center's Benchbook Committee to identify "best practices" for judges in addressing *Brady*/*Giglio* issues, which would be included in a forthcoming draft of the Federal Judicial Center's *Benchbook for U.S. District Court Judges*.

3. Mr. Robinson reported further on the "Daniel Faulkner Law Enforcement Officers and Judges Protection Act," which would abrogate the application of Civil Rule 60(b)(6) in petitions brought under 28 U.S.C § 2254.

4. Mr. Wroblewski noted that the Justice Department planned to monitor an upcoming hearing on crime victims' rights before the House Judiciary Committee, and would report any issues pertaining to the work of the Committee following the hearing.

VI. ELECTRONIC DISCOVERY

At the Committee's October 2011 meeting, Mr. Wroblewski reported that the Justice Department was participating in a Joint Electronic Technology Working Group (JETWG) with Federal Defenders, the Administrative Office, and the Federal Judicial Center to develop a protocol for discovery of electronically stored information (ESI) in federal criminal cases. The Committee invited Andrew D. Goldsmith, National Criminal Discovery Coordinator for the Department of Justice and a co-chair of the JETWG, to attend its April 2012 meeting to discuss the protocol, which was released in February.

Mr. Goldsmith recounted the formation of the JETWG and development of the protocol, which is intended to encourage early discussion of electronic discovery issues, the exchange of data in industry standard or reasonably usable formats, notice to the court of potential discovery issues, and resolution of disputes without court involvement wherever possible. He reviewed with the Committee the four parts of the protocol: (1) an introductory section, which describes several basic discovery principles; (2) a set of recommendations for ESI discovery; (3) strategies and commentary on ESI discovery; and (4) an ESI discovery checklist. Following questions, observations, and suggestions from members, Judge Raggi thanked Mr. Goldsmith and noted that future discussion of the protocol may be warranted after it becomes widely deployed and implemented.

VII. FUTURE MEETINGS AND CLOSING BUSINESS

The Committee mourned the loss of former member Donald J. Goldberg, a well respected private attorney who had contributed significantly to the work of the Committee and became a good friend to many members. Professor Beale recalled with fondness Mr. Goldberg's leadership of the Rule 16 Subcommittee. Other members expressed their condolences.

Judge Raggi also expressed the Committee's deep appreciation for the many contributions of Rachel Brill and Leo P. Cunningham, two distinguished members whose terms will expire before the fall meeting. Members added their sincere thanks for the hard work performed by and friendships forged with Ms. Brill and Mr. Cunningham. Judge Raggi invited Ms. Brill and Mr. Cunningham to attend the fall meeting as guests of the Committee.

Judge Raggi announced that the Committee will next meet on Monday and Tuesday, October 29-30, 2012, at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

All business being concluded, Judge Raggi adjourned the meeting.

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MEMORANDUM

DATE: May 8, 2012

TO: Synonyms Subcommittee members and reporters

FROM: Judge Neil M. Gorsuch
Catherine T. Struve

RE: Subcommittee conference call agenda

Thank you for agreeing to serve on this subcommittee. We look forward to working with you. This memorandum outlines some issues for discussion on our initial conference call. Subject, of course, to your input and further guidance from the Standing Committee, we envision this Subcommittee as a forum for discussions among the Rules Committees concerning the choice of terms to describe activities that previously involved paper documents and now involve electronic files. In our initial call, we hope that you will mention any issues that your Committees are facing that involve such questions and as to which the Subcommittee could provide assistance. Such assistance could, for example, take the form of Subcommittee review of, and comments on, a proposed draft rule amendment.

As context for our discussions, Part I of this memo briefly surveys terminology, employed in one or more sets of national Rules, that might implicate questions of interest to the Subcommittee. This survey is not intended to suggest that a project is called for to overhaul the Rules' use of all (or any) of these terms. Rather, we hope to stimulate discussion concerning the contexts in which deliberations about terminology – coordinated through this Subcommittee – could assist committees that are in the process of considering rule amendments that may implicate choices about the ways in which the Rules refer to or encompass electronic filing and service.

Part II of this memo sets out the Subcommittee's first specific agenda item: the proposed amendments to Appellate Rule 6 that the Appellate Rules Committee will seek permission to publish this summer. It was during the presentation to the Standing Committee of a prior draft of this proposal that the idea of this Subcommittee arose. Thus, it seems appropriate for the Subcommittee to commence its work by providing input to the Appellate Rules Committee and the Standing Committee concerning the Appellate Rule 6 proposal.

I. Relevant terminology

After the Standing Committee – at its January 2012 meeting – decided to create this Subcommittee, Andrea Kuperman provided us with very helpful and thorough research

concerning the terms used in each set of national Rules for describing the treatment of the record (or of other materials that could be handled in both paper and electronic form). She compiled a list of provisions in the national rules that discuss activities that would previously have involved (and may still involve) sharing paper documents[1] – e.g., filing by a party or a court reporter, service by a party, transmission from one clerk's office to another, or transmission from the clerk's office to a litigant – and that may now or in the future involve accomplishing substantially the same result by electronic means.

Her findings concerning each set of Rules are enclosed. Also enclosed is a list of omitted terms, which Andrea compiled in order to memorialize the items that appeared to fall outside the scope of her search. In considering the implications of Andrea's careful and comprehensive research, it may be helpful to reorganize these data to show which terms appear in which sets of rules. Here is a table showing a rough analysis of that question. For the sake of simplicity, the table employs the simplest form as short-hand for related terms (e.g., "sent," "sending," or the like are listed as "send").

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Communicate [information] by telephone or other reliable electronic means				Y	
Deliver	Y	Y	Y	Y	Y
Personal delivery			Y		
Deposit	Y	Y	Y	Y	
Disclose	Y	Y	Y	Y	Y
Dispatch	Y				

[1] As participants in our discussions have noted, in choosing terminology that reflects the adjustment to electronic filing, drafters should keep in mind that – for the foreseeable future – some litigants will continue to make paper filings.

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Electronic access / remote electronic access		Y	Y	Y	
File	Y	Y	Y	Y	Y
File ... by electronic means / electronic filing	Y	Y	Y	Y	
File ... by mailing or dispatch	Y				
Forward	Y			Y	
Furnish	Y	Y	Y	Y	
Give	Y	Y	Y	Y	Y
Hand			Y		
Issue	Y	Y	Y	Y	Y
Issue ... electronically		Y			
Leave			Y	Y	
Mail	Y	Y	Y	Y	
Make available		Y	Y	Y	Y
Notice by electronic transmission		Y			
Notice / notify by mail		Y			
Notice by publication		Y	Y	Y	

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Post		Y			
Post a notice on an official internet government forfeiture site			Y		
Present	Y	Y	Y	Y	
Produce		Y	Y	Y	Y
Provide	Y	Y	Y	Y	Y
Publish		Y	Y	Y	
Report		Y	Y	Y	
Return	Y	Y	Y	Y	
Return by reliable electronic means				Y	
Send	Y	Y	Y	Y	
Send by electronic mail			Y		
Serve	Y	Y	Y	Y	Y
Serve ... by sending to electronic address			Y		
Serve by mail	Y	Y	Y	Y	
Personal service	Y	Y	Y	Y	
Serve by ... publication		Y	Y		

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Serve ... in a sealed envelope			Y		
Submit	Y	Y	Y	Y	Y
Submit by reliable electronic means				Y	
Supply	Y	Y			
Transfer	Y				
Transmit	Y	Y	Y	Y	
Transmit by reliable electronic means				Y	
Transmission facilities			Y		
Turn over		Y			

This table suggests a few tentative observations. First, the Rules currently employ a large and diverse set of terms to describe activities that might be affected by the shift to electronic filing. Multiple terms are used to describe potentially similar concepts within a given set of rules. Some terms recur across multiple sets of rules. Some features are distinctive to a particular set of rules. For instance, the Bankruptcy Rules' use of the term "transmit" often occurs during discussions of transmission to the United States Trustee. For another example, the Criminal Rules confront a distinctive set of issues concerning communications between the government and the court (e.g., in the context of warrant applications or the like). Moreover, even where two sets of Rules use the same term, context and practice may imbue that term with different meanings for different sets of Rules.

II. The Appellate Rule 6 proposal

The Bankruptcy Rules Committee has prepared proposed amendments to Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP"). In tandem with that project, the Appellate Rules Committee is at work on proposed amendments to Appellate Rule 6 (concerning appeals to the court of

appeals in a bankruptcy case). Both sets of proposed amendments will be placed before the Standing Committee this June for approval for publication.

