COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Washington, DC
June 3-4, 2013

TABLE OF CONTENTS

AGENDA 19

TAB 1 **OPENING BUSINESS**

A. **ACTION ITEM: Draft Minutes of the January 3-4, 2013 Meeting of the Standing Committee** 27

TAB 2 **ADVISORY COMMITTEE ON CIVIL RULES**

Report of the Advisory Committee on Civil Rules (May 8, 2013)

A. **Introduction** 53

B. **ACTION ITEM: Proposed Amendments to Civil Rules 1, 4, 16, 26, 30, 31, 34, 36, and 37 for Publication** 59

C. **ACTION ITEM: Proposed Amendments to Civil Rule 37(e) for Publication** 93

D. **ACTION ITEM: Proposed Abrogation of Civil Rule 84 and Official Forms, and Amendment to Civil Rule 4 for Publication** 121

E. **Information Items** 131

F. **Draft Minutes of the April 11-12, 2013 Meeting of the Advisory Committee on Civil Rules** 139

TAB 3 **ADVISORY COMMITTEE ON CRIMINAL RULES**

A. **Report of the Advisory Committee on Criminal Rules (May 8, 2013)**

Introduction 189

ACTION ITEM: Proposed Amendments to Criminal Rules 12 and 34 for Final Approval 190

ACTION ITEM: Proposed Amendments to Criminal Rules 5 and 58 for Final Approval 194

Information Item 196

B. Supplemental Materials Regarding Proposed Amendments to Criminal Rules 12 and 34

B.1 2013 Submitted Rule 12 Amendment – Clean Version 201

B.2 Blackline Comparison of Current and Submitted Rule 12 211

B.3 Blackline Comparison of Current and Submitted Rule 34 221

B.4 Reporters' Memorandum to Advisory Committee Regarding Development of Rule 12 Amendment (March 24, 2013) 225

B.5 2011 Published Amendments to Rules 12 and 34 247

C. Supplemental Materials Regarding Proposed Amendments to Criminal Rules 5 and 58

C.1 2013 Submitted Rules 5 and 58 Amendments – Clean Version 261

C.2 Blackline Comparison of Current and Submitted Rules 5 and 58 271

C.3 2012 Published Amendments to Rules 5 and 58 281

C.4 Amendment Proposal Returned from the Supreme Court 289

D. Draft Minutes of the April 25, 2013 Meeting of the Advisory Committee on Criminal Rules 295

TAB 4 ADVISORY COMMITTEE ON BANKRUPTCY RULES

A. Report of the Advisory Committee on Bankruptcy Rules (May 8, 2013)

Introduction 315

ACTION ITEMS: Proposed Amendments for Final Approval 316

1. **Rules 7008, 7012, 7016, 9027, and 9033**
2. **Rules 8001-8028 (Part VIII of the Bankruptcy Rules)**
3. **Rule 1014(b)**

**4.	Rule 7004(e)**
**5.	Rules 7008(b) and 7054**
**6.	Rules 9023 and 9024**
**7.	Official Forms 3A, 3B, 6I, and 6J**
**8.	Official Form 23**

ACTION ITEMS: Proposed Amendments for Publication 332

**9.	Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2**
**10.	Rules to implement the chapter 13 plan form**
**11.	Rule 5005**
**12.	Rule 9006(f)**
**13.	Official Form 113 (chapter 13 plan form)**
**14.	Remaining revised forms for individual debtors**
**15.	Official Forms 17A, 17B, and 17C**

Appendix A – **Rules and Forms for Final Approval**

**A.1	Rules 1014, 7004, 7008, 7012, 7016, 7054, 9023, 9024, 9027, and 9033 .... 351**

**A.2	Rules 8001-8028 .... 375**

**A.3	Official Forms 3A, 3B, 6I, and 6J 505**

**A.4	Conforming Amendment to Official Form 23........ 541**

Appendix B – **Rules and Forms for Publication**

**B.1	Rules 2002, 3002, 3007, 3012, 3015, 4003, 5005, 5009, 7001, 9006, and 9009...................................... 547**

**B.2	Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2 (republication); Official Form 22A-1Supp (publication) 571**

**B.3	Form Number Conversion Chart, Official Forms 101, 101A, 101B, 103A/B filler, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106I/J filler, 106Dec, 107, 108/109/110 filler, 112, 119, 121, 318, 423, and 427, and Instruction Booklet 605**

**B.4	Official Form 113... 765**

**B.5	Official Forms 17A, 17B, and 17C.......................... 777**

Appendix C – **Draft Minutes of the April 2-3, 2013 Meeting of the Advisory Committee on Bankruptcy Rules............................... 787**

TAB 5 **ADVISORY COMMITTEE ON EVIDENCE RULES**

A. **Report of the Advisory Committee on Evidence Rules (May 7, 2013)**

Introduction **823**

ACTION ITEM: Proposed Amendment to Evidence Rule 801(d)(1)(B) for Final Approval **824**

ACTION ITEM: Proposed Amendments to Evidence Rules 803(6)-(8) for Final Approval **825**

Information Items **826**

B. **Blackline Comparison of Current and Submitted Evidence Rule 801(d)(1)(B)** **831**

C. **Blackline Comparison of Current and Submitted Evidence Rules 803(6)-(8)** **837**

D. **Draft Minutes of the May 3, 2013 Meeting of the Advisory Committee on Evidence Rules** **847**

TAB 6 **ADVISORY COMMITTEE ON APPELLATE RULES**

A. **Report of the Advisory Committee on Appellate Rules (May 8, 2013)**

Introduction **867**

ACTION ITEM: Proposed Amendments to Appellate Rule 6 for Final Approval **868**

Information Items **869**

B. **Blackline Comparison of Current and Submitted Appellate Rule 6** **875**

C. **Table of Agenda Items of the Advisory Committee on Appellate Rules (May 2013)** **887**

D. **Draft Minutes of the April 22-23, 2013 Meeting of the Advisory Committee on Appellate Rules** **893**

COMMITTEES ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

Chair, Committee on Rules of Practice and Procedure *(Standing Committee)*	**Honorable Jeffrey S. Sutton** United States Court of Appeals 260 Joseph P. Kinneary U.S. Courthouse 85 Marconi Boulevard Columbus, OH 43215
Reporter, Committee on Rules of Practice and Procedure *(Standing Committee)*	**Professor Daniel R. Coquillette** Boston College Law School 885 Centre Street Newton Centre, MA 02459

Chair, Advisory Committee on Appellate Rules	**Honorable Steven M. Colloton** United States Court of Appeals U.S. Courthouse Annex, Suite 461 110 East Court Avenue Des Moines, IA 50309-2044
Reporter, Advisory Committee on Appellate Rules	**Professor Catherine T. Struve** University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104

Chair, Advisory Committee on Bankruptcy Rules	**Honorable Eugene R. Wedoff** United States Bankruptcy Court Everett McKinley Dirksen U.S. Courthouse 219 South Dearborn Street Chicago, IL 60604
Reporter, Advisory Committee on Bankruptcy Rules	**Professor S. Elizabeth Gibson** 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380 **Professor Troy A. McKenzie** New York University School of Law 40 Washington Square South New York, NY 10012

Chair, Advisory Committee on Civil Rules	**Honorable David G. Campbell** United States District Court 623 Sandra Day O'Connor U.S. Courthouse 401 West Washington Street Phoenix, AZ 85003-2146
Reporter, Advisory Committee on Civil Rules	**Professor Edward H. Cooper** University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215 **Professor Richard L. Marcus** University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978

Chair, Advisory Committee on Criminal Rules	**Honorable Reena Raggi** United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818
Reporter, Advisory Committee on Criminal Rules	**Professor Sara Sun Beale** Charles L. B. Lowndes Professor Duke Law School 210 Science Drive Durham, NC 27708-0360 **Professor Nancy J. King** Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181

Chair, Advisory Committee on Evidence Rules	**Honorable Sidney A. Fitzwater** Chief Judge United States District Court Earle Cabell Federal Bldg. U.S. Courthouse 1100 Commerce Street, Room 1528 Dallas, TX 75242-1310
Reporter, Advisory Committee on Evidence Rules	**Professor Daniel J. Capra** Fordham University School of Law 140 West 62nd Street New York, NY 10023

Secretary, Standing Committee and Rules Committee Officer	**Jonathan C. Rose** Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Jonathan_Rose@ao.uscourts.gov
Chief Counsel	**Andrea L. Kuperman** Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Ave. Houston, TX 77002-2600 Phone 713-250-5980 Fax 713-250-5213 Andrea_Kuperman@txs.uscourts.gov
Deputy Rules Committee Officer and Counsel	**Benjamin J. Robinson** Deputy Rules Committee Officer and Counsel to the Rules Committees Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1516 Fax 202-502-1755 Benjamin_Robinson@ao.uscourts.gov

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair, Standing Committee	**Honorable Jeffrey S. Sutton** United States Court of Appeals 260 Joseph P. Kinneary U.S. Courthouse 85 Marconi Boulevard Columbus, OH 43215
Reporter, Standing Committee	**Professor Daniel R. Coquillette** Boston College Law School 885 Centre Street Newton Centre, MA 02459
Members, Standing Committee	**Honorable James M. Cole** Deputy Attorney General (ex officio) United States Department of Justice 950 Pennsylvania Avenue, N.W. - Room 4111 Washington, DC 20530 **Dean C. Colson, Esq**. Colson Hicks Eidson 255 Alhambra Circle Penthouse Coral Gables, FL 33134 **Roy T. Englert, Jr., Esq.** Robbins Russell Englert Orseck Untereiner & Sauber, LLP 801 K Street, N.W. - Suite 411-L Washington, DC 20006 **Gregory G. Garre, Esq.** Latham & Watkins LLP 555 Eleventh Street, N.W. Washington, DC 20004-1304 **Honorable Neil M. Gorsuch** United States Court of Appeals Byron White United States Courthouse 1823 Stout Street, 4th Floor Denver, CO 80257-1823

Members, Standing Committee ***(cont'd.)***	**Honorable Marilyn L. Huff** United States District Court Edward J. Schwartz U.S. Courthouse Suite 5135 940 Front Street San Diego, CA 92101 **Honorable Wallace B. Jefferson** Supreme Court of Texas Supreme Court Building 201 W. 14th Street, Room 104 Austin, Texas 78701 **Dean David F. Levi** Duke Law School Science Drive and Towerview Road Room 2012 Durham, NC 27708 **Honorable Patrick J. Schiltz** United States District Court United States Courthouse 300 South Fourth Street – Suite 14E Minneapolis, MN 55415 **Larry D. Thompson, Esq.** University of Georgia School of Law 212 Hirsch Hall Athens, GA 30602 **Honorable Richard C. Wesley** United States Court of Appeals Livingston County Government Center Six Court Street Geneseo, NY 14454-1043 **Honorable Diane P. Wood** United States Court of Appeals 2688 Everett McKinley Dirksen U.S. Courthouse 219 South Dearborn Street Chicago, IL 60604 **Honorable Jack Zouhary** United States District Court James M. Ashley and Thomas W.L. Ashley United States Courthouse 1716 Spielbusch Avenue, Room 203 Toledo, OH 43604

Advisors and Consultants, Standing Committee	**Professor Geoffrey C. Hazard, Jr.** Hastings College of the Law 200 McAllister Street San Francisco, CA 94102 **Professor R. Joseph Kimble** Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933 **Peter G. McCabe** Assistant Director Office of Judges Programs Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 4-180 Washington, DC 20544 **Joseph F. Spaniol, Jr., Esq.** 5602 Ontario Circle Bethesda, MD 20816-2461
Secretary, Standing Committee and Rules Committee Officer	**Jonathan C. Rose** Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Jonathan_Rose@ao.uscourts.gov
Chief Counsel	**Andrea L. Kuperman** Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Ave. Houston, TX 77002-2600 Phone 713-250-5980 Fax 713-250-5213 Andrea_Kuperman@txs.uscourts.gov
Deputy Rules Committee Officer and Counsel	**Benjamin J. Robinson** Deputy Rules Committee Officer and Counsel to the Rules Committees Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1516 Fax 202-502-1755 Benjamin_Robinson@ao.uscourts.gov

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
Jeffrey S. Sutton Chair	C	Sixth Circuit	2012	2015
James Cole*	DOJ	Washington, DC	----	Open
Dean C. Colson	ESQ	Florida	2009	2015
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	2015
Patrick J. Schiltz	D	Minnesota	2010	2013
Larry A. Thompson	ESQ	Georgia	2011	2014
Richard C. Wesley	C	Second Circuit	2011	2014
Diane P. Wood	C	Seventh Circuit	2007	2013
Jack Zouhary	D	Ohio (Northern)	2012	2015
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open
Secretary and Principal Staff:	Jonathan C. Rose	202-502-1820		

* Ex-officio

LIAISON MEMBERS

Committee	Liaison	Committee
Liaison for the Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.**	***(Standing)***
Liaison for the Advisory Committee on Appellate Rules	**Judge Adalberto Jordan**	***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(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)***

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Jonathan C. Rose Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Jonathan_Rose@ao.uscourts.gov
Peter G. McCabe Assistant Director Office of Judges Programs Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 4-180 Washington, DC 20544 Phone 202-502-1800 Fax 202-502-1755 peter_mccabe@ao.uscourts.gov
Benjamin J. Robinson Deputy Rules Committee Officer and Counsel to the Rules Committees Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1516 Fax 202-502-1755 Benjamin_Robinson@ao.uscourts.gov
Julie Wilson Attorney Advisor Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 4-250 Washington, DC 20544 Phone 202-502-3678 Fax 202-502-1766 Julie_Wilson@ao.uscourts.gov

James H. Wannamaker III
Senior Attorney
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-254
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
James_Wannamaker@ao.uscourts.gov

Scott Myers
Attorney Advisor
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-250
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
Scott_Myers@ao.uscourts.gov

Bridget M. Healy
Attorney Advisor
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-273
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
Bridget_Healy@ao.uscourts.gov

Frances F. Skillman
Paralegal Specialist
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-3945
Fax 202-502-1755
Frances_Skillman@ao.uscourts.gov

FEDERAL JUDICIAL CENTER

Joe Cecil *(Rules of Practice & Procedure)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4084 Fax 202-502-4199 jcecil@fjc.gov	**Marie Leary** *(Appellate Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 mleary@fjc.gov
Molly T. Johnson *(Bankruptcy Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 315-824-4945 mjohnson@fjc.gov	**Emery G. Lee** *(Civil Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4078 Fax 202-502-4199 elee@fjc.gov
Laural L. Hooper *(Criminal Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov	**Tim Reagan** *(Evidence Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4097 Fax 202-502-4199 treagan@fjc.gov

THIS PAGE INTENTIONALLY BLANK

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 3-4, 2013

1. **Welcome and Opening Remarks**

   A. Welcome and opening remarks by Chair

   B. Report on March 2013 Judicial Conference session

   C. Transmission of Supreme Court-approved proposed rules amendments to Congress

   D. **ACTION –** Approving Minutes of January 2013 Committee Meeting

2. **Report of the Advisory Committee on Civil Rules – Judge David G. Campbell**

   A. Duke Civil Litigation Conference Rules Package

      ACTION – Approving publishing for public comment proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37

   B. Rule 37(e)

      ACTION – Approving a modification to the proposed amendment to Rule 37(e) previously approved for publication for public comment

   C. Rule 84 and Official Forms

      ACTION – Approving publishing for public comment proposed abrogation of Rule 84 and the Appendix of Forms, and proposed amendments to Rule 4 and Forms 5 and 6

   D. Minutes and other informational items

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

   A. Rule 12 – Pleadings and Pretrial Motions

      ACTION – Approving and transmitting to the Judicial Conference proposed amendments to Rules 12 and 34

   B. Rules 5 and 58 – Consular Notification

      ACTION – Approving and transmitting to the Judicial Conference proposed amendments to Rules 5 and 58

C. Minutes and other informational items

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

A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to:

1. Rules 7008, 7012, 7016, 9027, and 9033
2. Rules 8001-8028 (Part VIII of the Bankruptcy Rules)
3. Rule 1014(b)
4. Rule 7004(e)
5. Rules 7008(b) and 7054
6. Rules 9023 and 9024
7. Official Forms 3A, 3B, 6I, and 6J
8. Official Form 23

B. **ACTION** – Approving publishing for public comment proposed amendments to:

9. Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2
10. Rules to implement the chapter 13 plan form
11. Rule 5005
12. Rule 9006(f)
13. Official Form 113 (chapter 13 plan form)
14. Remaining revised forms for individual debtors
15. Official Forms 17A, 17B, and 17C

C. Minutes and other informational items

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

A. **ACTION** – Approving and transmitting to the Judicial Conference a proposed amendment to Rule 801(d)(1)(B)

B. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 803(6), 803(7), and 803(8)

C. Minutes and other informational items

6. Report of the Advisory Committee on Appellate Rules – Judge Steven M. Colloton

A. **ACTION** – Approving and transmitting to the Judicial Conference a proposed amendment to Rule 6

B. Minutes and other informational items

7. Report of the Inter-Committee CM/ECF Subcommittee – Judge Michael A. Chagares

8. Report of the Administrative Office

9. Next meeting in Phoenix, Arizona on January 9-10, 2014

THIS PAGE INTENTIONALLY BLANK

TAB 1

THIS PAGE INTENTIONALLY BLANK

TAB 1A

THIS PAGE INTENTIONALLY BLANK

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 3-4, 2013
Cambridge, Massachusetts

Draft Minutes

TABLE OF CONTENTS

Attendance.. 1
Introductory Remarks.. 3
Approval of Minutes of the Last Meeting............................ 4
Report of the Advisory Committee on Civil Rules............. 4
Panel on Civil Litigation Reform Pilot Projects.................. 12
Report of the Advisory Committee on Appellate Rules....... 15
Report of the Advisory Committee on Criminal Rules........ 16
Report of Advisory Committee on Rules of Evidence......... 17
Report of the Administrative Office on Pace of Rulemaking.. 19
Report of the Advisory Committee on Bankruptcy Rules.... 20
Next Committee Meeting... 23

ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Cambridge, Massachusetts, on Thursday and Friday, January 3 and 4, 2013. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esq.
Roy T. Englert, Jr., Esq.
Gregory G. Garre, Esq.
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Larry D. Thompson, Esq.
Judge Richard C. Wesley
Judge Diane P. Wood

The Department of Justice was represented at various points at the meeting by Acting Assistant Attorney General Stuart F. Delery, Elizabeth J. Shapiro, Esq., and Allison Stanton, Esq.