The proposed amendments to Appellate Rule 6 would update the Rule's cross-references to the Bankruptcy Part VIII Rules; would amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling; would add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2); and – of most salience to this Subcommittee – would revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules as they currently exist were drafted on the assumption that the record on appeal would be available only in paper form. Reflecting the fact that the bankruptcy courts were ahead of other federal courts in making the transition to electronic filing, the proposed Part VIII Rules are drafted with a contrary presumption in mind: The default principle under those Rules is that the record will be made available in electronic form.

In revising Rule 6(b) and in drafting proposed new Rule 6(c), the Appellate Rules Committee sought to adopt language that could accommodate the various ways in which the lower-court record could be made available to the court of appeals – e.g., in paper form; or in electronic files that can be sent to the court of appeals; or by means of electronic links. The Committee considered a number of possible word choices, and concluded that neither "transmit" nor "furnish" nor "provide" captured the full range of methods for making the record available; in particular, none of these terms encompassed the provision of a set of electronic links by which to access the documents in the record. Ultimately, the Committee decided to refer to the lower-court clerk's "making the record available to" the court of appeals.

Part II.A below sets out the Rule 6 proposal. Part II.B surveys other places, in the sets of national Rules, where one can find references to "making" items "available." Part II.C. notes existing and proposed provisions (in the Appellate and Bankruptcy Rules) that discuss the transmission of the record from a lower court to an appellate court. With this information as background, we would like to seek your input – during the May 15 conference call – concerning the Appellate Rule 6 draft.

A. The Appellate Rule 6 draft

Here is the draft that the Appellate Rules Committee will submit for approval for publication at the Standing Committee's June meeting:

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

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original

Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

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

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). But there are 3 exceptions, but with these qualifications:

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

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; and

(C) when the appeal is from a bankruptcy appellate panel, the term "district court," as used in any applicable rule, means "appellate panel."; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

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

(A) Motion for rRehearing.

(i) If a timely motion for rehearing under Bankruptcy Rule 8015 8022 is filed, the time to appeal for all parties runs from the entry of the order

disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree – but before disposition of the motion for rehearing – becomes effective when the order disposing of the motion for rehearing is entered.

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then ~~requires~~ the party, in compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The ~~r~~Record on ~~a~~Appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and ~~sent~~ made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's

designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

• the redesignated record as provided above;

• the proceedings in the district court or bankruptcy appellate panel; and

• a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) ~~Forwarding~~ Making the r~~R~~ecord Available.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and ~~send~~ promptly make it available ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk. ~~Unless directed to do so by a party or the circuit clerk~~ If the clerk makes the record available in paper form, the clerk will not send ~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk

to assemble the record and ~~forward the record~~ make it available. When the record is made available in paper form, t~~T~~he court of appeals may provide by rule or order that a certified copy of the docket entries be ~~sent~~ made available in place of the redesignated record~~, b~~. But any party may request at any time during the pendency of the appeal that the redesignated record be ~~sent~~ made available.

(D) Filing the r~~R~~ecord. ~~Upon receiving the record – or a certified copy of the docket entries sent in place of the redesignated record – the circuit clerk must file it and immediately notify all parties of the filing date~~ When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

(1) Applicability of Other Rules. These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-12, 13-20, 22-23, and 24(b) do not apply;

(B) as used in any applicable rule, "district court" or "district clerk" includes – to the extent appropriate – a bankruptcy court or bankruptcy appellate panel or its clerk; and

(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).

(2) Additional Rules. In addition, the following rules apply:

(A) **The Record on Appeal.** Bankruptcy Rule 8009 governs the record on appeal.

(B) **Making the Record Available.** Bankruptcy Rule 8010 governs completing the record and making it available.

(C) **Stays Pending Appeal.** Bankruptcy Rule 8007 applies to stays pending appeal.

(D) **Duties of the Circuit Clerk.** When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(E) **Filing a Representation Statement**. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, the attorney who sought permission must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

Committee Note

Subdivision (b)(1). Subdivision (b)(1) is updated to reflect the renumbering of 28 U.S.C. § 158(d) as 28 U.S.C. § 158(d)(1). Subdivision (b)(1)(A) is updated to reflect the renumbering of Rule 12(b) as Rule 12(c). New subdivision (b)(1)(D) provides that references in Rule 12.1 to the "district court" include – as appropriate – a bankruptcy court or bankruptcy appellate panel.

Subdivision (b)(2). Subdivision (b)(2)(A)(i) is amended to refer to Bankruptcy Rule 8022 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge

an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal …." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal …." The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

Subdivision (b)(2)(B)(i) is amended to refer to Rule 8009 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(B)(i), (b)(2)(C), and (b)(2)(D) are amended to reflect the fact that the record sometimes will be made available electronically.

Subdivision (b)(2)(D) sets the duties of the circuit clerk when the record has been made available. Because the record may be made available in electronic form, subdivision (b)(2)(D) does not direct the clerk to "file" the record. Rather, it directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c). New subdivision (c) is added to govern permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). For further provisions governing such direct appeals, see Bankruptcy Rule 8006.

Subdivision (c)(1). Subdivision (c)(1) provides for the general applicability of the Federal Rules of Appellate Procedure, with specified exceptions, to appeals covered by subdivision (c) and makes necessary word adjustments.

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is governed by Bankruptcy Rule 8009. Subdivision (c)(2)(B) provides that the record shall be made available as stated in Bankruptcy Rule 8010. Subdivision (c)(2)(C) provides that Bankruptcy Rule 8007 applies to stays pending appeal; in addition, Appellate Rule 8(b) applies to sureties on bonds provided in connection with stays pending appeal.

Subdivision (c)(2)(D), like subdivision (b)(2)(D), directs the clerk to note on the docket the

date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c)(2)(E) is modeled on Rule 12(b), with appropriate adjustments.

B. Other references to "making" an item "available"

The following list points out other places where the Rules employ the idea of "making" something "available":[2]

- Bankruptcy Rule 4002(b)(2): "Every individual debtor shall bring to the meeting of creditors under § 341, and make available to the trustee, the following documents or copies of them, or provide a written statement that the documentation does not exist or is not in the debtor's possession:"

- Criminal Rule 5.1(g): "The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon any payment required by applicable Judicial Conference regulations."

- Criminal Rule 16(a)(1)(B): "Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:"

- Criminal Rule 32(i)(4)(C): "At sentencing, the court: … (C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons."

- Criminal Rule 57(c): "Copies of local rules and their amendments, when promulgated, must be furnished to the judicial council and the Administrative Office of the United States Courts and must be made available to the public."

    - See also Civil Rule 83(a)(1): "Copies of [local] rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public."

- Criminal Rule 58(g)(2)(C): "The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the

[2] This list was compiled by running the following search in the USC database on Westlaw: pr,ci,ti(rule! & (appellate bankruptcy criminal evidence civil)) & (((make made) /6 available) "make available" "made available").

docket entries. For purposes of the appeal, a copy of the record of the proceedings must be made available to a defendant who establishes by affidavit an inability to pay or give security for the record."

- Civil Rule 26(a)(1)(A)(iii): "Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: … (iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;"

- Civil Rule 36(a)(2): "Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying."

- Evidence Rule 902(11): "Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them."

- Evidence Rule 1006: "The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court."

This survey of the existing uses of "make available" shows that the term is currently employed to denote:

- Debtors making documents available to a trustee
- A recording being made available to a party
- Items being made available for inspection, copying, and the like
- A presentence report being made available to the Bureau of Prisons
- Circuits making local rules available to the public
- A copy of the record being made available to an indigent defendant
- A litigant making a record available to an opponent before offering it into evidence

C. Other references to the treatment of the record on appeal

A search in the national Rules for discussions of the transmission of the record on appeal from a lower court to an appellate court reveals that this topic is currently treated in the Appellate and Bankruptcy Rules but not in the other sets of Rules. Here is a summary of the relevant Appellate and Bankruptcy Rules (and proposed Bankruptcy Rules):

- The current Appellate Rules

- The current Appellate Rules tend to use "forward" to denote the treatment of the record, though they occasionally use other terms instead or in addition.

- See Appellate Rule 5(d)(3) (providing, for appeals by permission, that "The record must be forwarded and filed in accordance with Rules 11 and 12(c)"); Appellate Rule 6(b)(2)(B); Appellate Rule 11 (treating "Forwarding the Record").[3]

- See also Appellate Rule 12(c) (referring to the circuit clerk "receiving" the record); Appellate Rule 13(d) (addressing Tax Court appeals and using both "forward[]" and "sen[d]"); Appellate Rule 16(b) (referring to the "fil[ing]" of a supplemental record on review of an agency determination); Appellate Rule 17 (in the context of review of agency determinations, using both "file" and "sen[d]"); Appellate Rule 39(e)(1) (discussing costs of "transmission of the record"); Appellate Rule 45(d) (discussing the "return[]" of "original papers constituting the record ... to the court or agency from which they were received").

- The current Bankruptcy Rules

  - The current Part VIII rules use "transmit" and its cognates to denote the treatment of the record. See Bankruptcy Rule 8006 ("All parties shall take any other action necessary to enable the clerk to assemble and transmit the record."); Bankruptcy Rule 8007 (discussing, inter alia, "Completion and Transmission of the Record");[4] Bankruptcy Rule 8014 (referring to "[c]osts incurred ... in the preparation and transmission of the record"); Bankruptcy Rule 8016(b) ("Original papers transmitted as the record on appeal shall be returned to the clerk on disposition of the appeal.").

  - Bankruptcy Rule 9027(h) refers to "deliver[ing]" or "suppl[ying]" court records in a removed case.

- The proposed Bankruptcy Part VIII Rules

  - The proposed Bankruptcy Part VIII rules continue to use the term "transmit," and operate on a presumption that the transmission will ordinarily be in electronic rather than paper form.

There are two questions that warrant particular attention in this context. First, will proposed

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[3] Appellate Rule 11 also refers (variously) to the district clerk "retain[ing]" the record and to the district clerk "send[ing]" the record to the circuit clerk

[4] Rule 8007(b) also refers to the possibility of "additional copies of the record be[ing] furnished").

Appellate Rule 6's discussion of "making the record available" to the court of appeals fit well with the terms used elsewhere in the Appellate Rules? And second, with that usage fit well with the treatment of the record in the proposed Part VIII Rules? The Appellate Rules Committee believes that the answer to these two questions is yes, but it also is very interested in obtaining the views of this Subcommittee and of the Bankruptcy Rules Committee.

The Appellate Rules Committee noted that proposed Appellate Rule 6's references to "making the record available" would diverge from references, in other Appellate Rules, to "forwarding" the record. That divergence is not surprising given the idiosyncracies of appellate practice in bankruptcy cases. Rule 6(b) already makes special provision for direct appeals from a district court or BAP in a bankruptcy case; in that context, the record on appeal to the district court or BAP forms the basis for a redesignated record for purposes of the appeal to the court of appeals. Practitioners are unlikely to expect perfect parallelism between the terms used in Appellate Rule 6 and the terms used elsewhere in the Appellate Rules.

Perhaps more important, in practice, will be the question whether the procedures described in proposed Appellate Rule 6(c) – governing permissive direct appeals in bankruptcy cases – will dovetail with the relevant provisions in the proposed Part VIII Rules. Because the record in a bankruptcy case differs from trial-court records in other types of cases, it is necessary to treat specially the compilation of the record on appeal. Moreover, because – in a direct appeal – there will not have been a prior appeal, it is not possible to employ the redesignation approach currently used in Appellate Rule 6(b). Instead, the Appellate Rules Committee decided to incorporate by reference the Part VIII provisions that govern the treatment of the record on appeal. Thus, for example, proposed Appellate Rule 6(c)(2)(B) provides that "Bankruptcy Rule 8010 governs completing the record and making it available." Bankruptcy Rule 8010, in turn, refers to the "transmission" of the record. Although these terms are not identical, the Appellate Rules Committee believes that they are compatible. That seemed particularly true given that – in the draft of the Part VIII Rules that the Appellate Rules Committee had before it – the proposed Part VIII Rules defined "transmission" to mean electronic sending unless a pro se litigant is involved or "or the governing rules of the court expressly permit or require mailing or other means of delivery." Such a provision, the Committee believes, leaves room for a court of appeals to adopt a local rule directing a particular manner for making the record available to the court of appeals. Our upcoming conference call will provide an opportunity to seek input on this question from the Bankruptcy Rules Committee's representatives and other Subcommittee members.

III. Conclusion

To summarize, we are hoping that the Subcommittee's May 15 conference call will provide an opportunity for us to learn about topics that you believe the Subcommittee could usefully address. And we hope to discuss with you the pending Appellate Rules Committee proposal that is sketched in Part II of this memo. Thank you in advance for your participation.

Encls.

TAB 7B

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Memorandum

To: Professor Kimble

From: Thomas Myers

Date: December 13, 2011

Re: Research on whether the restyled rules created a substantive change

Organization of this memo

This memo is broken up into three parts.

- First, the rules are set out one at a time (pages 2-10). Under each rule, you'll find: (1) an argument that the restyled rule created a change that might be considered substantive; (2) any action that was taken on the rule or the current status; and (3) a side-by-side comparison of the rule before and after restyling.
- Second, you'll see cases noting and following the intent of the Advisory Committees — that the restyled rules were intended to be stylistic only (pages 11-13). I included a small sampling of those cases, but there are many more that followed the Advisory Committees' intent.
- Third, you'll see relevant information from published articles (pages 14-19). This section includes mostly quotes that the restyled rules are clearer and easier to understand. Even the most vocal critics have agreed that the restyled rules are much better.

Overall

From my research, there are essentially three unintended substantive changes that have prompted amendments or pending amendments to the rules. But the last one was caught by the Advisory Committees and has not caused any known trouble in practice.

- The first two changes were identified in cases (see pages 2 & 3). One rule has been amended (with a corresponding change now under consideration). And a possible amendment to the other rule was approved at the Advisory Committee's fall meeting.
- The third change involved the same incorrect cross-reference in two rules (see page 4). They have been amended.

Beyond that, an argument has been made that six other restyled rules might have created a substantive change (see pages 5-10). But no amendment has been made to any of those rules. In one instance (see page 5), the argument was made to the Advisory Committee by an attorney, and the Advisory Committee decided not to change the restyled rule. In a case (see page 6), the court raised the argument on its own and dismissed it. In another case (see page 7), the party raised the argument, and the court dismissed it. In the other three instances (pages 8-10), the arguments were raised in law-review articles.

I tried to be thorough when researching. It's possible, of course, that there are more cases where a party argued that the restyled rules inadvertently created a substantive change. But I didn't find any.

PART 1-A: RULES THAT HAVE BEEN AMENDED OR HAVE AN AMENDMENT UNDER CONSIDERATION

1. Fed. R. App. P. 4(a)(4)(B)(ii) — *Sorenson* issue

Before 1998, the rule provided that "[a] party intending to challenge *an alteration or amendment of the judgment* shall file a notice, or amended notice, of appeal . . . ." The relevant language was altered during the 1998 restyling: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or *a judgment altered or amended* upon such a motion, must file a notice of appeal, or an amended notice of appeal . . . ."

The problem was originally identified by Judge Leval in *Sorenson v. City of New York*, 413 F.3d 292, 296 n. 2 (2d Cir. 2005): "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." In other words, the restyled rule changed the substance of the pre-1998 rule because a court might read the rule to require an appellant to amend an earlier notice of appeal after the district court amends the judgment in the appellant's favor.

The problem was discussed at several of the Appellate Rules Committee meetings from 2006 to 2009. The committee ultimately amended the rule.

Current Fed. R. App. P. 4(a)(4)(B)(ii)

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

Related change in Fed. R. App. P. 6(b)(2)(A)(ii)

Rule 6(b)(2)(A)(ii) contains an issue identical to the issue in Rule 4(a)(4) that was pointed out in *Sorenson*.

Before 1998, the rule provided that "A party intending to challenge an *alteration or amendment of the* judgment, order, or decree shall file an amended notice of appeal . . . ." The 1998 restyled rule read in relevant part: "A party intending to challenge an *altered or amended* judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 . . . measured from the entry of the order disposing of the motion."

The Advisory Committee is considering an amendment to this rule.

Fed. R. App. P. 4(a)(4)
Before Restyling

Fed. R. App. P. 4(a)(4)(B)(ii)
After Restyling
(since amended; see page 2)

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.	(B) (i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered. (ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion. (iii) No additional fee is required to file an amended notice.

2-A

Fed. R. App. P. 6(b)(2)(i)
Before Restyling

Fed. R. App. P. 6(b)(2)(A)(ii)
After Restyling

(i) Effect of a Motion for Rehearing on the Time for Appeal. If any party files a timely motion for rehearing under Bankruptcy Rule 8015 in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after announcement or entry of the district court's or bankruptcy appellate panel's judgment, order, or decree, but before disposition of the motion for rehearing, is ineffective until the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires the party, in compliance with Appellate Rules 3(c) and 6(b)(1)(ii), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by Rule 4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees will be required for filing the amended notice.	(A) Motion for rehearing. (i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree — but before disposition of the motion for rehearing — becomes effective when the order disposing of the motion for rehearing is entered. (ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 — excluding Rules 4(a)(4) and 4(b) — measured from the entry of the order disposing of the motion. (iii) No additional fee is required to file an amended notice.