Deputy Attorney General James M. Cole, Judge Neil M. Gorsuch, and Judge Jack Zouhary were unable to attend.

Also participating were former member Judge James A. Teilborg; Professor Geoffrey C. Hazard, Jr., consultant to the committee; and Peter G. McCabe, Administrative Office Assistant Director for Judges Programs. The committee's style consultant, Professor R. Joseph Kimble, participated by telephone.

On Thursday afternoon, January 3, Judge Sutton moderated a panel discussion on civil litigation reform initiatives with the following panelists: Judge John G. Koeltl, a member of the Advisory Committee on Civil Rules and Chair of its Duke Conference subcommittee; Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System at the University of Denver and a former justice of the Colorado Supreme Court; Dr. Emery G. Lee, III, Senior Research Associate in the Research Division of the Federal Judicial Center; and Judge Barbara B. Crabb, U.S. District Court for the Western District of Wisconsin.

Providing support to the Standing Committee were:

Professor Daniel R. Coquillette	The Committee's Reporter
Jonathan C. Rose	The Committee's Secretary and Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman (by telephone)	Chief Counsel to the Rules Committees
Joe Cecil	Research Division, Federal Judicial Center

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter (by telephone)
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
Advisory Committee on Evidence Rules —
Chief Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by noting the extraordinary service to the rules committees by his predecessor Judge Mark Kravitz, which would be further commemorated at the committee's dinner in the evening. He praised Judge Kravitz's extraordinary ten years of service on both the Civil Rules Advisory Committee and the Standing Committee. Judge Kravitz served as chair of both committees.

Judge Sutton specifically called attention to the commendation of Judge Kravitz in Chief Justice Roberts's year-end report and asked that the following paragraph from that report be included in the minutes:

> On September 30, 2012, Mark R. Kravitz, United States District Judge for the District of Connecticut, passed away at the age of 62 from amyotrophic lateral sclerosis—Lou Gehrig's Disease. We in the Judiciary remember Mark not only as a superlative trial judge, but as an extraordinary teacher, scholar, husband, father, and friend. He possessed the temperament, insight, and wisdom that all judges aspire to bring to the bench. He tirelessly volunteered those same talents to the work of the Judicial Conference, as chair of the Committee on Rules of Practice and Procedure, which oversees the revision of all federal rules of judicial procedure. Mark battled a tragic illness with quiet courage and unrelenting good cheer, carrying a full caseload and continuing his committee work up until the final days of his life. We shall miss Mark, but his inspiring example remains with us as a model of patriotism and public service.

Chief Justice John G. Roberts, Jr., 2012 Year-End Report on the Federal Judiciary 11 (2012).

Judge Sutton reported that at its September 2012 meeting, the Judicial Conference approved without debate all fifteen proposed rules changes forwarded to it by the committee for transmittal to the Supreme Court. Assuming approval by the Court and no action by Congress to modify, defer, or delay the proposals, the amendments will become effective on December 1, 2013.

APPROVAL OF MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of its last meeting, held on June 11 and 12, 2012, in Washington, D.C.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum of December 5, 2012 (Agenda Item 3). Judge Campbell presented several action items, including the recommendation to publish for comment amendments to Rules 37(e), 6(d), and 55(c). Judge Campbell also presented the advisory committee's recommendation to adopt without publication an amendment to Rule 77(c)(1).

Amendment for Final Approval

FED. R. CIV. P. 77(c)(1) – CROSS REFERENCE CORRECTION

The proposed amendment to Rule 77(c)(1) corrects a cross-reference to Rule 6(a) that should have been changed when Rule 6(a) was amended in 2009 as part of the Time Computation Project. Before those amendments, Rule 6(a)(4)(A) defined "legal holiday" to include 10 days set aside by statute, and Rule 77(c)(1) incorporated that definition by cross-reference.

As a result of the 2009 Time Computation amendment, the Rule's list of legal holidays remained unchanged, but became Rule 6(a)(6)(A). However, through inadvertence, the cross-reference in Rule 77(c) was not addressed at that time. The proposed amendment corrects the cross-reference.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. CIV. P. 37(e)

Judge Campbell first gave a short history behind the drafting of the proposed new Rule 37(e). He stated that the subject of the rule had been extensively considered at a mini-conference, as well as in numerous meetings of the advisory committee and conference calls of the advisory committee's discovery subcommittee. There was wide

agreement that the time had come for developing a rules-based approach to preservation and sanctions.

The Civil Rules Committee hosted a mini-conference in Dallas in September 2011. Participants in that mini-conference provided examples of extraordinary costs assumed by litigants, and those not yet involved in litigation, to preserve massive amounts of information, as a result of the present uncertain state of preservation obligations under federal law. In December 2011, a subcommittee of the House Judiciary Committee held a hearing on the costs of American discovery that focused largely on the costs of preservation for litigation.

The discovery subcommittee of the advisory committee had agreed for some time that some form of uniform federal rule regarding preservation obligations and sanctions should be established. The subcommittee initially considered three different approaches: (1) implementing a specific set of preservation obligations; (2) employing a more general statement of preservation obligations, using reasonableness and proportionality as the touchstones; and (3) addressing the issue through sanctions. The subcommittee rejected the first two approaches. The approach that would set out specific guidance was rejected because it would be difficult to set out specific guidelines that would apply in all civil cases, and changing technology might quickly render such a rule obsolete. The more general approach was rejected because it might be too general to provide real guidance. The subcommittee therefore opted for a third approach that focuses on possible remedies and sanctions for failure to preserve. This approach attempts to specify the circumstances in which remedial actions, including discovery sanctions, will be permitted in cases where evidence has been lost or destroyed. It should provide a measure of protection to those litigants who have acted reasonably in the circumstances.

After an extensive and wide ranging discussion of the proposed new Rule 37(e), the committee approved it for publication in August 2013, conditioned on the advisory committee reviewing at its Spring 2013 meeting the major points raised at this meeting. Judge Campbell agreed that the advisory committee would address concerns raised by Standing Committee members and make appropriate revisions in the draft rule and note for the committee's consideration at its June 2013 meeting.

During the course of the committee's discussion, the following concerns were expressed with respect to the current draft of proposed new Rule 37(e) and its note:

Displacement of Other Laws

One committee member expressed concern about the statement in the note that the amended rule "*displaces* any other law that would authorize imposing litigation sanctions in the absence of a finding of wilfulness or bad faith, including state law in diversity

cases." (emphasis added).

The member pointed out that use of the term "displace" could be read as a possible effort to preempt on a broad basis state or federal laws or regulations requiring the preservation of records in different contexts and for different purposes, such as tax, banking, professional, or antitrust regulation. Judge Campbell stated that there had been no such intent on the part of the advisory committee. The advisory committee had been focused on establishing a uniform federal standard solely for the preservation of records for litigation in federal court (including cases based on diversity jurisdiction). The advisory committee intended to preserve any separate state-law torts of spoliation.

Judge Campbell believed the draft committee note could be appropriately clarified to make clear that the proposed rule on preservation sanctions had no application beyond the trial of cases. A committee member noted that a statutory requirement of records preservation for non-trial purposes should not require a litigant to make greater preservation efforts for trial discovery purposes than would otherwise be required by the amended rule.

Use of the Term "Sanction"

Another participant noted that the word "sanction" has particularly adverse significance in most contexts when applied to the conduct of a lawyer. In some jurisdictions, this might require reporting an attorney to the board of bar overseers. Thus, in using the term "sanction," he urged that the advisory committee differentiate between its use when referring to the actions permitted under the rule in response to failures to preserve and its broader application to the general area of professional responsibility.

"Irreparable Deprivation"

Several committee members raised concerns about proposed language that would allow for sanctions if the failure to preserve "irreparably deprived a party of any meaningful opportunity to present a claim or defense." These members stated that this language could potentially eliminate most of the rule's intended protection for the innocent and routine disposition of records. Also, as a matter of style and precise expression, one committee member preferred substitution of the word "adequate"for the word "meaningful."

Acts of God

Another concern was whether the proposed draft of Rule 37(e) would permit the imposition of sanctions against an innocent litigant whose records were destroyed by an "act of God." The accidental destruction of records because of flooding during the recent

Hurricane Sandy was offered as a hypothetical example. Judge Campbell agreed that a literal reading of the current draft might lead to imposition of sanctions as the result of a blameless destruction of records resulting from such an event. Both he and Professor Cooper agreed that the question of who should bear the loss in an "act of God" circumstance was an important policy issue for the advisory committee to revisit at its spring meeting.

Preservation of Current Rule 37(e) Language

The Department of Justice and several committee members also recommended retention of the language of the current Rule 37(e), which protects the routine, good-faith operation of an electronic information system. Andrea Kuperman's research showed that the current rule is rarely invoked. But the Department of Justice argued that in its experience, the presence of the Rule 37(e) has served as a useful incentive for government departments to modernize their record-keeping practices.

Expanded Definition of "Substantial Prejudice"

The Department also urged that the term "substantial prejudice in the litigation"—a finding required under the draft proposal in order to impose sanctions for failure to preserve—be given further definition. It suggested that "substantial prejudice" should be assessed both in the context of reliable alternative sources of the missing evidence or information as well as in the context of the materiality of the missing evidence to the claims and defenses involved in the case. The Department and several committee members suggested that publication for public comment might be helpful to the committee in developing its final proposed rule.

By voice vote, the committee preliminarily approved for publication in August 2013 draft proposed Rule 37(e) on the condition that the advisory committee would review the foregoing comments and make appropriate revisions in the proposed draft rule and note for approval by the Standing Committee at its June 2013 meeting.

FED. R. CIV. P. 6(d) – CLARIFICATION OF "3 DAYS AFTER SERVICE"

Professor Cooper reviewed the advisory committee's proposed amendment to Rule 6(d), which provides an additional 3 days to act after certain methods of service. The purpose of the amendment is to foreclose the possibility that a party who must act within a specified time after making service could extend the time to act by choosing a method of service that provides the added time.

Before Rule 6(d) was amended in 2005, the rule provided an additional 3 days to

respond when service was made by various described means. Only the party being served, not the party making the service, had the option of claiming the extra 3 days. When Rule 6(d) was revised in 2005 for other purposes, it was restyled according to the conventions adopted for the Style Project, allowing 3 additional days when a party must act within a specified time "after service." This could be interpreted to cover rules allowing a party to act within a specified time after making (as opposed to receiving) service, which is not what the advisory committee intended. For example, a literal reading of present Rule 6(d) would allow a defendant to extend from 21 to 24 days the Rule 15(a)(1)(A) period to amend once as a matter of course by choosing to serve the answer by any of the means specified in Rule 6(d). Although it had not received reports of problems in practice, the advisory committee determined that this unintended effect should be eliminated by clarifying that the extra 3 days are available only to the party receiving, as opposed to making, service.

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

FED. R. CIV. P. 55(c) – APPLICATION TO "FINAL" DEFAULT JUDGMENT

Professor Cooper explained that the proposed amendment to Rule 55(c), the rule on setting aside a default or a default judgment, addresses a latent ambiguity in the interplay of Rule 55(c) with Rules 54(b) and 60(b) that arises when a default judgment does not dispose of all claims among all parties to an action. Rule 54(b) directs that the judgment is not final unless the court directs entry of final judgment. Rule 54(b) also directs that the judgment "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Rule 55(c) provides simply that the court "may set aside a default judgment under Rule 60(b)." Rule 60(b) in turn provides a list of reasons to "relieve a party . . . from a final judgment, order, or proceeding . . . ."

A close reading of the three rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties.

Several cases, however, have struggled to reach the correct meaning of Rule 55(c), and at times a court may fail to recognize the meaning. The proposed amendment clarifies Rule 55(c) by adding the word "final" before "default judgment."

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

Information Items

Judge Campbell reported on several information items that did not require committee action at this time.

DUKE CONFERENCE SUBCOMMITTEE WORK

A subcommittee of the advisory committee formed after the advisory committee's May 2010 Conference on Civil Litigation held at Duke University School of Law ("Duke Conference subcommittee") is continuing to implement and oversee further work on ideas resulting from that conference. Judge Campbell and Judge Koeltl (the Chair of the Duke Conference subcommittee) presented to the committee a package of various potential rule amendments developed by the subcommittee that are aimed at reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding." This package of amendments has been developed though countless subcommittee conference calls, a mini-conference held in Dallas in October 2012, and discussions during advisory committee meetings. The discussions that have occurred will guide further development of the rules package, with a goal of recommending publication of this package for public comment at the committee's June 2013 meeting.

An important issue at the Duke Conference and in the work undertaken since by the Duke Conference subcommittee has been the principle that discovery should be conducted in reasonable proportion to the needs of the case. In an important fraction of the cases, discovery still seems to run out of control. Thus, the search for ways to embed the concept of proportionality successfully in the rules continues.

Current sketches of possible amendments to parts of Rule 26 exemplify this effort and include the following proposals:

Rule 26

* * * * *

(b) Discovery Scope and Limits.

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

resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~ * * *

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, ~~and~~ interrogatories, requests [to produce][under Rule 34], and requests for admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

(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~~ if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

* * * * *

(c) Protective Orders

(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; * * *

The drafts are works in progress and will be revisited by the advisory committee at its spring meeting.

FED. R. CIV. P. 84 AND FORMS

Judge Campbell further reported that the subcommittee of the advisory committee formed to study Rule 84 and associated forms is inclined to recommend abrogating Rule 84. This inclination follows months of gathering information about the general use of the forms and whether they provide meaningful help to attorneys and pro se litigants. The advisory committee is evaluating the subcommittee's inclination and intends to make a recommendation to the committee concerning the future of Rule 84 at the June 2013 meeting. If Rule 84 is abrogated, forms will still remain available through other sources, including the Administrative Office. Although forms developed by the Administrative Office do not go through the full Enabling Act process, the subcommittee would likely recommend that the advisory committee plan to work with the Administrative Office in drafting and revising forms for use in civil actions.

The committee briefly discussed the feasibility of appointing a liaison member of the civil rules advisory committee to the Administrative Office forms committee. Several members of the committee praised the prior work of the Administrative Office forms committee, particularly its ready responsiveness to current judicial and litigant needs. Its flexibility and responsiveness to rapidly changing requirements were favorably compared to the more cumbersome process imposed by the Rules Enabling Act. Peter McCabe, who chairs the Administrative Office forms committee, expressed the willingness of that committee to respond to the needs of the civil rules advisory committee.

No significant concern was raised by the committee about the potential abrogation of Rule 84.

MOTIONS TO REMAND

Judge Campbell reported on a proposal from Jim Hood, Attorney General of Mississippi, to require automatic remand in cases in which a district court takes no action on a motion to remand within thirty days. Attorney General Hood also proposed that the removing party be required to pay expenses, including attorney fees, incurred as a result of removal when remand is ordered. While the advisory committee was sympathetic to the problems created by federal courts failing to act timely on removal motions, it did not believe the subject fell within the jurisdiction of the rules committees. Both subject matter jurisdiction and the shifting of costs from one party to another on removal and remand are governed by federal statutes enacted by Congress and not by rules promulgated under the Rules Enabling Act. Judge Sutton has conveyed the advisory committee's response to Attorney General Hood.

PANEL ON CIVIL LITIGATION REFORM PILOT PROJECTS

Four panelists covered the topics outlined below.

Selected Federal Court Reform Projects

Judge Koeltl outlined five litigation reform projects that the Duke Conference subcommittee is following. These include:

a. A set of mandatory initial discovery protocols for employment discrimination cases was developed as part of the work resulting from the Duke Conference. These protocols were developed by experienced employment litigation lawyers and have so far been adopted by the Districts of Connecticut and Oregon.

b. A set of proposals embodied in a pilot project in the Southern District of New York to simplify the management of complex cases.

c. A Southern District of New York project to manage section 1983 prisoner abuse cases with increased automatic discovery and less judicial involvement. The project's goal is to resolve these types of cases within 5.5 months using judges as sparingly as possible through the use of such devices as specific mandatory reciprocal discovery, mandatory settlement demands, and mediation.

d. A project in the Seventh Circuit inspired by Chief Judge James F. Holderman that seeks to expedite and limit electronic discovery. The project emphasizes concepts of proportionality and cooperation among attorneys. One specific innovation, Judge Koeltl noted, was the mandatory appointment of a discovery liaison by each litigant.

e. The expedited trial project being implemented in the Northern District of California. This project provides for shortened periods for discovery and depositions and severely limits the duration of a trial. The goal is for the trial to occur within six months after discovery limits have been agreed upon. Judge Koeltl acknowledged, however, that this entire procedure is an "opt in" one, and so far no litigant has "opted" to use it. As a result, the entire project is now under review to determine what changes will make it more appealing to litigants.

State Court Pilot Projects

Justice Kourlis presented a summary of information compiled by the Institute for the Advancement of the American Legal System on state court pilot projects. She said

these projects fell into three basic categories, all with the common purpose of increasing access to the courts for all types of litigants. The three basic categories were:

a. Different rules for different types of cases

One category of pilot projects attempts to resolve issues of costs and delay by establishing different sets of rules for different types of cases, such as for complex (e.g., business) cases and simple cases amenable to short, summary, and expedited ("SES") procedures. Complex case programs are currently underway in California and Ohio. In those projects, the emphasis appears to be on close judicial case management, frequent conferences, and cooperation by counsel. Substantial prior experience in complex business cases by participating judges appears to have contributed to the success of the projects.

SES programs for simple cases are currently underway in California, Nevada, New York, Oregon, and Texas. These programs emphasize streamlined discovery, strict adherence to tight trial deadlines, and, in at least one state, mandatory participation by litigants whose cases fall under a $100,000 damages limit.

b. Proportionality in Discovery

A number of states have launched projects to achieve this objective. These projects have involved local rule changes to expedite and limit the scope of discovery, more frequent and earlier conferences with judges, and more active judicial case management to achieve proportionate discovery and encourage attorney cooperation.

c. Active Judicial Case Management

This third category of state projects overlaps with the first two categories. Some examples of the techniques employed include: (i) the assignment of a case to a single judicial officer from start to finish; (ii) early and comprehensive pretrial conferences; and (iii) enhanced judicial involvement in pretrial discovery disputes before the filing of any written motions.

A "Rocket Docket" Court

Judge Crabb gave a succinct presentation on the benefits of her "rocket docket" court (the Western District of Wisconsin) and how such a court can effectively manage its docket. She explained that litigants value certainty and predictability, and that the best way to achieve these goals is to set a firm trial date. Given her court's current case volume, the goal is to complete a case within twelve to fifteen months after it is filed. Judge Crabb explained that this management style achieves transparency, simplicity, and

service to the public.

Once a case is filed in the Western District of Wisconsin, a magistrate judge promptly holds a comprehensive scheduling conference. At this conference, a case plan is developed and discovery dates are fixed. Although this court usually will not change pre-trial discovery deadlines, it will do so on application of both parties if the ultimate trial date is not jeopardized.

In Judge Crabb's district, the magistrate judges are always available for telephone conferences on motions or other pretrial disputes, but they do not seek to actively manage cases. The litigants know that they have a firm trial date and can be relied upon to seek judicial intervention whenever it is necessary. In Judge Crabb's view, this "rocket docket" approach permits both the rapid disposition of a high volume of cases and maintenance of high morale of the court staff.

Federal Judicial Center Statistical Observations on Discovery

Dr. Lee of the Federal Judicial Center then gave a short presentation on statistical observations about discovery. He noted that the Center's research shows that the cost of discovery is a problem only in a minority of cases. Indeed, various statistical analyses lead him to conclude that the problem cases are a small subset of the total number of cases filed and involve a rather small subset of difficult lawyers.

Dr. Lee cited a multi-variant analysis done in 2009 and 2010 for the Duke Conference. In that study, the Federal Judicial Center found that the costly discovery cases have several common factors:

1. High stakes for the litigants (either economic or non-economic);
2. Factual complexity;
3. Disputes over electronic discovery; and
4. Rulings on motions for summary judgment.

Other interesting statistical observations of the study included the fact that on average a 1% increase in the economic value of the case leads to a .25% increase in its total discovery cost. Other discovery surveys indicate that almost 75% of lawyers on average believe that discovery in their cases is proportionate and that the other side is sufficiently cooperative. Only in a small minority of the cases—approximately 6%—are lawyers convinced that discovery demands by the opposing side are highly unreasonable.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set forth in Judge Colloton's memorandum of December 5, 2012 (Agenda Item 6). There were no action items for the committee.

Information Items

SEALING AND REDACTION OF APPELLATE BRIEFS

Judge Colloton reported that the advisory committee had decided not to proceed with a proposal to implement a national uniform standard for sealing or redaction of appellate briefs. He explained that the circuits take varying approaches to sealing and redaction on appeal. During the advisory committee's discussions, several members had expressed support for the approach of the Seventh Circuit, where sealed items in the record on appeal are unsealed after a brief grace period unless a party seeks the excision of those items from the record or moves to seal them on appeal. This approach is based on the belief that judicial proceedings should be open and transparent. However, members also noted that each circuit currently seems satisfied with its own approach to sealed filings.

Given the division of opinion among the circuits, the advisory committee ultimately decided there was no compelling reason to propose a rule amendment on the topic of sealing on appeal. However, its members believed that each circuit might find it helpful to know how other circuits handle such questions; therefore, shortly after its meeting, Judge Sutton, in one of his last acts as the chair of the advisory committee, wrote to the chief judge and clerk of each circuit to summarize the concerns that have been raised about sealed filings, the various approaches to those filings in different circuits, and the rationale behind the approach of the Seventh Circuit.

MANUFACTURED FINALITY

The advisory committee also revisited the topic of "manufactured finality," which occurs when parties attempt to create an appealable final judgment by dismissing peripheral claims in order to secure appellate review of the central claim. A review of circuit practice found that virtually all circuits agree that an appealable final judgment is created when all peripheral claims are dismissed with prejudice. Many circuits also agree that an appealable final judgment is not created when a litigant dismisses peripheral claims without prejudice, although some circuits take a different view. But less uniformity exists for handling middle ground attempts to "manufacture" finality. For example, there is disagreement in the circuits as to whether an appealable judgment results if the appellant conditionally dismisses the peripheral claims with prejudice by

agreeing not to reassert the peripheral claims unless the appeal results in reinstatement of the central claim. A joint civil-appellate rules subcommittee was appointed to review whether "manufactured finality" might be addressed in the federal rules. On initial examination, members had divergent views.

Before last fall's advisory committee meeting, the Supreme Court accepted for review *SEC v. Gabelli*, 653 F.3d 49 (2nd Cir. 2011), *cert. granted*, 133 S.Ct. 97 (2012). The Second Circuit's jurisdiction in that case rested on "conditional finality." Since the Court might clarify this issue in that case, the advisory committee decided to await the Court's decision before deciding how to proceed.

LENGTH LIMITS FOR BRIEFS

The advisory committee is considering whether to overhaul the treatment of filing-length limits in the Appellate Rules. The 1998 amendments to the Appellate Rules set the length limits for merits briefs by means of a type-volume limitation, but Rules 5, 21, 27, 35, and 40 still set length limits in terms of pages for other types of appellate filings. Members have reported that the page limits invite manipulation of fonts and margins, and that such manipulation wastes time, disadvantages opponents, and makes filings harder to read. The advisory committee intends to consider whether the type-volume approach should be extended to these other types of appellate filings.

CLASS ACTION OBJECTORS

Finally, the advisory committee has received correspondence about so-called "professional" class action objectors who allegedly file specious objections to a settlement and then appeal the approval of the settlement with the goal of extracting a payment from class action attorneys in exchange for withdrawing their appeals. One proposed solution would amend Rule 42 to require court approval of voluntary dismissal motions by class action objectors, together with a certification by an objector that nothing of value had been received in exchange for withdrawing the appeal. Another proposed solution would require an appeal bond from class action objectors sufficient to cover the costs of delay caused by appeals from denials of non-meritorious objections. Judge Colloton suggested that collaboration with the Civil Rules Advisory Committee would likely be required to determine both the scope of and possible remedies for this problem.

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 of November 26, 2012 (Agenda Item 8). As the committee's fall meeting in Washington was canceled as a result of Hurricane Sandy,

there were no action items for the committee.

Information Items

Judge Raggi reported that on the agenda for the advisory committee's Fall 2012 meeting and now high on the agenda for its Spring 2013 meeting is a Department of Justice proposal to amend Rule 4 to permit effective service of summons on a foreign organization that has no agent or principal place of business within the United States. The Department argues that its proposed change is necessary in order to prevent evasion of service by organizations committing offenses within the United States.

Judge Raggi also reported on the status of the proposed amendments to Rule 12, the rule addressing pleadings and pretrial motions. The proposed amendments were published for public comment in August 2011. The amendments clarify which motions must be raised before trial and the consequences if the motions are not timely filed. Numerous comments were received, including detailed objections and suggestions from various bar organizations. The committee's reporters prepared an 80-page analysis of these comments. In its consideration of the comments, the Rule 12 subcommittee reaffirmed the need for the amendment, but concluded that the public comments warranted several changes in its proposal. With those changes, the subcommittee has recommended to the advisory committee that an amended proposal be approved and transmitted to the Standing Committee for its approval. The advisory committee's consideration of the Rule 12 subcommittee's report will take place at its Spring 2013 meeting. Judge Raggi expressed her appreciation for the extended attention already devoted by Judge Sutton to the committee's work on Rule 12.

REPORT OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

Judge Fitzwater and Professor Capra delivered the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of November 26, 2012 (Agenda Item 4). There were no action items for the committee.

Information Items

SYMPOSIUM ON FED. R. EVID. 502

Professor Capra reported on a symposium the advisory committee hosted in conjunction with its Fall 2012 meeting. The purpose of the symposium was to review the current use (or lack of use) of Rule 502 (on attorney-client privilege and work product and waiver of those protections) and to discuss ways in which the rule can be better known and understood so that it can fulfill its original purposes of clarifying and limiting

waiver of privilege and work product protection, thereby reducing delays and costs in litigation. Panelists included judges, lawyers, and academics with expertise and experience in the subject matter of the rule, some of whom are also veterans of the rulemaking process. The symposium proceedings and a model Rule 502(d) order will be published in the March 2013 issue of the *Fordham Law Review*.

The panel attributed much of the lack of use of Rule 502 as a device to aid in pre-production review to a simple lack of knowledge of the rule by practitioners and judges. Part of this absence of knowledge was attributed to the rule's location in the rules of evidence as opposed to the rules of civil procedure. Various suggestions on promotion of the rule's visibility, including a model Rule 502 order, education through Federal Judicial Center classes and a possible informational letter to chief district judges, are in the process of being implemented or developed.

PROPOSED AMENDMENTS TO FED. R. EVID. 801(d)(1) AND 803(6)-(8)

A published proposed amendment to Rule 801(d)(1), the hearsay exemption for certain prior consistent statements, provides that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. This proposal has been the subject of only one public comment so far. Proposed amendments to Rule 803(6)-(8)—the hearsay exemptions for business records, absence of business records, and public records—would clarify that the opponent has the burden of showing that the proffered record is untrustworthy. No comments have been received yet on this proposal.

SYMPOSIUM ON TECHNOLOGY AND THE FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the advisory committee is planning to convene a symposium to highlight the intersection of the evidence rules and emerging technologies and to consider whether the evidence rules need to be amended in light of technological advances. The symposium will be held in conjunction with the advisory committee's Fall 2013 meeting at the University of Maine School of Law in Portland.

These presentations concluded the first day of the meeting of the Standing Committee.

FRIDAY, JANUARY 4, 2013

REPORT ON PACE OF RULEMAKING

Benjamin Robinson gave a brief presentation on the timing and pace of federal rulemaking over the past thirty years. Judge Sutton had requested the report, noting that at various times in the past both the Federal Judicial Center and the committee have tackled this subject. He specifically pointed to the Easterbrook-Baker "self-study" report by the Standing Committee, 169 F.R.D. 679 (1995), contained in the agenda book.

Mr. Robinson presented a series of charts that demonstrated that over the past thirty years there have been several peaks and valleys in the pace of federal rulemaking. The charts demonstrated that the peaks were caused by legislative activity and to a lesser extent by several rules restyling projects.

For example, bankruptcy legislation in the mid-1980s created the occasion in 1987 for 117 bankruptcy rule changes. Similarly, bankruptcy legislation created the occasion for 95 bankruptcy rule changes in 1991. Additional bankruptcy legislation in 2005 produced a total of 43 bankruptcy rules amendments in 2008. The civil and evidence rules restyling projects also have required a considerable number of rule changes.

Mr. Robinson's presentation initiated a broader discussion of the timing and pace of rulemaking by committee members.

Judge Sutton stated that he had placed this matter on the agenda in part to sensitize the Standing Committee to the work required by the Supreme Court on rule amendments.

At one point during the discussion, Judge Sutton advanced a theoretical proposal that perhaps rule changes could be made every two years instead of every year. For example, the civil and appellate rules committees could group their proposed changes in the even years, while the criminal, evidence, and bankruptcy rules committees could group their proposed changes in the odd years. Judge Sutton noted that such a scheme would have the advantage of predictability both for the Supreme Court and for the bar as to what types of rule changes could be expected in a particular year.

Judge Sutton asked for comments from several of those present, in particular, participants who have had extensive experience over the years in the rulemaking process. Several points emerged during the discussion. First, there is no question that the Supreme Court is very aware of the burden that the rulemaking process places upon it. Chief Justices Burger and Rehnquist were particularly conscious of it. Also, the current rules

calendar places a heavy burden on the Court in that the rule proposals arrive in the spring when the Court is busiest. However, no one argued that seeking a legislative change in the calendar made any sense. Instead, the idea was advanced that the Rules Committees could target the March meeting of the Judicial Conference for its major proposals, rather than the September meeting. This would mean that the rule changes could go to the Court at a more convenient time, such as late summer before its annual session begins on October 1. However, a correlative disadvantage would be the overall extension in the length of time required for a proposed amendment to the rules to be adopted.

Experienced observers pointed out that much of the timing of rulemaking is dictated by external factors such as legislation or decided cases. While the timing of such projects as the restyling of the evidence and civil rules might be discretionary, the need for new rules created by legislation or other external events often is not. All participants appeared to agree that keeping the Supreme Court involved in the rulemaking process is most important to its integrity and standing. Thus, all agreed at a minimum that greater sensitivity to the needs and desires of the Court as to the timing of proposed rules changes is highly advisable.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff, Professor Gibson, and Professor McKenzie presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum of December 5, 2012 (Agenda Item 7). The report covered four major subjects: (1) revisions to the official forms for individual debtors; (2) a mini-conference on home mortgage forms and rules; (3) the development of a Chapter 13 form plan and related rule amendments; and (4) electronic signature issues.

DRAFTS OF REVISED OFFICIAL FORMS FOR INDIVIDUAL DEBTORS

Judge Wedoff first reported on the restyled Official Bankruptcy Forms for individual debtors. These forms are the initial product of the forms modernization project, 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 forms modernization project are to improve the official bankruptcy forms and to improve the interface between the forms and available technology.

In August 2012, the first nine forms were published for public comment. To date, few comments have been received; however, the advisory committee expects to receive more comments before the February 15, 2013, deadline, and it will review those comments before seeking approval at the June meeting to publish the following eighteen remaining forms for individual debtor cases that have not yet been published:

Forms To Be Considered in June

- Official Form 101—Voluntary Petition for Individuals Filing for Bankruptcy
- Official Form 101AB—Your Statement About an Eviction Judgment Against You – Parts A and B
- Official Form 104—List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You Who are not Insiders
- Official Form 106 – Summary—A Summary of Your Assets and Liabilities and Certain Statistical Information
- Official Form 106A—Schedule A: Property
- Official Form 106B—Schedule B: Creditors Who Hold Claims Secured by Property
- Official Form 106C—Schedule C: Creditors Who Have Unsecured Claims
- Official Form 106D—Schedule D: The Property You Claim as Exempt
- Official Form 106E—Schedule E: Executory Contracts and Unexpired Leases
- Official Form 106F—Schedule F: Your Codebtors
- Official Form 106 – Declaration—Declaration About an Individual Debtor's Schedules
- Official Form 107—Your Statement of Financial Affairs for Individuals Filing for Bankruptcy
- Official Form 112—Statement of Intention for Individuals Filing Under Chapter 7
- Official Form 119—Bankruptcy Petition Preparer's Notice, Declaration and Signature
- Official Form 121—Your Statement About Your Social Security Numbers
- Official Form 318—Discharge of Debtor in a Chapter 7 Case
- Official Form 423—Certification About a Financial Management Course
- Official Form 427—Cover Sheet for Reaffirmation Agreement

In anticipation of seeking publication in June, Judge Wedoff gave the committee an extensive preview of each of the above forms and took under advisement specific committee member comments on each of them with a plan to incorporate these comments in the preparation of the advisory committee's ultimate proposals.