2-B

2. Fed. R. Crim. P. 16(a)(2), 16(a)(1)(C) & 16(a)(1)(E) — *Rudolph* case

This possible substantive change was discussed in *U.S. v. Rudolph*, 224 F.R.D. 503, 505-511 (N.D. Ala. 2004). One of the parties presented the argument in this case — that the restyled rule might have created a substantive change.

In 2002, Rule 16 was restyled, redesignating Rule 16(a)(1)(C) as 16(a)(1)(E), and revising the opening clause from Rule 16(a)(2).

Former Rule 16(a)(2) began with "*Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1) . . .*" In contrast, restyled Rule 16(a)(2) began with "*Except as Rule 16(a)(1) provides otherwise . . .*" Thus, the *except*-clause in Rule 16(a)(2) no longer explicitly protected the items described in restyled Rule 16(a)(1)(E) [formerly Rule 16(a)(1)(C)] from compelled disclosure.

The defendant in *Rudolph* argued that restyled Rule 16(a)(2) gives the defendant more discovery rights than the previous rule. In contrast, the government argued that Rule 16 continues to limit the defendant's discovery rights, as it did before the 2002 amendment.

The court concluded that the restyled rule did not create a substantive change. Instead, the amended rules were intended to be stylistic only. The court added that the defendant's interpretation of Rule 16(a)(2) is perhaps literally correct, but it would go against the stated purpose of the Advisory Committee and Congress.

The court suggested that Rule 16(a)(2) should begin with this clause: "*Except as Rule 16(a)(1)(A), (B), (C), (D), (F), and (G) provide otherwise . . .*" The court concluded that it hoped that the Advisory Committee would correct this error in the near future.

The Advisory Committee, at its fall meeting, decided to recommend amending the rule.

Current Fed. R. Crim. P. 16(a)(2)

(2) Information Not Subject to Disclosure.

Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Fed. R. Crim. P. 16
Before Restyling

Fed. R. Crim. P 16
After Restyling

Rule 16. Discovery and Inspection	Rule 16. Discovery and Inspection
(a) Governmental Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Statement of Defendant.** Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association, or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.	**(a) Government's Disclosure.** **(1) *Information Subject to Disclosure.*** **(A) *Defendant's Oral Statement.*** Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial. **(B) *Defendant's Written or Recorded Statement.*** Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following: **(i)** any relevant written or recorded statement by the defendant if: **(a)** the statement is within the government's possession, custody, or control; and **(b)** the attorney for the government knows — or through due diligence could know — that the statement exists; **(ii)** the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and **(iii)** the defendant's recorded testimony before a grand jury relating to the charged offense.

3-A

Fed. R. Crim. P. 16(a)(1)(C)
Before Restyling

Fed. R. Crim. P. 16(a)(1)(E)
After Restyling

	(C) *Organizational Defendant.* Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:
	(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or (ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.
(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.	(D) *Defendant's Prior Record.* Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows — or through due diligence could know — that the record exists.
(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.	(E) *Documents and Objects.* Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

3-B

Fed. R. Crim. P. 16(a)(2) Before Restyling

Fed. R. Crim. P. 16(a)(2) After Restyling

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.	(F) *Reports of Examinations and Tests.* Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the government's possession, custody, or control; (ii) the attorney for the government knows — or through due diligence could know — that the item exists; and (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.
(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.	(G) *Expert Testimony.* Upon a defendant's request, the government must give the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.
(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.	(2) ***Information Not Subject to Disclosure.*** Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

3-C

3. Fed. R. App. P. 5(c) — Permission to Appeal

Restyled Rule 5(c) required that a petition for permission to appeal "must conform to Rule 32(a)(1)." Rule 32(c)(2) required that "other papers" — which includes petitions for permission to appeal — must conform to "Rule 32(a)" (with two exceptions). It was thus not clear whether petitions for permission to appeal must conform only with the requirements of Rule 32(a)(1) (as Rule 5(c) seemed to say) or with all of the requirements of Rule 32(a), except two (as Rule 32(c)(2) seemed to say).

The problem was originally identified by the Reporter. The issue was characterized as an "obvious mistake," the result of a "typographical error that arose during the restyling of the appellate rules."

Notice that the two pre-1998 rules did not contain cross-references to Rule 32.

The problem was discussed at several of the Advisory Committee meetings from 1999 to 2001. The committee ultimately amended the rule.

Current Fed. R. App. P. 5(c)

All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Fed. R. App. P. 21(d) — Form of Papers

The mistake that appeared in Rule 5(c) also appeared in Rule 21(d).

The committee ultimately amended the rule.

Current Fed. R. App. P. 21(d)

All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Fed. R. App. P. 5(c)
Before Restyling

Fed. R. App. P. 5(c)
After Restyling
(since amended; see page 4)

(b) Content of petition; answer. — The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition, an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.	**(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.** (1) The petition must include the following: (A) the facts necessary to understand the question presented; (B) the question itself; (C) the relief sought; (D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and (E) an attached copy of: (i) the order, decree, or judgment complained of and any related opinion or memorandum, and (ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met. (2) A party may file an answer in opposition or a cross-petition within 7 days after the petition is served. (3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.
(c) Form of Papers; Number of Copies. — All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.	**(c) Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

4-A

Fed. R. App. P. 21(d)
Before Restyling

Fed. R. App. P. 21(d)
After Restyling
(since amended; see page 4)

(d) Form of Papers; Number of Copies. All papers may be typewritten. An original and three copies shall be filed unless the court requires the filing of a different number by local rule or by order in a particular case.	**(d) Form of Papers; Number of Copies. All papers must conform to Rule 32(a)(1). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.**

4-B

Fed. R. App. P. 32(b)
Before Restyling

Fed. R. App. P. 32(c)(2)
After Restyling

(b) Form of other papers. — Petitions for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8 ½ by 11 inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached at the left margin. Carbon copies may be used for filing and service if they are legible. A motion or other paper addressed to the court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.	(c) **Form of Other Papers.** (1) **Motion.** The form of a motion is governed by Rule 27(d). (2) **Other Papers.** Any other paper, including a petition for rehearing and a petition for rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions: (A) a cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2); and (B) Rule 32(a)(7) does not apply. (d) **Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

4-C

PART 1-B: RULES THAT HAVE BEEN QUESTIONED BUT NOT AMENDED

4. Fed. R. App. P. 15(b) — Cross-Application for Enforcement

Michael Powell, an attorney in Dallas, suggested this change, but the Appellate Rules Committee ultimately removed the item from its agenda.

Before it was restyled, Rule 15(b) stated that if a petition for review of an agency order was filed, "*the respondent* may file a cross-application for enforcement." As then written, Rule 15(b) seemed to contemplate that only the agency — which is always "the respondent" to a petition for review — could file a cross-application for enforcement.

As restyled, Rule 15(b)(1) now states that, if a petition for review of an agency order is filed, "*a party opposing the petition* may file a cross-application for enforcement."

Apparently, in at least one case, the question arose whether Rule 15(b) now permits cross-applications for enforcement to be filed not only by the agency, but by *any* party who opposes the petition for review (whether or not the agency itself has chosen to file a cross-application for enforcement). Mr. Powell suggested that the rule should be amended to clarify this ambiguity.

At the Committee Chair's request, the Department of Justice consulted with several federal agencies about Mr. Powell's concern. The agencies said that they had not experienced a problem and did not expect to experience a problem in the future. The agencies stressed that Rule 15 does not give a court jurisdiction over any application for enforcement; such jurisdiction must come from an underlying statute, and no underlying statute permits a private party to file an application for enforcement.

The item was removed. The rule has not been amended.

I could not find the case that these minutes refer to.

Fed. R. App. P. 15(b)
Before Restyling

Fed. R. App. P. 15(b)(1)
After Restyling

(b) Application for enforcement of order; answer; default; cross-application for enforcement. — An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.	(b) Application or Cross-Application to Enforce an Order; Answer; Default. (1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement. (2) Within 20 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested. (3) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested.

5-A

5. Fed. R. Civ. P. 4(i)

This possible substantive change was discussed in *Constien v. U.S.*, 628 F.3d 1207, 1213-1215 (10th Cir. 2010). Neither party made this argument; rather, the court discussed this issue on its own.

The court said that the restyled language of Rule 4(i) — "a party must" — could literally be read to permit a party herself, and not the process server, to mail process to the Attorney General. But the court easily dismissed this possible argument for two main reasons: (1) the 2007 styled revisions were intended "to be stylistic only"; and (2) the court was "confident that the revision was not intended to change the long-recognized requirement that only a process server, not the party, can serve process by personally delivering the documents." The court discussed and relied on Rule 4(c), which requires that process be served by a non-party or, in limited circumstances, by a U.S. marshal or deputy marshal or by a person specially appointed by the court.