MINI-CONFERENCE ON HOME MORTGAGE FORMS AND RULES

Judge Wedoff reported on a successful mini-conference held by the advisory committee on September 19, 2012, to explore the effectiveness of the new rules and forms concerning the impact of home mortgage rules and reporting requirements for chapter 13 cases, which went into effect on December 1, 2011. The mini-conference reflected a general acceptance of the disclosure requirements of the new rules, but pointed out various specific difficulties that will likely require some subsequent fine-tuning either

by the advisory committee or through case-law development.

CHAPTER 13 FORM PLAN AND RELATED RULE AMENDMENTS

Professor McKenzie reported on the advisory committee's development of a national form plan for chapter 13 cases. The working group presented a draft of the form plan for preliminary review at the advisory committee's Fall 2012 meeting. The group also proposed amendments to Bankruptcy Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, specifically to require use of the national form plan and to establish the authority needed to implement some of the plan's provisions.

The advisory committee discussed the proposed form and rules amendments and accepted the working group's suggestion that the drafts be shared with a cross-section of interested parties to obtain their feedback on the proposals. Professor McKenzie reported that a mini-conference on the draft plan and proposed rule amendments was scheduled to take place in Chicago on January 18, 2013. The working group will make revisions based on the feedback received at the mini-conference and then present the model plan package to both the consumer issues and forms subcommittees for their consideration. The subcommittees will report their recommendations to the advisory committee at its Spring 2013 meeting. If a chapter 13 form plan and related rule amendments are approved at that meeting, the advisory committee will request that they be approved for publication in August 2013 at the June meeting of the Standing Committee.

CONSIDERATION OF ELECTRONIC SIGNATURE ISSUES

The last item of Judge Wedoff's report was an update on the advisory committee's consideration (at the request of the forms modernization project) of a rule establishing a uniform procedure for the treatment and preservation of electronic signatures. The advisory committee has requested Dr. Molly Johnson of the Federal Judicial Center to gather information on existing practices regarding the use of electronic signatures by nonregistered individuals and requirements for retention of documents with handwritten signatures. Her findings will be available by the end of this year and will be reported to the advisory committee at its Spring 2014 meeting.

NEXT MEETING

The Standing Committee will hold its next meeting in Washington, D.C., on June 3 and 4, 2013.

TAB 2

THIS PAGE INTENTIONALLY BLANK

TAB 2A

THIS PAGE INTENTIONALLY BLANK

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

To: Honorable Jeffrey S. Sutton, 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, 2013

Re: Report of the Advisory Committee on Civil Rules

I. Introduction

The Civil Rules Advisory Committee met at the University of Oklahoma College of Law on April 11-12, 2013. 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 IA of this Report presents for action a proposal recommending publication for comment of revisions to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. These recommendations are little changed from the proposals that were presented for discussion, but not for action, at the January meeting of the Standing Committee. They form a package developed in response to the central themes that emerged from the conference held at the Duke Law School in May, 2010. Participants urged the need for increased cooperation; proportionality in using procedural tools, most particularly discovery; and early, active judicial case management.

Part IB presents for action a proposal recommending publication for comment of a revised Rule 37(e). Publication was

approved at the January 2013 meeting of the Standing Committee, recognizing that the Advisory Committee would consider several matters discussed at the January meeting and report back to this June meeting. The revisions provide both remedies and sanctions for failure to preserve discoverable information that should have been preserved. In addition, they describe factors to be considered both in determining whether information should have been preserved and also in determining whether a failure was willful or in bad faith. This report describes the outcome of deliberations by the Discovery Subcommittee and Advisory Committee in addressing the matters raised at the January meeting, and also lists the questions that will be specifically flagged in the request for public comment.

Part IC presents for action a recommendation to approve for publication a proposal that would abrogate Rule 84 and the Rule 84 official forms. This proposal includes amendments of Rule 4(d)(1)(C) and (D) that direct use of official Rule 4 Forms that adopt what now are the Form 5 request to waive service and the Form 6 waiver.

Part II presents information on several matters that were discussed at the April meeting. Several of these matters remain on the Committee agenda. Others have been put aside. The Committee is not now seeking guidance on these matters, but will welcome discussion on any of them.

The matters that remain on the agenda include some specific new questions: Should Rule 17(c)(2) be amended to address the circumstances that may require a court to inquire whether it need appoint a guardian for an unrepresented party who may be incompetent? Is it time to reexamine the procedures for stays pending appeal under Rule 62 in conjunction with possible consideration of the same questions by the Appellate Rules Committee?

Several new matters have been referred to the Committee by the Committee on Court Administration and Case Management, mostly in conjunction with development of the next generation CM/ECF program. These questions involve such issues as use of the Notice of Electronic Filing as a certificate of service and the acceptance of electronic signatures. The Committee anticipates that these and a number of other issues involving electronic filing and service will be addressed in a joint committee constituted by representatives from all of the advisory committees. Other of the CACM issues await further development in CACM’s work.

Other matters have been on the agenda for some time but do not yet seem ripe for present development. These include the development of pleading standards in response to the Supreme Court's *Twombly* and *Iqbal* decisions, and emerging issues in class-action practice.

Two items have been removed from the agenda. The Committee concluded there is no need to reconsider the provision in Rule 41 that allows dismissal of an action without prejudice on stipulation by all parties. It also concluded that there is no need to adopt a rule recommending speedy trial and appellate action on a petition to return a child to its home country under the Hague Convention on the Civil Aspects of International Child Abduction.

Finally, the Committee benefited from a panel discussion of the use of Technology Assisted Review in discovery of electronically stored information.

THIS PAGE INTENTIONALLY BLANK

TAB 2B

THIS PAGE INTENTIONALLY BLANK

PART I: ACTION ITEMS

1 **A. Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, 37: Action to**
2 **Recommend Publication of Revised Rules ("Duke Rules" Package)**

3 The 2010 Duke Conference bristled with ideas for reducing cost
4 and delay in civil litigation, including many that seem suitable
5 subjects for incorporation in the rules. Advanced drafts were
6 discussed at the January meeting of the Standing Committee.
7 Suggestions made during the meeting and other refinements were
8 explored in two conference calls of the Duke Conference
9 Subcommittee. The Advisory Committee recommends publication for
10 comment of the package presented to it by the Subcommittee.

11 Judge Koeltl, chair of the Duke Conference Subcommittee,
12 recalled that three main themes were repeatedly stressed at the
13 Duke Conference. Proportionality in discovery, cooperation among
14 lawyers, and early and active judicial case management are highly
15 valued and, at times, missing in action. The Subcommittee worked on
16 various means of advancing these goals. The package of rules
17 changes has evolved over a period of nearly three years through
18 many drafts and meetings and discussions in Advisory Committee
19 meetings. The Committee is unanimous in proposing that each part of
20 the amendments be recommended for publication.

21 The rules proposals are grouped in three sets. One set looks
22 to improve early and effective judicial case management. The second
23 seeks to enhance the means of keeping discovery proportional to the
24 action. The third hopes to advance cooperation. The rules involved
25 in these three sets overlap. The changes are described first, set-
26 by-set. The rules texts showing the changes follow, along with
27 Committee Notes. The final step is a clean set of the rules texts
28 as they would appear after amending.

29 Case-Management Proposals

30 The case-management proposals reflect a perception that the
31 early stages of litigation often take far too long. "Time is
32 money." The longer it takes to litigate an action, the more it
33 costs. And delay is itself undesirable. The most direct aim at
34 early case management is reflected in Rules 4(m) and 16(b). Another
35 important proposal relaxes the Rule 26(d)(1) discovery moratorium
36 to permit early delivery of Rule 34 requests to produce, setting
37 the time to respond to begin at the first Rule 26(f) conference.

38 Rule 4(m): Rule 4(m) would be revised to shorten the time to serve
39 the summons and complaint from 120 days to 60 days. The effect will

40 be to get the action moving in half the time. The amendment
41 responds to the commonly expressed view that four months to serve
42 the summons and complaint is too long. Concerns that circumstances
43 occasionally justify a longer time to effect service are met by the
44 court's duty, already in Rule 4(m), to extend the time if the
45 plaintiff shows good cause for the failure to serve within the
46 specified time.

47 The Department of Justice has reacted to this proposal by
48 suggesting that shortening the time to serve will exacerbate a
49 problem it now encounters in condemnation actions. Rule
50 71.1(d)(3)(A) directs that service of notice of the proceeding be
51 made on defendant-owners "in accordance with Rule 4." This
52 wholesale incorporation of Rule 4 may seem to include Rule 4(m).
53 Invoking Rule 4(m) to dismiss a condemnation proceeding for failure
54 to effect service within the required time, however, is
55 inconsistent with Rule 71.1(i)(C), which directs that if the
56 plaintiff "has already taken title, a lesser interest, or
57 possession of" the property, the court must award compensation.
58 This provision protects the interests of owners, who would be
59 disserved if the proceeding is dismissed without awarding
60 compensation but leaving title in the plaintiff. The Department
61 regularly finds it necessary to explain to courts that dismissal
62 under Rule 4(m) is inappropriate in these circumstances, and fears
63 that this problem will arise more frequently because it is
64 frequently difficult to identify and serve all owners even within
65 120 days.

66 The need to better integrate Rule 4(m) with Rule 71.1 is met
67 by amending Rule 4(m)'s last sentence: "This subdivision (m) does
68 not apply to service in a foreign country under Rule 4(f) or
69 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A)." The
70 Department of Justice believes that this amendment will resolve the
71 problem. The Department does not believe that there is any further
72 need to consider the integration of Rule 4 with Rule 71.1(d)(3)(A).

73 Rule 16(b)(2): Time for Scheduling Order: Rule 16(b)(2) now
74 provides that the judge must issue the scheduling order within the
75 earlier of 120 days after any defendant has been served or 90 days
76 after any defendant has appeared. Several Subcommittee drafts cut
77 these times in half, to 60 days and 45 days. The recommended
78 revision, however, cuts the times to 90 days after any defendant is
79 served or 60 days after any defendant appears. The reduced
80 reductions reflect concerns that in many cases it may not be
81 possible to be prepared adequately for a productive scheduling
82 conference in a shorter period. These concerns are further
83 reflected in the addition of a new provision that allows the judge

84 to extend the time on finding good cause for delay. The Committee
85 believes that even this modest reduction in the presumed time will
86 do some good, while affording adequate time for most cases.

87 The Department of Justice, however, expressed some concerns
88 about accelerating time lines at the onset of litigation. Many of
89 the reasons are much the same as those that underlie the Rule 12
90 provisions allowing it 60 days to answer. It is not just that the
91 Department is a vast and intricate organization. Its clients often
92 are other vast and intricate government agencies. The time required
93 to designate the right attorneys in the Department is followed by
94 the time required to identify the right people in the client agency
95 to work with the attorneys and to begin gathering the information
96 necessary to litigate. More generally, there is room to be
97 skeptical that shortening the time to serve and the time to enter
98 a scheduling order will do much to advance things. It is important
99 that lawyers have time at the beginning of an action to think about
100 the case, and to discuss it with each other. More time to prepare
101 will make for a better scheduling conference, and for more
102 effective discovery in the end. The Note should reflect that
103 extensions should be liberally granted for the sake of better
104 overall efficiency.

105 Other attorneys have expressed similar concerns that there are
106 cases in which it is not feasible to prepare for a meaningful
107 scheduling conference on an accelerated schedule. A defendant may
108 take time to select its attorneys, compressing the apparent
109 schedule. And some cases are inherently too complex to allow even
110 a preliminary working grasp of likely litigation needs in the
111 presumptive times allowed.

112 These concerns persuaded the Subcommittee to relax its initial
113 proposal, which would have cut the present times in half, to 60
114 days after service or 45 days after an appearance. They also were
115 responsible for adding the new provision that authorizes the court
116 to delay the scheduling order beyond the specified times. This
117 provision would provide more time than the current rule, but only
118 in appropriate cases, and seems protection enough, both for complex
119 cases in general and for the special needs of the Department of
120 Justice.

121 Rule 16(b): Actual Conference: Present Rule 16(b)(1)(B) authorizes
122 issuance of a scheduling order after receiving the parties' Rule
123 26(f) report or after consulting "at a scheduling conference by
124 telephone, mail, or other means."

125 The Committee believes that an actual conference by direct

126 communication among the parties and court is very valuable. It
127 considered a proposal that would require an actual conference in
128 all actions, except those in exempted categories. This proposal was
129 rejected in the end after hearing from several judges and lawyers
130 at the miniconference hosted by the Subcommittee in Dallas that
131 there are cases in which the judge is confident that a Rule 26(f)
132 report prepared by able lawyers provides a sound basis for a
133 scheduling order without further ado. But if there is to be a
134 scheduling conference, the Committee believes it should be by
135 direct communication; "mail, or other means" are not effective.
136 This change is effected by requiring consultation "at a scheduling
137 conference," striking "by telephone, mail, or other means." The
138 Committee Note makes it clear that a conference can be held face-
139 to-face, by telephone, or by other means of simultaneous
140 communication.

141 A separate issue has been held in abeyance. Rule 16(b)(1)
142 exempts "categories of actions exempted by local rule" from the
143 scheduling order requirement. It may be attractive to substitute a
144 uniform national set of exemptions, uniform not only for Rule 16(b)
145 but integrated with the exemptions from initial disclosure. Actions
146 exempt from initial disclosure also are exempt from the discovery
147 moratorium in Rule 26(d) and the parties' conference required by
148 Rule 26(f). Exempting the same categories of actions from the
149 scheduling order requirement would simplify the rules and should
150 respond to similar concerns. But it has seemed better to await
151 further inquiry into the categories now exempted by local rules,
152 and to explore the reasons for exemptions not now made in Rule
153 26(a)(1)(B). This topic is being developed for possible future
154 action.

155 <u>Rules 16(b)(3), 26(f): Additional Subjects</u>: Three subjects are
156 proposed for addition to the Rule 16(b)(3) list of permitted
157 contents of a scheduling order. Two of them are also proposed for
158 the list of subjects in a Rule 26(f) discovery plan. Those two are
159 described here; the third is noted separately below.

160 The proposals would permit a scheduling order and discovery
161 plan to provide for the preservation of electronically stored
162 information and to include agreements reached under Rule 502 of the
163 Federal Rules of Evidence. Each is an attempt to remind litigants
164 that these are useful subjects for discussion and agreement. The
165 Evidence Rules Committee is concerned that Rule 502 remains
166 underused; an express reference in Rule 16 may promote its more
167 effective use.

168 <u>Rule 16(b)(3): Conference Before Discovery Motion</u>: This proposal

169 would add a new Rule 16(b)(3)(v), permitting a scheduling order to
170 "direct that before moving for an order relating to discovery the
171 movant must request a conference with the court."

172 Many courts, but less than a majority, now have local rules
173 similar to this proposal. Experience with these rules shows that an
174 informal pre-motion conference with the court often resolves a
175 discovery dispute without the need for a motion, briefing, and
176 order. The practice has proved highly effective in reducing cost
177 and delay.

178 The Subcommittee considered an alternative that would have
179 required a conference with the court before any discovery motion.
180 In the end, it concluded that at present it is better simply to
181 encourage this practice. Many judges do not require a pre-motion
182 conference now. It is possible that local conditions and practices
183 in some courts establish effective substitutes. Absent a stronger
184 showing of need, it seems premature to adopt a mandate, but the
185 consideration of this practice should encourage its use.

186 Rule 26(d)(1): Early Rule 34 Requests: The Subcommittee considered
187 at length a variety of proposals that would allow discovery
188 requests to be made before the parties' Rule 26(f) conference. The
189 purpose of the early requests would not be to start the time to
190 respond. Instead, the purpose is to facilitate the conference by
191 allowing consideration of actual requests, providing a focus for
192 specific discussion. In the end, the proposal has been limited to
193 Rule 34 requests to produce.

194 The proposal adds a new Rule 26(d)(2), better set out in full
195 than summarized:

196 (2) *Early Rule 34 Requests.*

197 (A) *Time to Deliver.* More than 21 days after the summons and
198 complaint are served on any party, a request under Rule
199 34 may be delivered:

200 (i) to that party by any other party, and

201 (ii) by that party to any plaintiff or to any other
202 party that has been served.

203 (B) *When Considered Served.* The request is considered as
204 served at the first Rule 26(f) conference.

205 A corresponding change would be made in Rule 34(b)(2)(A),

206 setting the time to respond to a request delivered under Rule
207 26(d)(2) within 30 days after the parties' first Rule 26(f)
208 conference.

209 Some participants in the miniconference — particularly those
210 who typically represent plaintiffs — said they would take advantage
211 of this procedure to advance the Rule 26(f) conference and early
212 discovery planning. Concrete disputes as to the scope of discovery
213 could then be brought to the attention of the court at a Rule 16
214 conference. Others expressed skepticism, wondering why anyone would
215 want to expose discovery strategy earlier than required and fearing
216 that initial requests made before the conference are likely to be
217 unreasonably broad and to generate an inertia that will resist
218 change at the conference.

219 After considering these concerns, the Subcommittee concluded
220 that the opportunity should be made available to advance the Rule
221 26(f) conference by providing a specific focus for discussion of
222 Rule 34 requests, which often involve heavy discovery burdens.
223 Little harm will be done if parties fail to take advantage of the
224 opportunity, and real benefit may be gained if they do.

225 Proportionality: Discovery Proposals

226 Several proposals seek to promote responsible use of discovery
227 proportional to the needs of the case. The most important address
228 the scope of discovery directly by amending Rule 26(b)(1), and by
229 promoting clearer responses to Rule 34 requests to produce. Others
230 tighten the presumptive limits on the number and duration of
231 depositions and the number of interrogatories, and for the first
232 time add a presumptive limit of 25 to the number of requests for
233 admission other than those that relate to the genuineness of
234 documents. Yet another explicitly recognizes the present authority
235 to issue a protective order specifying an allocation of expenses
236 incurred by discovery.

237 Rule 26(b)(1): Proportionality By Adopting Rule 26(b)(2)(C)(iii)
238 Cost-Benefit Analysis: In 1983 the Committee thought to have solved
239 the problems of disproportionate discovery by adding the provision
240 that has come to be lodged in present Rule 26(b)(2)(C)(iii). This
241 rule directs that "on motion or on its own, the court must limit
242 the frequency or extent of discovery otherwise allowed by these
243 rules if it determines that * * * (iii) the burden or expense of
244 the proposed discovery outweighs its likely benefit, considering
245 the needs of the case, the amount in controversy, the parties'
246 resources, the importance of the issues at stake in the action, and
247 the importance of the discovery in resolving the issues."

248 Although the rule now directs that the court "must" limit
249 discovery, on its own and without motion, it cannot be said to have
250 realized the hopes of its authors. In most cases discovery now, as
251 it was then, is accomplished in reasonable proportion to the
252 realistic needs of the case. This conclusion has been established
253 by repeated empirical studies, including the large-scale closed-
254 case study done by the Federal Judicial Center for the Duke
255 Conference. But at the same time discovery runs out of proportion
256 in a worrisome number of cases, particularly those that are
257 complex, involve high stakes, and generate particularly contentious
258 adversary behavior. The number of cases and the burdens imposed
259 present serious problems. These problems have not yet been solved.

260 Several proposals were considered to limit the general scope
261 of discovery provided by Rule 26(b)(1) by adding a requirement of
262 "proportionality." Addition of this term without definition,
263 however, generated concerns that it would be too open-ended to
264 support uniform or even meaningful implementation. Limiting it to
265 "reasonably proportional" did not allay those concerns. At the same
266 time, many participants in the miniconference expressed respect for
267 the principles embodied in Rule 26(b)(2)(C)(iii), finding it
268 suitably nuanced and balanced. The problem is not with the rule
269 text but with its implementation — it is not invoked often enough
270 to dampen excessive discovery demands.

271 These considerations frame the proposal to revise the scope of
272 discovery defined in Rule 26(b)(1) by transferring the analysis
273 required by present Rule 26(b)(2)(C)(iii) to become a limit on the
274 scope of discovery, so that discovery must be

275 proportional to the needs of the case considering the
276 amount in controversy, the importance of the issues at
277 stake in the action, the parties's resources, the
278 importance of the discovery in resolving the issues, and
279 whether the burden or expense of the proposed discovery
280 outweighs its likely benefit.

281 A corresponding change is made by amending Rule 26(b)(2)(C)(iii) to
282 cross-refer to (b)(1): the court remains under a duty to limit the
283 frequency or extent of discovery that exceeds these limits, on
284 motion or on its own.

285 Other changes as well are made in Rule 26(b)(1). The rule was
286 amended in 2000 to introduce a distinction between party-controlled
287 discovery and court-controlled discovery. Party-controlled
288 discovery is now limited to "matter that is relevant to any party's
289 claim or defense." That provision is carried forward in proposed

290 Rule 26(b)(1). Court-controlled discovery is now authorized to
291 extend, on court order for good cause, to "any matter relevant to
292 the subject matter involved in the action." The Committee Note made
293 it clear that the parties' claims or defenses are those identified
294 in the pleadings. The proposed amendment deletes the "subject
295 matter involved in the action" from the scope of discovery.
296 Discovery should be limited to the parties' claims or defenses. If
297 discovery of information relevant to the claims or defenses
298 identified in the pleadings shows support for new claims or
299 defenses, amendment of the pleadings may be allowed when
300 appropriate.

301 Rule 26(b)(1) also would be amended by revising the
302 penultimate sentence: "Relevant information need not be admissible
303 at the trial if the discovery appears reasonably calculated to lead
304 to the discovery of admissible evidence." This provision traces
305 back to 1946, when it was added to overcome decisions that denied
306 discovery solely on the ground that the requested information would
307 not be admissible in evidence. A common example was hearsay.
308 Although a witness often could not testify that someone told him
309 the defendant ran through a red light, knowing who it was that told
310 that to the witness could readily lead to admissible testimony.
311 This sentence was amended in 2000 to add "Relevant" as the first
312 word. The 2000 Committee Note reflects concern that the "reasonably
313 calculated" standard "might swallow any other limitation on the
314 scope of discovery." "Relevant" was added "to clarify that
315 information must be relevant to be discoverable * * *." Despite the
316 2000 amendment, many cases continue to cite the "reasonably
317 calculated" language as though it defines the scope of discovery,
318 and judges often hear lawyers argue that this sentence sets a broad
319 standard for appropriate discovery.

320 To offset the risk that the provision addressing admissibility
321 may defeat the limits otherwise defining the scope of discovery,
322 the proposal is to revise this sentence to read: "Information
323 within this scope of discovery need not be admissible in evidence
324 to be discoverable." The limits defining the scope of discovery are
325 thus preserved. The purpose of the amendment is to carry through
326 the purpose underlying the 2000 amendment, with the hope that this
327 further change will at last overcome the inertia that has thwarted
328 this purpose.

329 A portion of present Rule 26(b)(1) is omitted from the
330 proposed revision. After allowing discovery of any matter relevant
331 to any party's claim or defense, the present rule adds: "including
332 the existence, description, nature, custody, condition, and
333 location of any documents or other tangible things and the identity

334 and location of persons who know of any discoverable matter."
335 Discovery of such matters is so deeply entrenched in practice that
336 it is no longer necessary to clutter the rule text with these
337 examples.

338 Several discovery rules cross-refer to Rule 26(b)(2) as a
339 reminder that it applies to all methods of discovery. Transferring
340 the restrictions of (b)(2)(C)(iii) to become part of (b)(1) makes
341 it appropriate to revise the cross-references to include both
342 (b)(1) and (b)(2). The revisions are shown throughout the proposed
343 rules.

344 <u>Proportionality: Rule 26(c): Allocation of Expenses</u>: Another
345 proposal adds to Rule 26(c)(1)(B) an explicit recognition of the
346 authority to enter a protective order that allocates the expenses
347 of discovery. This power is implicit in present Rule 26(c), and is
348 being exercised with increasing frequency. The amendment will make
349 the power explicit, avoiding arguments that it is not conferred by
350 the present rule text. The Committee soon will begin to focus on
351 proposals advanced by some groups that greater changes should be
352 made in the general presumption that the responding party should
353 bear the costs imposed by discovery requests. It will be some time,
354 however, before the Committee determines whether any broader
355 recommendations might be made.

356 <u>Proportionality: Rules 30, 31, 33, and 36: Presumptive Numerical</u>
357 <u>Limits</u>: Rules 30 and 31 establish a presumptive limit of 10
358 depositions by the plaintiffs, or by the defendants, or by third-
359 party defendants. Rule 30(d)(1) establishes a presumptive time
360 limit of 1 day of 7 hours for a deposition by oral examination.
361 Rule 33(a)(1) sets a presumptive limit of "no more than 25 written
362 interrogatories, including all discrete subparts." There are no
363 presumptive numerical limits for Rule 34 requests to produce or for
364 Rule 36 requests to admit. The proposals reduce the limits in
365 Rules 30, 31, and 33. They add to Rule 36, for the first time,
366 presumptive numerical limits. A presumptive limit of 25 Rule 34
367 requests to produce was studied at length but ultimately abandoned.

368 The proposals would reduce the presumptive limit on the number
369 of depositions from 10 to 5, and would reduce the presumptive
370 duration to 1 day of 6 hours. Rules 30 and 31 continue to provide
371 that the court must grant leave to take more depositions "to the
372 extent consistent with Rule 26(b)(1) and (2)."

373 Reducing the presumptive limit on the number of depositions
374 was considered at length. Some judges at the Duke Conference
375 expressed the view that civil litigators over-use depositions,

376 apparently holding the view that every witness who testifies at
377 trial must be deposed beforehand. These judges noted that they
378 regularly see lawyers effectively cross-examine witnesses in
379 criminal trials without the benefit of depositions, a practice
380 widely viewed as sufficient to satisfy the demands of due process.
381 The judges also observed that they rarely, if ever, see witnesses
382 effectively impeached with deposition transcripts. At the same
383 time, many parties are opting to resolve their disputes through
384 private arbitration or mediation services that are less expensive
385 than civil litigation because they do not involve depositions, and
386 yet these alternatives are thought sufficient to reach resolution
387 of important disagreements.

388 Research by the FJC further supports these concerns, and also
389 suggests that a presumptive limit of 5 depositions will have no
390 effect in most cases. Emery Lee returned to the data base compiled
391 for the 2010 FJC study to measure the frequency of cases with more
392 than 5 depositions by plaintiffs or by defendants. The data base
393 itself was built by excluding several categories of actions that
394 are not likely to have discovery. The data for numbers of
395 depositions were further limited by counting only cases in which
396 there was at least one deposition. Drawing from reports by
397 plaintiffs of how many depositions the plaintiffs took and how many
398 depositions the defendants took, and parallel reports by
399 defendants, the numbers ranged from 14% to 23% of cases with more
400 than 5 depositions by the plaintiff or by the defendant. With one
401 exception, the estimates were that 78% or 79% of these cases had 10
402 or fewer depositions. Other findings are that each additional
403 deposition increases the cost of an action by about 5%, and that
404 estimates that discovery costs were "too high" increase with the
405 number of depositions.

406 On the other hand, many comments say that the present limit of
407 10 depositions works well — that leave is readily granted when
408 there is good reason to take more than 10, and that parties do not
409 wantonly take more than 5 depositions simply because the
410 presumptive limit is 10. More pointedly, some lawyers who represent
411 individual plaintiffs in employment discrimination cases have urged
412 that they commonly need more than 5 depositions to establish their
413 claims.

414 In short, it appears that less than one-quarter of federal
415 court civil cases result in more than five depositions, and even
416 fewer in more than ten. The question is whether it will be useful
417 to revise Rules 30 and 31 to establish a lower presumptive
418 threshold for potential judicial management. Setting the limit at
419 5 does not mean that motions and orders must be made in every case

420 that deserves more than 5 — the parties can be expected to agree,
421 and should manage to agree, in most of these cases. But the lower
422 limit can be useful in inducing reflection on the need for
423 depositions, in prompting discussions among the parties, and — when
424 those avenues fail — in securing court supervision. The Committee
425 Note addresses the concerns expressed by those who oppose the new
426 limit by stressing that leave to take more than 5 depositions must
427 be granted when appropriate. The fear that lowering the threshold
428 will raise judicial resistance seems ill-founded. Courts are
429 willing now to grant leave to take more than 10 depositions per
430 side in actions that warrant a greater number. The argument that
431 they will become reluctant to grant leave to take more than 5, or
432 more than 10, is not persuasive.

433 Considering judicial experience and the FJC findings, and
434 aiming to decrease the cost of civil litigation, making it more
435 accessible for average citizens, the Committee is persuaded that
436 the presumptive number of depositions should be reduced. Hopefully,
437 the change will result in an adjustment of expectations concerning
438 the appropriate amount of civil discovery.

439 Shortening the presumptive length of a deposition from 7 hours
440 to 6 hours reflects revision of earlier drafts that would have
441 reduced the time to 4 hours. The 4-hour limit was prompted by
442 experience in some state courts. Arizona, for example, adopted a 4-
443 hour limit several years ago. Judges in Arizona federal courts
444 often find that parties stipulate to 4-hour limits based on their
445 favorable experience with the state rule. But several comments have
446 suggested that for many depositions, 4 hours do not suffice. At the
447 same time, several others have observed that squeezing 7 hours of
448 deposition time into one day, after accounting for lunch time and
449 other breaks, often means that the deposition extends well into the
450 evening. Judges also have noted that 6 hours of trial time makes
451 for a very full day when lunch and breaks are considered. The
452 reduction to 6 hours is intended to reduce the burden of deposing
453 a witness for 7 hours in one day, but without sacrificing the
454 opportunity to conduct a complete examination.

455 The proposal to reduce the presumptive number of Rule 33
456 interrogatories to 15 has not attracted much concern. There has
457 been some concern that 15 interrogatories are not enough even for
458 some relatively small-stakes cases. As with Rules 30 and 31, the
459 Subcommittee has concluded that 15 will meet the needs of most
460 cases, and that it is advantageous to provide for court supervision
461 when the parties cannot reach agreement in the cases that may
462 justify a greater number.

463 Rule 36 requests to admit are an established part of the
464 rules, whether they be regarded as true "discovery" devices or as
465 a device for framing the issues more directly than is accomplished
466 even by contention interrogatories. The proposal to add a
467 presumptive limit of 25 expressly exempts requests to admit the
468 genuineness of documents, avoiding any risk that the limit might
469 cause problems in document-heavy litigation. This proposal did not
470 draw much criticism from those who commented on Subcommittee
471 deliberations. (The Subcommittee also considered provisions that
472 would generally defer the time for admissions to the completion of
473 other discovery, but in the end decided that early requests can be
474 useful.)

475 Proportionality: Rule 34 Objections and Responses: Discovery
476 burdens can be pushed out of proportion to the reasonable needs of
477 a case by those asked to respond, not only those who make requests.
478 The Subcommittee considered adding to Rule 26(g) a provision that
479 signing a discovery request, response, or objection certifies that
480 it is "not evasive." That proposal was put aside in the face of
481 concerns that "evasive" is a malleable concept, and that
482 malleability will invite satellite litigation.

483 More specific concerns underlie Rule 34 proposals addressing
484 objections and actual production. Objections are addressed in two
485 ways. First, Rule 34(b)(2)(B) would require that the grounds for
486 objecting to a request be stated with specificity. This language is
487 borrowed from Rule 33(b)(4), where it has served well. Second, Rule
488 34(b)(2)(C) would require that an objection "state whether any
489 responsive materials are being withheld on the basis of that
490 objection." This provision responds to the common lament that Rule
491 34 responses often begin with a "laundry list" of objections, then
492 produce volumes of materials, and finally conclude that the
493 production is made subject to the objections. The requesting party
494 is left uncertain whether anything actually has been withheld.
495 Providing that information can aid the decision whether to contest
496 the objections. The Committee Note also explains that it is proper
497 to state limits on the extent of the search without further
498 elaboration — for example, that the search was limited to documents
499 created on or after a specified date, or maintained by identified
500 sources.

501 Actual production is addressed by new language in Rule
502 34(b)(2)(B) and a corresponding addition to Rule 37(a)(3)(B)(iv).
503 Present Rule 34 recognizes a distinction between permitting
504 inspection of documents, electronically stored information, or
505 tangible things, and actually producing copies. The distinction,
506 however, is not clearly developed in the rule. If a party elects to

507 produce materials rather than permit inspection, the current rule
508 does not indicate when such production is required to be made. The
509 new provision directs that a party electing to produce must state
510 that copies will be produced, and directs that production be
511 completed no later than the time for inspection stated in the
512 request or a later reasonable time stated in the response. The
513 Committee Note recognizes the value of "rolling production" that
514 makes production in discrete batches. Rule 37 is amended by adding
515 authority to move for an order to compel production if "a party
516 fails to produce documents."

517 Cooperation

518 Reasonable cooperation among adversaries is vitally important
519 to successful use of the resources provided by the Civil Rules.
520 Participants at the Duke Conference regularly pointed to the costs
521 imposed by hyperadversary behavior and wished for some rule that
522 would enhance cooperation.