The rule has not been amended.

Fed. R. Civ. P. 4(i)(1)
Before Restyling

Fed. R. Civ. P. 4(i)(1)
After Restyling

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) (A) Service on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation.

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States — whether or not the officer or employee is sued also in an official capacity — is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g).

(3) The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) ***United States.*** To serve the United States, a party must:

(A) (i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought — or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk — or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) ***Agency; Corporation; Officer or Employee Sued in an Official Capacity.*** To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) ***Officer or Employee Sued Individually.*** To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) ***Extending Time.*** The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

6-A

Fed. R. Civ. P. 4(c)
Before Restyling

Fed. R. Civ. P. 4(c)(2)
After Restyling

Rule 4. Summons	Rule 4. Summons
(a) **Form.** The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.	(a) **Contents; Amendments.** (1) *Contents.* A summons must: (A) name the court and the parties; (B) be directed to the defendant; (C) state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff; (D) state the time within which the defendant must appear and defend; (E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; (F) be signed by the clerk; and (G) bear the court's seal. (2) *Amendments.* The court may permit a summons to be amended.
(b) **Issuance.** Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.	(b) **Issuance.** On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served.
(c) **Service with Complaint; by Whom Made.** (1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint. (2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a seaman under 28 U.S.C. § 1916.	(c) **Service.** (1) *In General.* A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service. (2) *By Whom.* Any person who is at least 18 years old and not a party may serve a summons and complaint. (3) *By a Marshal or Someone Specially Appointed.* At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. § 1916.

6-8

6. Fed. R. Civ. P. 6(b)

This possible substantive change was discussed in *Argentine Republic v. Nat'l Grid Plc*, 637 F.3d 365, 367-369 (D.C. Cir. 2011). One of the parties presented the argument in this case — that the restyled rule might have created a substantive change.

Former Rule 6(b) dealt with extending time limits set "by these rules" or "by order of court." The restyled rule refers generally to any "specified time." The party argued that restyled 6(b) might be used to extend time limits *by statute*. But the court fairly easily dismissed the argument.

Here is the language from the case (from page 368):

> "National Grid argues that the district court could not, as a matter of law, have granted the motion because Rule 6(b) may not be used to extend periods of time dictated by statute. We agree. Every court to have considered this question has held that Rule 6(b) may be used only to extend time limits imposed by the court itself or by other Federal Rules, but not by statute. . . . To be sure, the language of Rule 6(b) on which the Sixth Circuit relied, i.e., the specific reference to time periods set out in the Federal Rules or by court order, was eliminated in the 2007 restyling of the Rules. The current language merely requires that "When an act may or must be done within a specified time, the court may, for good cause, extend the time." But the 2007 revision was meant to be stylistic only, so the pre-revision language remains relevant.
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> . . .
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> We see three reasons for following the lead of the other courts that have addressed this issue. First, like the Sixth Circuit, we believe that Rule 6(b)'s pre–2007 text clearly limits the rule's application to deadlines established by other Federal Rules and by court orders. Second, a comparison of the current Rule 6(b) with Rule 6(a), which governs methods for computing time, supports this reading. Rule 6(a) expressly applies to statutory time periods, suggesting by negative implication that Rule 6(b), which contains no parallel specification, does not. Finally, where Congress has set out a specific deadline that courts have consistently construed to prohibit extension on equitable grounds, we think that it would be incongruous to allow courts to circumvent the congressional directive through the use of Rule 6(b)."

The rule has not been amended.

Fed. R. Civ. P. 6(b)
Before Restyling

Fed. R. Civ. P. 6(b)(1)
After Restyling

Rule 6. Time	Rule 6. Computing and Extending Time; Time for Motion Papers
(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.	(a) **Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute: (1) ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period. (2) ***Exclusions from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days. (3) ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. (4) ***"Legal Holiday" Defined.*** As used in these rules, "legal holiday" means: (A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and (B) any other day declared a holiday by the President, Congress, or the state where the district court is located.
(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.	(b) **Extending Time.** (1) ***In General.*** When an act may or must be done within a specified time, the court may, for good cause, extend the time: (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or (B) on motion made after the time has expired if the party failed to act because of excusable neglect. (2) ***Exceptions.*** A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow.

7-A

7. Fed. R. Civ. P. 26(a)(5)

[from Counseller article]

During the 2007 restyling, Rule 26(a)(5) was deleted. This rule indexed the various discovery instruments. Professor Jeremy Counseller discussed this possible substantive change in his article "Rooting for the Restyled Rules (Even Though I Opposed Them)." 78 Miss. L.J. 519, 552-554 (Spring 2009).

Counseller argues that deleting Rule 26(a)(5) is a substantive change because courts relied upon it to overcome arguments that certain procedures did not constitute discovery devices and, therefore, did not need to be offered within the discovery period.

While Counseller notes the restylists' position that Rule 26(a)(5) is merely redundant when examining the language of the rule in isolation, he states that case law has assigned 26(a)(5) an importance beyond a mere redundant index of discovery devices.

Professor Counseller suggests that the Advisory Committee reinsert former Rule 26(a)(5).

The rule has not been amended.

Fed. R. Civ. P. 26(a)(5) Before Restyling

Fed. R. Civ. P. 26(a)(5) After Restyling

(3) **Pretrial Disclosures.** In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment: (A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises; (B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and (C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises. Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.	(3) *Pretrial Disclosures.* (A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: (i) the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises; (ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and (iii) an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises. (B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made — except for one under Federal Rule of Evidence 402 or 403 — is waived unless excused by the court for good cause.
(4) **Form of Disclosures.** Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served. (5) **Methods to Discover Additional Matter.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.	(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served. [Current Rule 26(a)(5) is deleted.]

8-A

8. Discovery Rules — Civil Rules 29, 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 34(b)(2)(A), 36(a)(3), 39(a)(1), and 59(c)

[from Counseller article]

During the 2007 restyling, the word "stipulation" was substituted for the words "written stipulation" in a number of rules. Professor Jeremy Counseller discussed this possible substantive change in his article "Rooting for the Restyled Rules (Even Though I Opposed Them)." 78 Miss. L.J. 519, 554-558 (Spring 2009).

Counseller specifically lists and discusses the following restyled rules that contained "written stipulation" before restyling: 29, 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3), and 59(c). Although not specifically discussed in Counseller's article, the words "written stipulation" also appeared in restyled Rules 34(b)(2)(A) and 39(a)(1) before restyling.

Counseller argues that changing "written stipulation" to merely "stipulation" caused a substantive change. He suggests that deleting "written" is the result of the effort to "reduce inconsistencies by using the same words to express the same meaning." And, indeed, pre-2007 Rules 16(c)(3), 26(a), 26(a)(2)(C), 30(b)(4), 41(a)(1)(ii), 65.1, 71.1(i)(2), and 71.1(i)(4) all use the word "stipulation" but not "written." (These eight rules are not included in the side-by-sides that follow.) Thus, the Advisory Committee may have concluded that all stipulations are written unless otherwise specified — or at least concluded that the word "written" in some rules and not others was not meant to be a substantive difference in the first place.

Counseller concludes that the Advisory Committee should restore the written-stipulation requirement in the discovery rules.

The rules have not been amended.

Fed. R. Civ. P. 29
Before Restyling

Fed. R. Civ. P. 29
After Restyling

Rule 29. Stipulations Regarding Discovery Procedure	Rule 29. Stipulations About Discovery Procedure
Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.	Unless the court orders otherwise, the parties may stipulate that: (a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified — in which event it may be used in the same way as any other deposition; and (b) other procedures governing or limiting discovery be modified — but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

9-A

Fed. R. Civ. P. 30(a)(2) Before Restyling

Fed. R. Civ. P. 30(a)(2)(A) After Restyling

Rule 30. Depositions Upon Oral Examination	Rule 30. Depositions by Oral Examination
(a) When Depositions May Be Taken; When Leave Required. (1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45. (2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties, (A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants; (B) the person to be examined already has been deposed in the case; or (C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.	(a) When a Deposition May Be Taken. (1) *Without Leave.* A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2): (A) if the parties have not stipulated to the deposition and: (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; (ii) the deponent has already been deposed in the case; or (iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or (B) if the deponent is confined in prison.
(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone. (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.	(b) Notice of the Deposition; Other Formal Requirements. (1) *Notice in General.* A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. (2) *Producing Documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

9-B

Fed. R. Civ. P. 30(b)(7)
Before Restyling

Fed. R. Civ. P. 30(b)(4)
After Restyling

(7) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(3) *Method of Recording.*

(A) *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition that was taken nonstenographically.