523 It would be possible to impose a duty of cooperation by direct
524 rule provisions. The provisions might be limited to the discovery
525 rules alone, because discovery behavior gives rise to many of the
526 laments, or could apply generally to all litigation behavior.
527 Consideration of drafts that would impose a direct and general duty
528 of cooperation faced several concerns. Cooperation is an open-ended
529 concept. It is difficult to identify a proper balance of
530 cooperation with legitimate, even essential, adversary behavior. A
531 general duty might easily generate excessive collateral litigation,
532 similar to the experience with an abandoned and unlamented version
533 of Rule 11. And there may be some risk that a general duty of
534 cooperation could conflict with professional responsibilities of
535 effective representation. These drafts were abandoned.

536 What is proposed is a modest addition to Rule 1. The parties
537 are made to share responsibility for achieving the high aspirations
538 expressed in Rule 1: "[T]hese rules should be construed,
539 administered, and employed by the court and the parties to secure
540 the just, speedy, and inexpensive determination of every action and
541 proceeding." The Note observes that most lawyers and parties
542 conform to this expectation, and notes that "[e]ffective advocacy
543 is consistent with — and indeed depends upon — cooperative and
544 proportional use of procedure."

545 As amended, Rule 1 will encourage cooperation by lawyers and
546 parties directly, and will provide useful support for judicial
547 efforts to elicit better cooperation when the lawyers and parties
548 fall short. It cannot be expected to cure all adversary excesses,

but it will do some good.

Package

These proposals constitute a whole that is greater than the sum of its parts. Together, these proposals can do much to reduce cost and delay. Still, each part must be scrutinized and stand, be modified, or fall on its own. The proposals are not interdependent in the sense that all, or even most, must be adopted to achieve meaningful gains.

Duke Rules Package

Rule 1 Scope and Purpose

> * * * [These rules] should be construed, ~~and~~ administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Committee Note

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.

Rule 4 Summons

* * *

(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 for the failure, the court must extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

Committee Note

The presumptive time for serving a defendant is reduced from 120 days to 60 days. This change, together with the shortened times for issuing a scheduling order set by amended Rule 16(b)(2), will reduce delay at the beginning of litigation.

590 The final sentence is amended to make it clear that the
591 reference to Rule 4 in Rule 71.1(d)(3)(A) does not include Rule
592 4(m). Dismissal under Rule 4(m) for failure to make timely service
593 would be inconsistent with the limits on dismissal established by
594 Rule 71.1(i)(C) when "the plaintiff has already taken title, a
595 lesser interest, or possession as to any part of" the property.

596 **Rule 16 Pretrial Conferences; Scheduling; Management**

597 (b) SCHEDULING.

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

602 (A) after receiving the parties' report under Rule
603 26(f); or

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

607 (2) *Time to Issue.* The judge must issue the scheduling order
608 as soon as practicable, but ~~in any event~~ unless the judge
609 finds good cause for delay the judge must issue it within
610 the earlier of ~~120~~ 90 days after any defendant has been
611 served with the complaint or ~~90~~ 60 days after any
612 defendant has appeared.

613 (3) *Contents of the Order.* * * *

614 (B) *Permitted Contents.* The scheduling order may: * * *

615 (iii) provide for disclosure, ~~or~~ discovery, or
616 preservation of electronically stored
617 information;

618 (iv) include any agreements the parties reach for
619 asserting claims of privilege or of protection
620 as trial-preparation material after
621 information is produced, including agreements
622 reached under Federal Rule of Evidence 502;

623 (v) direct that before moving for an order relating
624 to discovery the movant must request a
625 conference with the court;

626 [present (v) and (vi) would be renumbered] * * *

627 Committee Note

628 The provision for consulting at a scheduling conference by

629 "telephone, mail, or other means" is deleted. A scheduling
630 conference is more effective if the court and parties engage in
631 direct simultaneous communication. The conference may be held in
632 person, by telephone, or by more sophisticated electronic means.

633 The time to issue the scheduling order is reduced to the
634 earlier of 90 days (not 120 days) after any defendant has been
635 served, or 60 days (not 90 days) after any defendant has appeared.
636 This change, together with the shortened time for making service
637 under Rule 4(m), will reduce delay at the beginning of litigation.
638 At the same time, a new provision recognizes that the court may
639 find good cause to extend the time to issue the scheduling order.
640 In some cases it may be that the parties cannot prepare adequately
641 for a meaningful Rule 26(f) conference and then a scheduling
642 conference in the time allowed. Because the time for the Rule 26(f)
643 conference is geared to the time for the scheduling conference or
644 order, an order extending the time for the scheduling conference
645 will also extend the time for the Rule 26(f) conference. But in
646 most cases it will be desirable to hold at least a first scheduling
647 conference in the time set by the rule.

648 Three items are added to the list of permitted contents in
649 Rule 16(b)(3)(B).

650 The order may provide for preservation of electronically
651 stored information, a topic also added to the provisions of a
652 discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule
653 37(e) recognize that a duty to preserve discoverable information
654 may arise before an action is filed, and may be shaped by prefiling
655 requests to preserve and responses to them.

656 The order also may include agreements incorporated in a court
657 order under Evidence Rule 502 controlling the effects of disclosure
658 of information covered by attorney-client privilege or work-product
659 protection, a topic also added to the provisions of a discovery
660 plan under Rule 26(f)(3)(D).

661 Finally, the order may direct that before filing a motion for
662 an order relating to discovery the movant must request a conference
663 with the court. Many judges who hold such conferences find them an
664 efficient way to resolve most discovery disputes without the delay
665 and burdens attending a formal motion, but the decision whether to
666 require such conferences is left to the discretion of the judge in
667 each case.

668 **Rule 26. Duty to Disclose; General Provisions; Governing**
669 **Discovery**

670 (b) DISCOVERY SCOPE AND LIMITS.

671 (1) *Scope in General.* Unless otherwise limited by court order,

672 the scope of discovery is as follows: Parties may obtain
673 discovery regarding any nonprivileged matter that is
674 relevant to any party's claim or defense and proportional
675 to the needs of the case considering the amount in
676 controversy, the importance of the issues at stake in the
677 action, the parties' resources, the importance of the
678 discovery in resolving the issues, and whether the burden
679 or expense of the proposed discovery outweighs its likely
680 benefit. Information within this scope of discovery need
681 not be admissible in evidence to be discoverable. ~~—~~
682 ~~including the existence, description, nature, custody,~~
683 ~~condition, and location of any documents or other~~
684 ~~tangible things and the identity and location of persons~~
685 ~~who know of any discoverable matter. For good cause, the~~
686 ~~court may order discovery of any matter relevant to the~~
687 ~~subject matter involved in the action. Relevant~~
688 ~~information need not be admissible at the trial if the~~
689 ~~discovery appears reasonably calculated to lead to the~~
690 ~~discovery of admissible evidence. All discovery is~~
691 ~~subject to the limitations imposed by Rule 26(b)(2)(C).~~

692 (2) *Limitations on Frequency and Extent.*

693 (A) *When Permitted.* By order, the court may alter the
694 limits in these rules on the number of depositions,
695 ~~and~~ interrogatories, and requests for admissions,
696 or on the length of depositions under Rule 30. ~~By~~
697 ~~order or local rule, the court may also limit the~~
698 ~~number of requests under Rule 36.~~

699 * * *

700 (C) *When Required.* On motion or on its own, the court
701 must limit the frequency or extent of discovery
702 ~~otherwise allowed by these rules or by local rule~~
703 if it determines that: * * *

704 (iii) the ~~burden or expense of the~~ proposed
705 discovery is outside the scope permitted by
706 Rule 26(b)(1) ~~outweighs its likely benefit,~~
707 ~~considering the needs of the case, the amount~~
708 ~~in controversy, the parties' resources, the~~
709 ~~importance of the issues at stake in the~~
710 ~~action, and the importance of the discovery in~~
711 ~~resolving the issues.~~

712 * * *

713 (c) PROTECTIVE ORDERS.

714 (1) *In General.* * * * The court may, for good cause, issue an

715 order to protect a party or person from annoyance,
716 embarrassment, oppression, or undue burden or expense,
717 including one or more of the following: * * *

718 (B) specifying terms, including time and place or the
719 allocation of expenses, for the disclosure or
720 discovery; * * *

721 (d) TIMING AND SEQUENCE OF DISCOVERY.

722 (1) *Timing*. A party may not seek discovery from any source
723 before the parties have conferred as required by Rule
724 26(f), except:

725 (A) in a proceeding exempted from initial disclosure
726 under Rule 26(a)(1)(B),; or

727 (B) when authorized by these rules, including Rule
728 26(d)(2), by stipulation, or by court order.

729 (2) *Early Rule 34 Requests.*

730 (A) *Time to Deliver.* More than 21 days after the summons
731 and complaint are served on a party, a request
732 under Rule 34 may be delivered:

733 (i) to that party by any other party, and

734 (ii) by that party to any plaintiff or to any other
735 party that has been served.

736 (B) When Considered Served. The request is considered as
737 served at the first Rule 26(f) conference.

738 (~~2~~3) *Sequence.* Unless~~, on motion,~~ the parties stipulate or
739 the court orders otherwise for the parties' and
740 witnesses' convenience and in the interests of justice:

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

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

745 * * *

746 (f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

747 (1) *Conference Timing.* Except in a proceeding exempted from
748 initial disclosure under Rule 26(a)(1)(B) or * * *

749 (3) *Discovery Plan.* A discovery plan must state the parties'
750 views and proposals on: * * *

751 (C) any issues about disclosure, ~~or~~ discovery, or

752 preservation of electronically stored information,
753 including the form or forms in which it should be
754 produced;

755 (D) any issues about claims of privilege or of
756 protection as trial-preparation materials,
757 including — if the parties agree on a procedure to
758 assert these claims after production — whether to
759 ask the court to include their agreement in an
760 order under Federal Rule of Evidence 502;

761 Committee Note

762 The scope of discovery is changed in several ways. Rule
763 26(b)(1) is revised to limit the scope of discovery to what is
764 proportional to the needs of the case. The considerations that bear
765 on proportionality are moved from present Rule 26(b)(2)(C)(iii).
766 Although the considerations are familiar, and have measured the
767 court's duty to limit the frequency or extent of discovery, the
768 change incorporates them into the scope of discovery that must be
769 observed by the parties without court order.

770 The amendment deletes the former provision authorizing the
771 court, for good cause, to order discovery of any matter relevant to
772 the subject matter involved in the action. Proportional discovery
773 relevant to any party's claim or defense suffices. Such discovery
774 may support amendment of the pleadings to add a new claim or
775 defense that affects the scope of discovery.

776 The former provision for discovery of relevant but
777 inadmissible information that appears reasonably calculated to lead
778 to the discovery of admissible evidence is also amended. Discovery
779 of nonprivileged information not admissible in evidence remains
780 available so long as it is otherwise within the scope of discovery.
781 Hearsay is a common illustration. The qualifying phrase — "if the
782 discovery appears reasonably calculated to lead to the discovery of
783 admissible evidence" — is omitted. Discovery of inadmissible
784 information is limited to matter that is otherwise within the scope
785 of discovery, namely that which is relevant to a party's claim or
786 defense and proportional to the needs of the case. The discovery of
787 inadmissible evidence should not extend beyond the permissible
788 scope of discovery simply because it is "reasonably calculated" to
789 lead to the discovery of admissible evidence. Deleting the
790 "reasonably calculated" phrase will further the purpose of the 2000
791 amendment that revised this sentence out of concern that, as
792 expressed in the 2000 Committee Note, it "might swallow any other
793 limitation on the scope of discovery."

794 Rule 26(b)(2)(A) is revised to reflect the addition of
795 presumptive limits on the number of requests for admission under

796 Rule 36. The court may alter these limits just as it may alter the
797 presumptive limits set by Rules 30, 31, and 33.

798 Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of
799 the considerations that bear on proportionality to Rule 26(b)(1).
800 The court still must limit the frequency or extent of proposed
801 discovery, on motion or on its own, if it is outside the scope
802 permitted by Rule 26(b)(1). Rule 26(b)(2)(C) is further amended by
803 deleting the reference to discovery "otherwise allowed by these
804 rules or local rule." Neither these rules nor local rules can
805 "otherwise allow" discovery that exceeds the scope defined by Rule
806 26(b)(1) or that must be limited under Rule 26(b)(2)(C).

807 Rule 26(c)(1)(B) is amended to include an express recognition
808 of protective orders that specify terms allocating expenses for
809 disclosure or discovery. Authority to enter such orders is included
810 in the present rule, and courts are coming to exercise this
811 authority. Explicit recognition will forestall the temptation some
812 parties may feel to contest this authority.

813 Rule 26(d)(1)(B) is amended to allow a party to deliver Rule
814 34 requests to another party more than 21 days after that party has
815 been served even though the parties have not yet had a required
816 Rule 26(f) conference. Delivery may be made by any party to the
817 party that has been served, and by that party to any plaintiff and
818 any other party that has been served. Delivery does not count as
819 service; the requests are considered to be served at the first Rule
820 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs
821 from service. This relaxation of the discovery moratorium is
822 designed to facilitate focused discussion during the Rule 26(f)
823 conference. Discussion at the conference may produce changes in the
824 requests. The opportunity for advance scrutiny of requests
825 delivered before the Rule 26(f) conference should not affect a
826 decision whether to allow additional time to respond.

827 Former Rule 26(d)(2) is renumbered as (d)(3) and amended to
828 recognize that the parties may stipulate to case-specific sequences
829 of discovery.

830 Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add
831 two items to the discovery plan — issues about preserving
832 electronically stored information and court orders on agreements to
833 protect against waiver of privilege or work-product protection
834 under Evidence Rule 502. Parallel amendments of Rule 37(e)
835 recognize that a duty to preserve discoverable information may
836 arise before an action is filed, and may be shaped by prefiling
837 requests to preserve and responses to them.

Rule 30 Depositions by Oral Examination

(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)(1) and (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; * * *

(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~~ 6 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

Committee Note

Rule 30 is amended to reduce the presumptive number of depositions to 5 by the plaintiffs, or by the defendants, or by the third-party defendants. Rule 30(a)(2), however, continues to direct that the court must grant leave to take more depositions to the extent consistent with Rule 26(b)(1) and (2). And Rule 30(a)(2)(A) continues to recognize that the parties may stipulate to a greater number. Just as cases frequently arise in which one or all sides reasonably need more than 10 depositions, so there will be still more cases that reasonably justify more than 5. First-line reliance continues to rest on the parties to recognize the cases in which more depositions are required, acting in accord with Rule 1. But if the parties fail to agree, the court is responsible for identifying the cases that need more, recognizing that the context of particular cases often will justify more. The court's determination is guided by the scope of discovery defined in Rule 26(b)(1) and the limiting principles stated in Rule 26(b)(2).

Rule 30(d) is amended to reduce the presumptive limit of a deposition to one day of 6 hours. Experience with the present 7-hour presumptive limit suggests that a deposition begun in the morning often runs into evening hours after accounting for breaks. Six hours should suffice for most depositions, and encourage efficient use of the time while providing a less arduous experience

for the deponent.

Rule 31 Depositions by Written Questions

(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)(1) and (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; * * *

Committee Note

Rule 31 is amended to adopt for depositions by written questions the same presumptive limit of 5 depositions by the plaintiffs, or by the defendants, or by the third-party defendants as is adopted for Rule 30 depositions by oral examination.

Rule 33 Interrogatories to Parties

(a) IN GENERAL.

(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. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

Committee Note

Rule 33 is amended to reduce from 25 to 15 the presumptive limit on the number of interrogatories to parties. As with the reduction in the presumptive number of depositions under Rules 30 and 31, the purpose is to encourage the parties to think carefully about the most efficient and least burdensome use of discovery devices. There is no change in the authority to increase the number by stipulation or by court order. As with other numerical limits on discovery, the court should recognize that some cases will require a greater number of interrogatories, and set a limit consistent with Rule 26(b)(1) and (2).

916 **Rule 34 Producing Documents, Electronically Stored Information,**
917 **and Tangible Things, or Entering onto Land, for Inspection and**
918 **Other Purposes** * * *

919 (b) PROCEDURE. * * *

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

921 (A) *Time to Respond.* The party to whom the request is
922 directed must respond in writing within 30 days
923 after being served or — if the request was
924 delivered under Rule 26(d)(1)(B) — within 30 days
925 after the parties' first Rule 26(f) conference. A
926 shorter or longer time may be stipulated to under
927 Rule 29 or be ordered by the court.

928 (B) *Responding to Each Item.* For each item or
929 category, the response must either state that
930 inspection and related activities will be
931 permitted as requested or state the grounds
932 for objecting to the request with specificity,
933 including the reasons. If the responding party
934 states that it will produce copies of
935 documents or of electronically stored
936 information instead of permitting inspection,
937 the production must be completed no later than
938 the time for inspection stated in the request
939 or a later reasonable time stated in the
940 response.

941 (C) *Objections*. An objection must state whether any
942 responsive materials are being withheld on the
943 basis of that objection. An objection to part of a
944 request must specify the part and permit inspection
945 of the rest. . * * *

946 Committee Note

947 Several amendments are made in Rule 34, aimed at reducing the
948 potential to impose unreasonable burdens by objections to requests
949 to produce.

950 Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(1)(B).
951 The time to respond to a Rule 34 request delivered before the
952 parties' Rule 26(f) conference is 30 days after the first Rule
953 26(f) conference.

954 Rule 34(b)(2)(B) is amended to make it clear that objections
955 to Rule 34 requests must be stated with specificity. This provision
956 adopts the language of Rule 33(b)(4), eliminating any doubt that
957 less specific objections might be suitable under Rule 34.

958 Rule 34(b)(2)(B) is further amended to reflect the common
959 practice of producing copies of documents or electronically stored
960 information rather than simply permitting inspection. The response
961 to the request must state that copies will be produced. The
962 production must be completed either by the time for inspection
963 stated in the request or by a later reasonable time specifically
964 identified in the response. When it is necessary to make the
965 production in stages the response should specify the beginning and
966 end dates of the production.

967 Rule 34(b)(2)(C) is amended to provide that an objection to a
968 Rule 34 request must state whether anything is being withheld on
969 the basis of the objection. This amendment should end the confusion
970 that frequently arises when a producing party states several
971 objections and still produces information, leaving the requesting
972 party uncertain whether any relevant and responsive information has
973 been withheld on the basis of the objections. An objection that
974 states the limits that have controlled the search for responsive
975 and relevant materials qualifies as a statement that the materials
976 have been "withheld." Examples would be a statement that the search
977 was limited to materials created during a defined period, or
978 maintained by identified sources.

979 **Rule 36 Requests for Admission**

980 (a) SCOPE AND PROCEDURE.

981 (1) *Scope.* A party may serve on any other party a written
982 request to admit, for purposes of the pending action
983 only, the truth of any matters within the scope of Rule
984 26(b)(1) relating to:

985 (A) facts, the application of law to fact, or opinions
986 about either; and

987 (B) the genuineness of any described document.

988 (2) *Number.* Unless otherwise stipulated or ordered by the
989 court, a party may serve no more than 25 requests to
990 admit under Rule 36(a)(1)(A) on any other party,
991 including all discrete subparts. The court may grant
992 leave to serve additional requests to the extent
993 consistent with Rule 26(b)(1) and (2). * * *

994 [Present (2), (3), (4), (5), and(6) would be renumbered]

995 Committee Note

996 For the first time, a presumptive limit of 25 is introduced
997 for the number of Rule 36(a)(1)(A) requests to admit the truth of
998 facts, the application of law to fact, or opinions about either.
999 "[A]ll discrete subparts" are included in the count, to be

1000 determined in the same way as under Rule 33(a)(1). The limit does
1001 not apply to requests to admit the genuineness of any described
1002 document under Rule 36(a)(1)(B). As with other numerical limits on
1003 discovery, the court should recognize that some cases will require
1004 a greater number of requests, and set a limit consistent with the
1005 limits of Rule 26(b)(1) and (2).

1006 **Rule 37 Failure to Make Disclosures or to Cooperate in Discovery;**
1007 **Sanctions**

1008 (a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY. * * *

1009 (3) *Specific Motions.* * * *

1010 (B) *To Compel a Discovery Response.* A party seeking
1011 discovery may move for an order compelling an
1012 answer, designation, production, or inspection.
1013 This motion may be made if: * * *

1014 (iv) a party fails to produce documents or fails
1015 to respond that inspection will be permitted —
1016 or fails to permit inspection — as requested
1017 under Rule 34.

1018 Committee Note

1019 Rule 37(a)(3)(B)(iv) is amended to reflect the common practice
1020 of producing copies of documents or electronically stored
1021 information rather than simply permitting inspection. This change
1022 brings item (iv) into line with paragraph (B), which provides a
1023 motion for an order compelling "production, or inspection."

1024 Rules Text

1025 **Rule 1 Scope and Purpose**

1026 * * * [These rules] should be construed, administered,
1027 and employed by the court and the parties to secure the
1028 just, speedy, and inexpensive determination of every
1029 action and proceeding.

1030 **Rule 4 Summons**

1031 * * *

1032 (m) TIME LIMIT FOR SERVICE. If a defendant is not served within 60 days
1033 after the complaint is filed, the court * * * must dismiss the
1034 action without prejudice against that defendant or order that
1035 service be made within a specified time. But if the plaintiff
1036 shows good cause for the failure, the court must extend the
1037 time for service for an appropriate period. This subdivision
1038 (m) does not apply to service in a foreign country under Rule
1039 4(f) or 4(j)(1) or to service of a notice under Rule
1040 71.1(d)(3)(A).

1041 **Rule 16 Pretrial Conferences; Scheduling; Management**

1042 (b) SCHEDULING.

1043 (1) *Scheduling Order.* Except in categories of actions
1044 exempted by local rule, the district judge — or a
1045 magistrate judge when authorized by local rule — must
1046 issue a scheduling order:

1047 (A) after receiving the parties' report under Rule
1048 26(f); or

1049 (B) after consulting with the parties' attorneys and
1050 any unrepresented parties at a scheduling
1051 conference.

1052 (2) *Time to Issue.* The judge must issue the scheduling order
1053 as soon as practicable, but unless the judge finds good
1054 cause for delay the judge must issue it within the
1055 earlier of 90 days after any defendant has been served
1056 with the complaint or 60 days after any defendant has
1057 appeared.

1058 (3) *Contents of the Order.* * * *

1059 (B) *Permitted Contents.* The scheduling order may: * * *

1060 (iii) provide for disclosure, discovery, or
1061 preservation of electronically stored
1062 information;

1063 (iv) include any agreements the parties reach for
1064 asserting claims of privilege or of protection
1065 as trial-preparation material after
1066 information is produced, including agreements
1067 reached under Federal Rule 502 of Evidence
1068 502;

1069 (v) direct that before moving for an order relating
1070 to discovery the movant must request a
1071 conference with the court;

1072 [present (v) and (vi) would be renumbered] * * *

1073 **Rule 26. Duty to Disclose; General Provisions; Governing**
1074 **Discovery**

1075 (b) DISCOVERY SCOPE AND LIMITS.

1076 (1) *Scope in General.* Unless otherwise limited by court order,
1077 the scope of discovery is as follows: Parties may obtain
1078 discovery regarding any nonprivileged matter that is
1079 relevant to any party's claim or defense and proportional
1080 to the needs of the case considering the amount in
1081 controversy, the importance of the issues at stake in the
1082 action, the parties' resources, the importance of the
1083 discovery in resolving the issues, and whether the burden
1084 or expense of the proposed discovery outweighs its likely
1085 benefit. Information within this scope of discovery need
1086 not be admissible in evidence to be discoverable.

1087 (2) *Limitations on Frequency and Extent.*

1088 (A) *When Permitted.* By order, the court may alter the
1089 limits in these rules on the number of depositions,
1090 interrogatories, and requests for admissions, or on
1091 the length of depositions under Rule 30.

1092 * * *

1093 (C) *When Required.* On motion or on its own, the court
1094 must limit the frequency or extent of discovery if
1095 it determines that: * * *

1096 (iii) the proposed discovery is outside the scope
1097 permitted by Rule 26(b)(1).

1098 * * *

1099 (c) PROTECTIVE ORDERS.

1100 (1) *In General.* * * * The court may, for good cause, issue an
1101 order to protect a party or person from annoyance,
1102 embarrassment, oppression, or undue burden or expense,

1103 including one or more of the following: * * *

1104 (B) specifying terms, including time and place or the
1105 allocation of expenses, for the disclosure or
1106 discovery; * * *

1107 (d) TIMING AND SEQUENCE OF DISCOVERY.

1108 (1) *Timing*. A party may not seek discovery from any source
1109 before the parties have conferred as required by Rule
1110 26(f), except:

1111 (A) in a proceeding exempted from initial disclosure
1112 under Rule 26(a)(1)(B); or

1113 (B) when authorized by these rules, including Rule
1114 26(d)(2), by stipulation, or by court order.

1115 (2) *Early Rule 34 Requests.*

1116 (A) *Time to Deliver.* More than 21 days after the summons
1117 and complaint are served on a party, a request
1118 under Rule 34 may be delivered:

1119 (i) to that party by any other party, and

1120 (ii) by that party to any plaintiff or to any other
1121 party that has been served.

1122 (B) *When Considered Served.* The request is considered as
1123 served at the first Rule 26(f) conference.

1124 (3) *Sequence.* Unless the parties stipulate or the court
1125 orders otherwise for the parties' and witnesses'
1126 convenience and in the interests of justice:

1127 (A) methods of discovery may be used in any sequence;
1128 and

1129 (B) discovery by one party does not require any other
1130 party to delay its discovery.

1131 * * *

1132 (f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

1133 (1) *Conference Timing.* Except in a proceeding exempted from
1134 initial disclosure under Rule 26(a)(1)(B) or * * *

1135 (3) *Discovery Plan.* A discovery plan must state the parties'
1136 views and proposals on: * * *

1137 (C) any issues about disclosure, discovery, or
1138 preservation of electronically stored information,
1139 including the form or forms in which it should be

1140 produced;

1141 (D) any issues about claims of privilege or of
1142 protection as trial-preparation materials,
1143 including — if the parties agree on a procedure to
1144 assert these claims after production — whether to
1145 ask the court to include their agreement in an
1146 order under Federal Rule of Evidence 502;

1147 **Rule 30 Depositions by Oral Examination**

1148 (a) WHEN A DEPOSITION MAY BE TAKEN. * * *

1149 (2) *With Leave.* A party must obtain leave of court, and the
1150 court must grant leave to the extent consistent with Rule
1151 26(b)(1) and (2):

1152 (A) if the parties have not stipulated to the deposition
1153 and:

1154 (i) the deposition would result in more than 5
1155 depositions being taken under this rule or
1156 Rule 31 by the plaintiffs, or by the
1157 defendants, or by the third-party defendants;
1158 * * *

1159 (d) DURATION; SANCTION; MOTION TO TERMINATE OR LIMIT.

1160 (1) *Duration.* Unless otherwise stipulated or ordered by the
1161 court, a deposition is limited to one day of 6 hours. The
1162 court must allow additional time consistent with Rule
1163 26(b)(1) and (2) if needed to fairly examine the deponent
1164 or if the deponent, another person, or any other
1165 circumstance impedes or delays the examination.

1166 **Rule 31 Depositions by Written Questions**

1167 (a) WHEN A DEPOSITION MAY BE TAKEN. * * *

1168 (2) *With Leave.* A party must obtain leave of court, and the
1169 court must grant leave to the extent consistent with Rule
1170 26(b)(1) and (2):

1171 (A) if the parties have not stipulated to the deposition
1172 and:

1173 (i) the deposition would result in more than 5
1174 depositions being taken under this rule or
1175 Rule 30 by the plaintiffs, or by the
1176 defendants, or by the third-party defendants;
1177 * * *

1178 **Rule 33 Interrogatories to Parties**

1179 (a) IN GENERAL.

1180 (1) *Number.* Unless otherwise stipulated or ordered by the court, a
1181 party may serve on another party no more than 15
1182 interrogatories, including all discrete subparts. Leave to
1183 serve additional interrogatories may be granted to the extent
1184 consistent with Rule 26(b)(1) and (2).

1185 **Rule 34 Producing Documents, Electronically Stored Information,**
1186 **and Tangible Things, or Entering onto Land, for Inspection and**
1187 **Other Purposes** * * *

1188 (b) PROCEDURE. * * *

1189 (2) *Responses and Objections.* * * *

1190 (A) *Time to Respond.* The party to whom the request is
1191 directed must respond in writing within 30 days
1192 after being served or — if the request was
1193 delivered under Rule 26(d)(1)(B) — within 30 days
1194 after the parties' first Rule 26(f) conference. A
1195 shorter or longer time may be stipulated to under
1196 Rule 29 or be ordered by the court.

1197 (B) *Responding to Each Item.* For each item or
1198 category, the response must either state that
1199 inspection and related activities will be
1200 permitted as requested or state the grounds
1201 for objecting to the request with specificity,
1202 including the reasons. If the responding party
1203 states that it will produce copies of
1204 documents or of electronically stored
1205 information instead of permitting inspection,
1206 the production must be completed no later than
1207 the time for inspection stated in the request
1208 or a later reasonable time stated in the
1209 response.

1210 (C) *Objections*. An objection must state whether any
1211 responsive materials are being withheld on the
1212 basis of that objection. An objection to part of a
1213 request must specify the part and permit inspection
1214 of the rest. . * * *

1215 **Rule 36 Requests for Admission**

1216 (a) SCOPE AND PROCEDURE.

1217 (1) *Scope.* A party may serve on any other party a written
1218 request to admit, for purposes of the pending action

1219 only, the truth of any matters within the scope of Rule
1220 26(b)(1) relating to:

1221 (A) facts, the application of law to fact, or opinions
1222 about either; and

1223 (B) the genuineness of any described document.

1224 (2) *Number.* Unless otherwise stipulated or ordered by the
1225 court, a party may serve no more than 25 requests to
1226 admit under Rule 36(a)(1)(A) on any other party,
1227 including all discrete subparts. The court may grant
1228 leave to serve additional requests to the extent
1229 consistent with Rule 26(b)(1) and (2). * * *

1230 [Present (2), (3), (4), (5), and(6) would be renumbered]

1231 **Rule 37 Failure to Make Disclosures or to Cooperate in Discovery;**
1232 **Sanctions**

1233 (a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY. * * *

1234 (3) *Specific Motions.* * * *

1235 (B) *To Compel a Discovery Response.* A party seeking
1236 discovery may move for an order compelling an
1237 answer, designation, production, or inspection.
1238 This motion may be made if: * * *

1239 (iv) a party fails to produce documents or fails
1240 to respond that inspection will be permitted —
1241 or fails to permit inspection — as requested
1242 under Rule 34.

THIS PAGE INTENTIONALLY BLANK

TAB 2C

THIS PAGE INTENTIONALLY BLANK

1243 **B. Rule 37(e): Action to Recommend Publication of Revised**
1244 **Rule 37(e)**

1245 In January, the Standing Committee preliminarily approved
1246 proposed amendments to Rule 37(e) for publication in August, 2013,
1247 on condition that the Advisory Committee consider the issues raised
1248 during the January meeting and make appropriate revisions in the
1249 draft rule and Note, returning for approval by the Standing
1250 Committee during the June meeting. The Advisory Committee's
1251 Discovery Subcommittee has carefully considered possible revisions
1252 responsive to the concerns raised by the Standing Committee. The
1253 Subcommittee's revisions were submitted to the Advisory Committee
1254 during its Spring meeting and -- with further revisions --
1255 unanimously approved by the Advisory Committee.

1256 The fundamental thrust of the proposal is as presented during
1257 the Standing Committee's January meeting -- to amend the rule to
1258 address the overbroad preservation many litigants and potential
1259 litigants felt they had to undertake to ensure they would not later
1260 face sanctions. Rule amendments for this purpose were unanimously
1261 proposed by the E-Discovery Panel at the May, 2010, Duke
1262 Conference, and the Discovery Subcommittee set to work on
1263 developing amendments soon thereafter. A mini-conference was
1264 convened in September, 2011, to evaluate the various proposed
1265 approaches the Subcommittee had identified. From that point, the
1266 Subcommittee refined the approach that was presented in January.

1267 The proposed amendment focuses on sanctions rather than
1268 attempting directly to regulate the details of preservation. But
1269 it provides guidance for a court by recognizing that a party that
1270 adopts reasonable and proportionate preservation measures should
1271 not be subject to sanctions. In addition, the amendment provides
1272 a uniform national standard for culpability findings to support
1273 imposition of sanctions. Except in exceptional cases in which a
1274 party's actions irreparably deprive another party of any meaningful
1275 opportunity to present or defend against the claims in the
1276 litigation, sanctions may be imposed only on a finding that the
1277 party acted willfully or in bad faith. So the amendment rejects
1278 the view adopted in some cases, such as Residential Funding Corp.
1279 v. DeGeorge Finan. Corp., 306 F.3d 99 (2d Cir. 2002), that would
1280 permit sanctions for negligence.

1281 Below is the revised rule and Note, along with a list of
1282 questions that the Advisory Committee feels should be published
1283 with the draft of the rule amendment, in order to focus public
1284 comment on issues that have been raised, including those raised by
1285 members of the Standing Committee. There follows an

1286 overstrike/double underline version of the rule (and similar
1287 version of the Note) showing changes to the restyled rule since the
1288 Standing Committee's January meeting.

1289 It seems simplest to address separately the various issues
1290 raised during the January meeting.

1291 Displacement of Other Laws

1292 Concern was expressed in January about draft Note language
1293 saying that amended Rule 37(e) "displaces any other law that would
1294 authorize imposing litigation sanctions in the absence of a finding
1295 of willfulness or bad faith, including state law in diversity
1296 cases."