(B) *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) *By Remote Means.* The parties may stipulate — or the court may on motion order — that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(6)(4) and (6)(5) intentionally omitted

(6)(5) intentionally omitted

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

9-C

Fed. R. Civ. P. 31(a)(2) Before Restyling

Fed. R. Civ. P. 31(a)(2)(A) After Restyling

Rule 31. Depositions Upon Written Questions	Rule 31. Depositions by Written Questions
(a) Serving Questions; Notice. (1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. (2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties, (A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants; (B) the person to be examined has already been deposed in the case; or (C) a party seeks to take a deposition before the time specified in Rule 26(d).	(a) When a Deposition May Be Taken. (1) *Without Leave.* A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2): (A) if the parties have not stipulated to the deposition and: (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; (ii) the deponent has already been deposed in the case; or (iii) the party seeks to take a deposition before the time specified in Rule 26(d); or (B) if the deponent is confined in prison.
(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6). (4) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.	(3) *Service; Required Notice.* A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken. (4) *Questions Directed to an Organization.* A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6). (5) *Questions from Other Parties.* Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

9-D

Fed. R. Civ. P. 33(a) Before Restyling

Fed. R. Civ. P. 33(a)(1) After Restyling

Rule 33. Interrogatories to Parties	Rule 33. Interrogatories to Parties
(a) **Availability.** Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).	(a) **In General.** (1) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2). (2) *Scope.* An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.
(b) **Answers and Objections.** (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. (2) The answers are to be signed by the person making them, and the objections signed by the attorney making them. (3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. (4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. (5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.	(b) **Answers and Objections.** (1) *Responding Party.* The interrogatories must be answered: (A) by the party to whom they are directed; or (B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party. (2) *Time to Respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. (3) *Answering Each Interrogatory.* Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath. (4) *Objections.* The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. (5) *Signature.* The person who makes the answers must sign them, and the attorney who objects must sign any objections.

9-E

Fed. R. Civ. P. 33(b)(3) Before Restyling

Fed. R. Civ. P. 33(b)(2) After Restyling

Rule 33. Interrogatories to Parties	Rule 33. Interrogatories to Parties
(a) **Availability.** Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).	(a) **In General.** (1) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2). (2) *Scope.* An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.
(b) **Answers and Objections.** (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. (2) The answers are to be signed by the person making them, and the objections signed by the attorney making them. (3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. (4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. (5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.	(b) **Answers and Objections.** (1) *Responding Party.* The interrogatories must be answered: (A) by the party to whom they are directed; or (B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party. (2) *Time to Respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. (3) *Answering Each Interrogatory.* Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath. (4) *Objections.* The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. (5) *Signature.* The person who makes the answers must sign them, and the attorney who objects must sign any objections.

9-F

Fed. R. Civ. P. 34(b) Before Restyling

Fed. R. Civ. P. 34(b)(2)(A) After Restyling

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes	Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for Inspection and Other Purposes
(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).	(a) **In General.** A party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect and copy the following items in the responding party's possession, custody, or control: (A) any designated documents — including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained either directly or after the responding party translates them into a reasonably usable form; or (B) any tangible things — and to test or sample these things; or (2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.
(b) **Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d). The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.	(b) **Procedure.** (1) *Contents of the Request.* The request must: (A) describe with reasonable particularity each item or category of items to be inspected; and (B) specify a reasonable time, place, and manner for the inspection and for performing the related acts. (2) *Responses and Objections.* (A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. (B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons. (C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest. (D) *Producing the Documents.* A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.

9-G

Fed. R. Civ. P. 36(a) Before Restyling

Fed. R. Civ. P. 36(a)(3) After Restyling

Rule 36. Requests for Admission	Rule 36. Requests for Admission
(a) **Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d). Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.	(a) **Scope and Procedure.** (1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: (A) facts, the application of law to fact, or opinions about either; and (B) the genuineness of any described documents. (2) *Form; Copy of a Document.* Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying. (3) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court. (4) *Answer.* If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.
The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.	(5) *Objections.* The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial. (6) *Motion Regarding the Sufficiency of an Answer or Objection.* The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

9-H

Fed. R. Civ. P. 39(a)(1) Before Restyling

Fed. R. Civ. P. 39(a)(1) After Restyling

Rule 39. Trial by Jury or by the Court	Rule 39. Trial by Jury or by the Court
(a) **By Jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.	(a) **When a Demand Is Made.** When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless: (1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or (2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.
(b) **By the Court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.	(b) **When No Demand Is Made.** Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.
(c) **Advisory Jury and Trial by Consent.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.	(c) **Advisory Jury; Jury Trial by Consent.** In an action not triable of right by a jury, the court, on motion or on its own: (1) may try any issue with an advisory jury; or (2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

9-I

Fed. R. Civ. P. 59(c) Before Restyling

Fed. R. Civ. P. 59(c) After Restyling

Rule 59. New Trials; Amendment of Judgments	Rule 59. New Trial; Altering or Amending a Judgment
(a) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.	(a) **In General.** (1) *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows: (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or (B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court. (2) *Further Action After a Nonjury Trial.* After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.
(b) **Time for Motion.** Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.	(b) **Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 10 days after the entry of judgment.
(c) **Time for Serving Affidavits.** When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.	(c) **Time to Serve Affidavits.** When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation. The court may permit reply affidavits.

9-J

9. Fed. R. Civ. P. 68

[from Hartnett article]

Professor Edward Hartnett discussed this possible substantive change in his article *Against (Mere) Restyling*, 82 Notre Dame L. Rev. 155, 166 (Nov. 2006). He discussed a possible substantive change to Rule 68 that he contended would be caused by the restyled rules (which had been published for comment at that time).

Professor Hartnett states that the change from "judgment . . . for the money or property or to the effect specified in the offer" to "judgment on specified terms" makes it more difficult to contend that (1) an offer cannot be conditioned on acceptance by all plaintiffs; and (2) the rule does not apply to offers to accept a particular equitable decree.

The rule has not been amended.

Fed. R. Civ. P. 68
Before Restyling

Fed. R. Civ. P. 68(a)
After Restyling

Rule 68. Offer of Judgment	Rule 68. Offer of Judgment
At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.	(a) **Making an Offer; Judgment on an Accepted Offer.** More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment. (b) **Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs. (c) **Offer After Liability Is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time — but at least 10 days — before a hearing to determine the extent of liability. (d) **Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

10-A

PART 2: CASES FOLLOWING THE INTENT OF THE ADVISORY COMMITTEES — THAT THE RESTYLED RULES WERE INTENDED TO BY STYLISTIC ONLY

Many cases state that the changes to the rules were intended to be stylistic only. Here is a small sampling of those cases. In each case, the court seemed to make the quoted statement in passing; there was no issue about substantive change.

Republic of Philippines v. Pimentel, 553 U.S. 851 (2008)

. . . after the case was in the Court of Appeals and before it came here, the text of the Rule changed. The Rules Committee advised the changes were stylistic only, see Advisory Committee's Notes on 2007 Amendment to Fed. Rule Civ. Proc. 19, 28 U.S.C. A., p. 168 (2008); and we agree.

In re Railworks Corp., 401 B.R. 196 (Bankr. D. Md. 2008)

From FN 5

When Rule 15 was rewritten in 2007 as part of a larger stylistic overhaul of the Federal Rules of Civil Procedure, no substantive changes were made.

U.S. v. Soto-Diarte, 402 Fed. Appx. 388 (10th Cir. 2010)

From FN 1

Prior to amendments in 2002, the substance of Rule 41(g) was contained in former Rule 41(e). The changes made in these amendments were stylistic only. See *United States v. Copeman*, 458 F.3d 1070, 1071 n. 1 (10th Cir.2006) ("What was formerly Rule 41(e) is now Rule 41(g), with only stylistic changes.").

Marks v. Tenn., 2008 WL 4372764 (M.D. Tenn. Sept. 18, 2008)

*This is an unpublished case, but it states that the restyled rule "removed some of the ambiguity."

From FN 1

It is perhaps significant that the court reached this conclusion after noting the ambiguity of Rule 71's application to orders "made in favor of" nonparties. The language of the rule was changed with the 2007 amendments to the Federal Rules, so that it now applies "[w]hen an order grants relief for a nonparty ..." This change was intended to be stylistic only, but appears to have removed some of the ambiguity from the situation here, in the undersigned's view.

Thompson v. RelationServe Media, 610 F.3d 628 (11th Cir. 2010)

Rule 11 was amended in 2007 "as part of the general restyling of the Civil Rules," this amendment was "intended to be stylistic only." Fed.R.Civ.P. 11 advisory committee's note, 2007 amendment. Nevertheless, I refer to the 2006 version of the Rule.

Neiberger v. Fed Ex Ground Package Sys., 566 F.3d 1184 (10th Cir. 2009)

From FN 2

The language of the rule in force at the time of trial has since been revised, but only for stylistic purposes. See Fed.R.Civ.P. 26 advisory committee's note (2007 amend.). For convenience, we use the revised language. The same is true of Rule 37, see Fed.R.Civ.P. 37 advisory committee's note (2007 amend.), and we likewise employ the revised language of that rule in our discussion.

U.S. v. Penev, 362 Fed. Appx. 170 (2d Cir. 2010)

From FN 3

Federal Rule of Criminal Procedure 11(e)(1)(C) is Rule 11(c)(1)(C)'s predecessor, and was revised and renumbered in 2002 with only stylistic changes. Fed.R.Crim.P. 11 advisory committee's notes.

U.S. v. Main, 579 F.3d 200 (2d Cir. 2009)

From FN 2

Federal Rule of Criminal Procedure 11(e)(1)(C) is Rule 11(c)(1)(C)'s predecessor, and was revised and renumbered in 2002 with only stylistic changes. Fed.R.Crim.P. 11 advisory committee's notes.

Great Am. Ins. Co. of N.Y. v. Vegas Const. Co., 251 F.R.D. 534 (D. Nev. 2008)

From FN 1

Effective December 1, 2007, the language of Rule 30 was amended to make style and terminology changes consistent throughout the Federal Rules of Civil Procedure.

Sweitzer v. Am. Express Centurion Bank, 554 F. Supp. 2d 788 (S.D. Ohio 2008)

From FN 1

Rule 25 of the Federal Rules of Civil Procedure was amended in 2007 to reflect stylistic changes. This does not have any effect on the parties' arguments or the Court's analysis. See 7C Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice & Procedure § 1951 (3d ed.2007).

PART 3: COMMENTS FROM ARTICLES

Edward A. Hartnett, *Against (Mere) Restyling*, 82 Notre Dame L. Rev. 155, 157 (Nov. 2006)

Support for the Restyled Rules

"The restyled rules are clearer and easier to understand."

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, 42 (Fall 2010)

Support for the Restyled Rules

"These stylistic revisions have resulted in a tremendous improvement in the clarity and elegance of many of the Federal Rules of Civil Procedure."

Fed. R. Civ. P. 6 — Criticism

Professor Duane identified that, since 1938, Rule 6 provided three extra days when calculating certain deadlines that begin to run with service by mail. The three extra days were granted *to the party to whom service was sent through the mail.*

He claims that restyled Rule 6 created a substantive change because it now can be interpreted to mean that *either* party has three extra days.

But the issue that Professor Duane raised was not caused by the 2007 restyled rules. Instead, it stems from an amendment that took effect in 2005, reflecting work on time-computation rules that began in 2002 and involved collaboration with the Appellate, Bankruptcy, and Criminal Rules Committees. (See Judge Kravitz's letter to Professor Duane, Jan. 11, 2011.)

No amendment has been made to Rule 6. But it has been discussed by the Committee and deferred for now, although it remains on the Committee's agenda.

Jeremy Counseller, *Rooting for the Restyled Rules (Even Though I Opposed Them)*, 78 Miss. L.J. 519 (Spring 2009)

Support for the Restyled Rules

"My optimism comes from the fact that the Restyled Rules are clearer than the old rules. In most cases, the Restyled Rules undoubtedly express the same meaning as the old rules but do so in shorter, crisper sentences that avoid antiquated legalese and near impenetrable syntax." (pg 522)

"The Rule 14 comparison Kimble urges reveals convincingly the benefits of the Restylists' formatting conventions. The old Rule 14(a) was a single paragraph of nearly 400 words that contained numerous, distinct joinder rules. The Restylists subdivided Rule 14(a) into a vertical list numbered one through six and added subtitles to each numbered item in the list, making it easier to understand the various functions of the rules." (pgs 532-533)

"For the most part, the Restylists simply applied widely-accepted principles of good drafting. Consequently, the rules are clearer and more readable. No critic claims that the Restyled Rules are less clear or less readable than they were before the Style Project." (pg 534)

"On the whole, the restyled federal rules are clearer and more readable than their predecessors. As someone who has already presented the Restyled Rules to a group of first-year law students, I can tell you that students overwhelmingly prefer the Restyled Rules. One student's comment is representative: "they're easier to read and they're already outlined for us."" (pg 536-537)

"It should come as no surprise that the restyled federal rules are clearer and easier to read. After all, they are the result of the application of accepted principles of good writing--short sentences, no redundancy, avoid the passive voice, etc. Consider the example Professor Kimble provides comparing Rule 8(e)(2) with the restyled rule.

> Rule 8(e)(2): When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.
>
> Restyled: If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

No one has complained that the restyling of this particular provision of Rule 8 has caused a substantive change, and it is hard to argue that the old version is clearer than the new, restyled provision. This example is not an isolated one. The Restyled Rules are consistently more readable than the old rules. Even critics of the rules were impressed with the readability of the Restyled Rules. Professor Hartnett opposed the Restyled Rules, but even he was impressed with their clarity and readability. Without question, the Restyled Rules give us clearer words . . ." (pg 537)

Lisa Eichhorn, *Clarity and the Federal Rules of Civil Procedure: A Lesson from the Style Project*, 5 J. Ass'n Legal Writing Dirs. 1 (Fall 2008)

Support for the Restyled Rules

"Comparisons of old and restyled rule language reveal that plain language techniques can play a beneficial role in the ordinary rule-drafting process." (pg 2)

"A side-by-side comparison reveals how streamlined organization and inclusion of more, and more helpful, subheadings facilitate readability while not compromising the precision or completeness of the information conveyed." (pg 15)

"In addition, thanks to cutting some unnecessary words — why should "a deposition on oral examination" not become "an oral deposition"? — the restyled version is not only clearer, but shorter." (pg 15)

"Again, a side-by-side comparison of the old and restyled rule language reveals that more logical organization of the rule's content, along with helpful subheadings, allows the reader to understand the restyled rule much more quickly and easily, even though the substantive meaning remains the same." (pg 17)

"Indeed, thanks to the subheadings, the reader of the restyled rule can see immediately that both plaintiffs and defendants may use the interpleader device and that this joinder mechanism has some relation to other rules and statutes." (pg 18)

"And apart from the subheadings, the further division of the text into paragraphs (denoted by numerals) and subparagraphs (denoted by uppercase letters) clarifies the circumstances in which interpleader is permitted. (pgs 18-19)

"As in Rule 37, the subheadings and divisions allow the reader to navigate long sentences with ease." (pg 19)

"Indeed, the second sentence of restyled Rule 22 weighs in at a relatively hefty fifty words, but it has the virtue of describing very precisely two specific circumstances that will not negate the availability of interpleader. Again, like the single sentence of Rule 37(a)(3)(B), this sentence represents a common-sense trade-off between sentence length and the need to express a complete, complex idea in one place. Both sentences illustrate that plain language guidelines—like the preference for shorter sentences—can bend in the interest of expressing complicated content precisely and accurately." (pg 19)

"Another way to increase the clarity of a complex rule is to replace gratuitously confusing sentence structure with more straightforward structure that emphasizes the point of the legal test or the exception described. For example, Rule 26(b)(3), commonly known as the work product rule, generally prohibits parties from discovering trial preparation materials of their opponents, with a few limited exceptions. In the following side-by-side comparison, note how the first two sentences of the restyled rule quickly and simply set up the idea of an exception to the general discoverability of relevant information ("Ordinarily, a party may not discover"), while the first sentence of the old rule takes its time revealing that trial

preparation materials are not generally discoverable. Indeed, the old rule does not signal to the reader that it is describing an exception ("only upon showing") until its sixty-second word." (pg 19)

"Also within Rule 26, the provision explaining the protection of non-testifying experts from discovery presents a similar example of the older rule language starting out in an unnecessarily confusing manner while the restyled language immediately tells the reader that the protection involves a general rule with some exceptions. Again, the reader of the old rule must wade through more than half of a lengthy sentence before arriving at the word "only," which signals that the sentence has been describing an exception all along." (pg 20)

"The two comparisons above, regarding the work product protection and the non-testifying expert protection, also point to the importance of the plain language technique of focusing one's sentences on a subject, verb, and object that convey the real point to be communicated. . . . Thus, the most important grammatical parts of the restyled sentences convey the most important aspects of the provisions' substance." (pg 21)

"An additional technique that helps to clarify complex subject matter is the elimination of unnecessary words in the form of needless intensifiers. . . . By eliminating these and other unnecessary intensifiers, the restyling has not only made the rule text a bit more concise, but also prevented some possible misreadings." (pgs 21-22)

"The above techniques, as well as others, were aimed at allowing the rules to retain their complex content while becoming much easier to read." (pg 22)

"[t]he restyled rules aim for, and for the most part achieve, plain, easy-to-understand English." (pgs 29-30) (quoting Michael C. Dorf, *Meet the New Federal Rules of Civil Procedure: Same as the Old Rules?*, http://writ.news.findlaw.com/dorf/20070718.html (July 18,2007)).

"Having seized a unique opportunity to clarify the entire code of civil rules, the Style Project drafters have not only made today's rules easier to comprehend but have also paved the way for clearer drafting of future substantive rule amendments. Rather than becoming "progressively more difficult to understand," the civil rules are likely to retain the clarity of the restyled language because substantive amendments will no longer have to mesh with the convoluted sentence structure and ineffective word choice of the pre-restyling language." (pg 30)

"In addition, the Style Project has generated, as a by-product, some excellent drafting guidance on plain language techniques. This guidance can aid drafters not only of future federal rule amendments but also any of rule or statutory provision. The dissemination of this guidance throughout the American legal community may prove as valuable as the actual restyling of the civil rules themselves." (pg 30)

"Plain language drafting techniques have allowed the restyling to accomplish the first part of this charge; the restyled rules are decidedly clearer, thanks to more effective organization, sentence structure, and word choice, among other changes." (pgs 30-31)

" . . . the restyling, as a case study, demonstrates that plain language techniques can allow drafters to meet the sophisticated demands that complex content, legal context, and a varied audience place upon a code of procedural rules." (pg 31)

William F. Stute, *Amendments to Civil Rules Proposed*, 30 Litigation News 5 (July 2005)

Support for the Restyled Rules

"Overall, leaders of the Section of Litigation strongly support the changes. 'Anyone who has attempted to walk through the rules will tell you that they are fraught with arcane language and inconsistencies. The amended rules, on the other hand, are written in a clear, useful style,' says Dennis J. Drasco, Roseland, NJ, Chair of the Section of Litigation."

"'The Committee has done an excellent job of making the rules simpler and easier to read, without any apparent change in meaning. It's about time," agrees W. Reece Bader, Menlo Park, CA, member of the Section's Federal Practice Task Force."

"'The amended rules are much more user friendly and easier to understand. . . .' notes Martha K. Gooding, Irvine, CA, Co-Chair of the Section's Commercial and Business Litigation Committee."

"She [Ms. Gooding] points out that the amended rules 'are drafted in a way that you would expect a brief to be written—clear, concise, and visually appealing. I appreciate the short paragraphs, headings, and clear layout of subdivisions. It takes less energy to read them. The changes are terrific, and long overdue.'"

"'Reaction to the restyled appellate and criminal rules has been overwhelmingly positive,' adds Drasco."

Mark Aronchick, Chairman of the ACTL Federal Rules of Evidence Committee, Comments of the Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (Aug. 17, 2009), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2010-04.pdf, p. 269.

"Our Committee members commented, time and again, on the excellent work of the restyling sub-committee."

Letter to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, written by officers and members of the American Bar Association's Litigation Section (March 3, 2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2010-04.pdf, p. 347

"We commend the Advisory Committee on their excellent and careful work. The overwhelming majority of the proposed changes will lead to clearer rules that will be of great benefit to the practicing bar and the public."

Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009).

Joseph Kimble, *Drafting Examples from the Proposed New Federal Rules of Evidence*, 88 Mich. B.J. 52 (Aug. 2009); 88 Mich. B.J. 46 (Sept. 2009); 88 Mich. B.J. 54 (Oct. 2009); 88 Mich. B.J. 50 (Nov. 2009).

In the first article, Professor Kimble includes scores of side-by-side comparisons of the pre-2007 Civil Rules and the restyled rules. In the second — actually a series of four articles — he identifies dozens of drafting deficiencies in each of four sample evidence rules before the restyling.

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TAB 7C

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

MEMORANDUM

TO: Members, Committee on Rules of Practice and Procedure

FROM: Mark R. Kravitz

DATE: May 18, 2012

RE: IMPLEMENTATION OF THE STRATEGIC PLAN FOR THE FEDERAL JUDICIARY

Attached to this memorandum is an April 10, 2012 memorandum from Judge Charles Breyer, the Judiciary Planning Coordinator, requesting a report on the Standing Committee's progress in implementing the *Strategic Plan for the Federal Judiciary*.

By way of background, on September 14, 2010, the Judicial Conference approved the *Strategic Plan* as well as an approach to strategic planning in which Conference committees assume a great deal of responsibility for its implementation. (JCUS-SEP 10, pp. 5-6). As you will recall, in January 2011, in response to a request by the Advisory Committee on Judiciary Planning, the Standing Committee submitted a memorandum identifying the following two strategic initiatives: (1) 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; and (2) 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 Standing Committee also identified one strategy and one goal from the *Strategic Plan* that it recommended the Executive Committee consider a judiciary-wide priority—specifically, the development and implementation of a comprehensive approach to enhancing relations between the judiciary and Congress.

Judge Breyer reported on the efforts of the Judicial Conference committees to implement the *Strategic Plan* at the February 2011 meeting of the Executive Committee. On March 14, 2011, after considering the suggestions of the various Judicial Conference committees, the Executive Committee selected the following four strategies and one goal from the *Strategic Plan* as priorities for the next two years: (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.

The Executive Committee has asked Judge Breyer to submit an interim assessment of the judiciary's progress in implementing the *Strategic Plan* by September 2012. To assist in the preparation of this report, in a letter to Judge Lee Rosenthal dated May 5, 2011, Judge Breyer requested that the Standing Committee both verify and update the information previously provided about its strategic initiatives and identify desired outcomes for each. Judge Breyer further asked that the Standing Committee begin considering how to measure or assess its progress in implementing the *Strategic Plan*. At the June 2011 meeting, the Standing Committee unanimously approved by voice vote a responsive memorandum prepared by Judge Rosenthal. That memorandum provided updates on the two strategic initiatives previously identified and identified two additional initiatives, namely, (1) the effort by all of the Advisory Committees to assess the impact of electronic filing and to identify ways to take advantage of technological advances; and (2) the Forms Modernization Project undertaken by the Advisory Committee on the Bankruptcy Rules.

In his most recent memorandum, Judge Breyer requests another interim report on the status and planned assessment approach for each of our initiatives as well as our perspective on whether our efforts are achieving their desired effects. Judge Breyer additionally requests that the Standing Committee comment on whether its work is helping to preserve the judiciary's core values and address critical strategic planning issues.

Judge Breyer will prepare his report to the Executive Committee over the summer and has therefore requested a response by June 30, 2012. We are working to meet that deadline so that Judge Breyer, in turn, may meet his September deadline.

> **RECOMMENDATION:** That the members delegate to the Chair and Reporter the task of preparing and transmitting to the Judiciary Planning Coordinator a report on the Standing Committee's progress in implementing the *Strategic Plan for the Federal Judiciary*.

Attachment

United States District Court
Northern District of California
United States Courthouse
San Francisco, California 94102

Chambers of
Charles R. Breyer
United States District Judge

April 10, 2012

MEMORANDUM

To: Chairs of Judicial Conference Committees

From: Charles R. Breyer
Judiciary Planning Coordinator

RE: INTERIM ASSESSMENT OF THE IMPLEMENTATION OF THE *STRATEGIC PLAN FOR THE FEDERAL JUDICIARY*

This summer, I will prepare a report for the Executive Committee on the judiciary's progress achieving the goals set forth in the *Strategic Plan for the Federal Judiciary*.

I ask for your assistance in preparing this report. Since the approval of the *Strategic Plan*, each committee has identified projects and initiatives related to the plan's strategies and goals. Committees have also identified the outcomes that these projects are intended to achieve. By June 30, 2012, please provide me with an account of the judiciary's progress in achieving these outcomes. This account might include quantitative measures, qualitative assessments, evaluation studies, survey results, or other information.

The report to the Executive Committee will be an interim assessment, and I fully understand that some initiatives may be in progress. For these efforts, a description of the status of the initiative and the planned assessment approach would be most helpful. I also understand that many outcomes are inherently difficult to measure. Your committee's perspective on whether these efforts are achieving their desired effects would also be very helpful.

Finally, I ask that each committee take some time for a broader discussion about the extent to which its work is helping to preserve the judiciary's core values and address critical strategic planning issues. Please let me know your committee's ideas about planning issues that the judiciary should address, and improvements to the judiciary's planning approach.

I anticipate that a draft of the interim assessment will be completed in time for the September Judicial Conference session. As always, I am very grateful for your efforts to implement the *Strategic Plan*. Please contact me or Brian Lynch, the AO's Long-Range Planning Officer, if you have any questions or suggestions.

cc: Executive Committee
Committee Staff

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