1297 The Note language concerning the origin of the obligation to
1298 preserve has been revised as follows:

1299 This preservation obligation was not created by Rule 37(e),
1300 but has been recognized by many court decisions. ~~arises from~~
1301 ~~the common law, and~~ It may in some instances be triggered or
1302 clarified by a court order in the case.

1303 In addition, further revisions removed "displacement" from the
1304 Note:
1305 The amended rule therefore forecloses reliance on
1306 inherent authority or state law to impose litigation sanctions
1307 in the absence of the findings required under Rule
1308 37(e)(1)(B). ~~displaces any other law that would authorize~~
1309 ~~imposing litigation sanctions in the absence of a finding of~~
1310 ~~wilfulness or bad faith, including state law in diversity~~
1311 ~~cases.~~

1312 Use of the Term "Sanction"

1313 Concern was expressed about use of the word "sanction," which
1314 might have adverse significance when applied to the conduct of a
1315 lawyer, such as requiring that the attorney report the imposition
1316 of this "sanction" to the state bar.

1317 The following additional sentence was added to the Note:

1318 It [the new rule] borrows the term "sanctions" from Rule
1319 37(b)(2), and does not attempt to prescribe whether such
1320 measures would be so regarded for other purposes, such as an
1321 attorney's professional responsibility.

1322 "Irreparable Prejudice" provision

1323 Standing Committee members expressed concern that the proposed
1324 rule language would permit imposition of litigation sanctions
1325 whenever the loss of information prevented a party from presenting
1326 "a claim or defense" even when the claim or defense is of minor
1327 significance in the litigation. In addition, as a matter of style
1328 some members urged that the Advisory Committee reconsider using the
1329 word "meaningful" in the rule.

1330 Rule 37(e)(1)(B)(ii) has been revised to authorize imposition
1331 of sanctions in the absence of a finding of willfulness or bad
1332 faith only when the court finds that the party's actions:

1333 irreparably deprived a party of any meaningful opportunity to
1334 present or defend against the ~~a~~ claims ~~or defense~~ in the
1335 litigation.

1336 A party seeking sanctions under this revised provision must show
1337 that it was disabled from presenting its side in the litigation.
1338 The word "meaningful" has been retained because the committee
1339 concluded that it most accurately reflects the narrow nature of
1340 this exception.

1341 In order to make clearer the narrowness of this authorization
1342 for sanctions, the Note has been substantially revised as follows:

1343 This subdivision ~~Rule 37(e)(2)(B)~~ permits the court to
1344 impose sanctions in narrowly limited circumstances without
1345 making a finding of either bad faith or willfulness. The need
1346 to show bad faith or willfulness is excused only by finding an
1347 impact more severe than the substantial prejudice required to
1348 support sanctions under Rule 37(e)(1)(B)(i). It still must be
1349 shown that a party failed to preserve discoverable information
1350 that should have been preserved. In addition, it must be
1351 shown that the failure irreparably deprived a party of any
1352 meaningful opportunity to present or defend against the claims
1353 in the litigation. ~~As under Rule 37(e)(2)(A), the threshold~~
1354 ~~for sanctions is that the court find that lost information~~
1355 ~~reasonably should have been preserved by the party to be~~
1356 ~~sanctioned.~~

1357 The first step in determining whether a party's failure
1358 to preserve discoverable information that should have been
1359 preserved has irreparably deprived another party of any
1360 meaningful opportunity to present or defend against the claims
1361 in the litigation is to examine carefully the apparent

1362 importance of the lost information. Particularly with
1363 electronically stored information, alternative sources may
1364 often exist. The next step is to explore the possibility that
1365 curative measures under subdivision (e)(1)(A) can reduce the
1366 adverse impact. If a party loses readily accessible
1367 electronically stored information, for example, the court may
1368 direct the party to attempt to retrieve the information by
1369 alternative means. If such measures are not possible or fail
1370 to restore important information, the court must determine
1371 whether the loss has irreparably deprived a party of any
1372 meaningful opportunity to present or defend against the claims
1373 in the litigation.

1374 The "irreparably deprived" test is more demanding than
1375 the "substantial prejudice" that permits sanctions under Rule
1376 37(e)(1)(B)(i) on a showing of bad faith or willfulness.
1377 Examples might include cases in which the alleged injury-
1378 causing instrumentality has been lost. A plaintiff's failure
1379 to preserve an automobile claimed to have defects that caused
1380 injury without affording the defendant manufacturer an
1381 opportunity to inspect the damaged vehicle may be an example.
1382 Such a situation led to affirmance of dismissal, as not an
1383 abuse of discretion, in Silvestri v. General Motors Corp., 271
1384 F.3d 583 (4th Cir. 2001). Or a party may lose the only
1385 evidence of a critically important event. But even such losses
1386 may not irreparably deprive another party of any meaningful
1387 opportunity to litigate. Remaining sources of evidence and
1388 the opportunity to challenge the evidence presented by the
1389 party who lost discoverable information that should have been
1390 preserved, along with possible presentation of evidence and
1391 argument about the significance of the lost information,
1392 should often afford a meaningful opportunity to litigate.

1393 The requirement that a party be irreparably deprived of
1394 any meaningful opportunity to present or defend against the
1395 claims in the litigation is further narrowed by looking to all
1396 the claims in the action. Lost information may appear critical
1397 to litigating a particular claim or defense, but sanctions
1398 should not be imposed — or should be limited to the affected
1399 claims or defenses — if those claims or defenses are not
1400 central to the litigation.

1401 It should also be noted that the first two questions in the
1402 list of questions for public comment invite input on issues related
1403 to those raised by the Standing Committee discussion:

1404 1. Should the rule be limited to sanctions for loss of

1405 electronically stored information? Current Rule 37(e) is so
1406 limited, and much commentary focuses on the preservation
1407 problems resulting from the proliferation of such information.
1408 But the dividing line between "electronically stored
1409 information" and other discoverable matter may be uncertain,
1410 and may become more uncertain in the future, and loss of
1411 tangible things or documents important in litigation is a
1412 recurrent concern in litigation today.

1413 2. Should Rule 37(b)(1)(B)(ii) be retained in the rule?
1414 This provision is focused on the possibility that one side's
1415 failure to preserve evidence may catastrophically deprive the
1416 other side of any meaningful opportunity to litigate, and
1417 permits imposition of sanctions even absent a finding of
1418 willfulness or bad faith. It has been suggested that limiting
1419 the rule to loss of electronically stored information would
1420 make (B)(ii) unnecessary. Does this provision add important
1421 flexibility to the rule?

1422 Acts of God

1423 Standing Committee members raised concerns about whether
1424 proposed (B)(ii) was meant to authorize imposition of sanctions
1425 when information was lost without any fault by the party that lost
1426 it.

1427 The Discovery Subcommittee spent considerable time evaluating
1428 this issue. It even considered proposing that an alternative
1429 amendment be published as an appendix to the main proposal,
1430 eliminating (B)(ii) and limiting the rule to loss of electronically
1431 stored information, on the theory that loss of that sort of
1432 evidence would rarely, if ever, have the cataclysmic consequences
1433 that (B)(ii) addresses.

1434 Eventually, the Advisory Committee decided that changing
1435 proposed Rule 37(e)(1)(B) to focus on "the party's actions" rather
1436 than "the party's failure" afforded a solution to this problem.
1437 The proposed version of the rule therefore will permit sanctions in
1438 the absence of willfulness or bad faith only if "the party's
1439 actions" irreparably deprive the opponent of any meaningful
1440 opportunity to litigate the case. This will preclude sanctions
1441 when information is lost through causes other than the party's
1442 actions, such as a natural disaster. This point is made by the
1443 following new Note language:

1444 A special situation arises when discoverable information
1445 is lost because of events outside a party's control. A party

1446 may take the steps that should have been taken to preserve the
1447 information, but lose it to such unforeseeable circumstances
1448 as flood, earthquake, fire, or malicious computer attacks.
1449 Curative measures may be appropriate in such circumstances —
1450 this is information that should have been preserved — but
1451 sanctions are not. The loss is not caused by "the party's
1452 actions" as required by (e)(1)(B).

1453 Preservation of current Rule 37(e) Language

1454 During the January meeting, concern was expressed about the
1455 absence of any explanation in the Note for the abrogation of Rule
1456 37(e). The Discovery Subcommittee had obtained a thorough research
1457 memo from Andrea Kuperman showing that current Rule 37(e) has been
1458 used only very rarely. It concluded that there was no circumstance
1459 that would be covered by current Rule 37(e) but would not be
1460 protected under the proposed revision.

1461 The Note has been amended to provide this explanation:

1462 Amended Rule 37(e) supersedes the current rule because it
1463 provides protection for any conduct that would be protected
1464 under the current rule. The current rule provides: "Absent
1465 exceptional circumstances, a court may not impose sanctions
1466 under these rules on a party for failing to provide
1467 electronically stored information lost as a result of the
1468 routine, good-faith operation of an electronic information
1469 system." The routine good faith operation of an electronic
1470 information system should be respected under the amended rule.
1471 As under the current rule, the prospect of litigation may call
1472 for altering that routine operation. And the prohibition of
1473 sanctions in the amended rule means that any loss of data that
1474 would be insulated against sanctions under the current rule
1475 would also be protected under the amended rule.

1476 In addition, the Advisory Committee proposes that the
1477 invitation for public comment highlight this issue:

1478 3. Should the provisions of current Rule 37(e) be
1479 retained in the rule? As stated in the Committee Note, the
1480 amended rule appears to provide protection in any situation in
1481 which current Rule 37(e) would apply.

1482 This treatment is intended both to make a suitable record
1483 showing that abrogation of current Rule 37(e) is not intended in
1484 any way to remove protection it provided, and to permit the public
1485 comment period to illuminate whether there is reason for worry

1486 about abrogating the current rule.

1487 Expanded definition of "Substantial Prejudice"

1488 In January, it was suggested that the term "substantial
1489 prejudice in the litigation" in Rule 37(e)(1)(B)(i) might
1490 profitably be given further definition, and the Advisory Committee
1491 was urged to invite public comment on this topic. The Note to Rule
1492 37(e)(1)(B)(i) already provides:

1493 [T]he court must find that the loss of information caused
1494 substantial prejudice in the litigation. Because digital data
1495 often duplicate other data, substitute evidence is often
1496 available. Although it is impossible to demonstrate with
1497 certainty what lost information would prove, the party seeking
1498 sanctions must show that it has been substantially prejudiced
1499 by the loss. Among other things, the court may consider the
1500 measures identified in Rule 37(e)(1)(A) in making this
1501 determination; if these measures can sufficiently reduce the
1502 prejudice, sanctions would be inappropriate even when the
1503 court finds willfulness or bad faith. Rule 37(e)(1)(B)(i)
1504 authorizes imposition of Rule 37(b)(2) sanctions in the
1505 expectation that the court will employ the least severe
1506 sanction needed to repair the prejudice resulting from loss of
1507 the information.

1508 In addition, the Advisory Committee proposes to raise this
1509 issue during the public comment period with the following
1510 invitation to comment:

1511 4. Should there be an additional definition of
1512 "substantial prejudice" under Rule 37(e)(1)(B)(i)? One
1513 possibility is that the rule could be augmented by directing
1514 that the court should consider all factors, including the
1515 availability of reliable alternative sources of the lost or
1516 destroyed information, and the importance of the lost
1517 information to the claims or defenses in the case.

1518 Added flexibility on Curative Measures

1519 Another topic raised by some members of the Standing Committee
1520 in January was that the rule might unduly limit curative measures
1521 the court might deem desirable. Reflecting on this concern, the
1522 Discovery Subcommittee concluded that the rule could be improved by
1523 removing the phrase "the party to undertake" from Rule 37(e)(1)(A):

> permit additional discovery, order ~~the party to undertake~~ curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

The removal of this phrase means that curative measures are not limited to orders directed to the party that failed to preserve information. Additional Note material addresses this possibility:

> Additional curative measures might include permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information.

Role of Other Preservation Duties

Another concern raised during the January meeting was the role of preservation duties imposed by other bodies of law, such as statutes or regulations. Note language has been added addressing this issue:

> Although the rule focuses on the common law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation.

Removal of "reasonably" from Rule 37(e)(1)

Rule 37(e)(2) focuses on the reasonableness and proportionality of parties' conduct in preserving information in the anticipation or conduct of litigation. A redundant invocation of "reasonably" also appeared in Rule 37(e)(1) and has been removed.

1553 "Clean" version of Rule 37(e) amendment

1554 **Rule 37. Failure to Make Disclosures or to Cooperate in**
1555 **Discovery; Sanctions**

1556 * * * * *

1557 ~~**(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.** Absent~~
1558 ~~exceptional circumstances, a court may not impose sanctions~~
1559 ~~under these rules on a party for failing to provide~~
1560 ~~electronically stored information lost as a result of the~~
1561 ~~routine, good-faith operation of an electronic information~~
1562 ~~system.~~
1563
1564 **(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.**

1565 **(1)** *Curative measures; sanctions.* If a party failed to
1566 preserve discoverable information that should have been
1567 preserved in the anticipation or conduct of litigation,
1568 the court may

1569 **(A)** permit additional discovery, order curative
1570 measures, or order the party to pay the reasonable
1571 expenses, including attorney's fees, caused by the
1572 failure; and

1573 **(B)** impose any sanction listed in Rule 37(b)(2)(A) or
1574 give an adverse-inference jury instruction, but
1575 only if the court finds that the party's actions:

1576 **(i)** caused substantial prejudice in the litigation
1577 and were willful or in bad faith; or

1578 **(ii)** irreparably deprived a party of any meaningful
1579 opportunity to present or defend against the
1580 claims in the litigation.

1581 **(2)** *Factors to be considered in assessing a party's conduct.*
1582 The court should consider all relevant factors in
1583 determining whether a party failed to preserve
1584 discoverable information that should have been preserved
1585 in the anticipation or conduct of litigation, and whether
1586 the failure was willful or in bad faith. The factors
1587 include:

1588 **(A)** the extent to which the party was on notice that
1589 litigation was likely and that the information
1590 would be discoverable;

1591 **(B)** the reasonableness of the party's efforts to
1592 preserve the information;

1593 **(C)** whether the party received a request to preserve
1594 information, whether the request was clear and
1595 reasonable, and whether the person who made it and
1596 the party consulted in good faith about the scope
1597 of preservation;

1598 **(D)** the proportionality of the preservation efforts to
1599 any anticipated or ongoing litigation; and

1600 **(E)** whether the party timely sought the court's
1601 guidance on any unresolved disputes about
1602 preserving discoverable information.

1603 COMMITTEE NOTE

1604 In 2006, Rule 37(e) was added to provide protection against
1605 sanctions for loss of electronically stored information under
1606 certain limited circumstances, but preservation problems have
1607 nonetheless increased. The Committee has been repeatedly informed
1608 of growing concern about the increasing burden of preserving
1609 information for litigation, particularly with regard to
1610 electronically stored information. Many litigants and prospective
1611 litigants have emphasized their uncertainty about the obligation to
1612 preserve information, particularly before litigation has actually
1613 begun. The remarkable growth in the amount of information that
1614 might be preserved has heightened these concerns. Significant
1615 divergences among federal courts across the country have meant that
1616 potential parties cannot determine what preservation standards they
1617 will have to satisfy to avoid sanctions. Extremely expensive
1618 overpreservation may seem necessary due to the risk that very
1619 serious sanctions could be imposed even for merely negligent,
1620 inadvertent failure to preserve some information later sought in
1621 discovery.

1622 This amendment to Rule 37(e) addresses these concerns by
1623 adopting a uniform set of guidelines for federal courts, and
1624 applying them to all discoverable information, not just
1625 electronically stored information. The amended rule is not
1626 limited, as is the current rule, to information lost due to "the
1627 routine, good-faith operation of an electronic information system."
1628 The amended rule is designed to ensure that potential litigants who
1629 make reasonable efforts to satisfy their preservation
1630 responsibilities may do so with confidence that they will not be
1631 subjected to serious sanctions should information be lost despite
1632 those efforts. It does not provide "bright line" preservation
1633 directives because bright lines seem unsuited to a set of problems
1634 that is intensely context-specific. Instead, the rule focuses on

1635 a variety of considerations that the court should weigh in
1636 calibrating its response to the loss of information.

1637 Amended Rule 37(e) supersedes the current rule because it
1638 provides protection for any conduct that would be protected under
1639 the current rule. The current rule provides: "Absent exceptional
1640 circumstances, a court may not impose sanctions under these rules
1641 on a party for failing to provide electronically stored information
1642 lost as a result of the routine, good-faith operation of an
1643 electronic information system." The routine good faith operation
1644 of an electronic information system should be respected under the
1645 amended rule. As under the current rule, the prospect of
1646 litigation may call for altering that routine operation. And the
1647 prohibition of sanctions in the amended rule means that any loss of
1648 data that would be insulated against sanctions under the current
1649 rule would also be protected under the amended rule.

1650 Amended Rule 37(e) applies to loss of discoverable information
1651 "that should have been preserved in the anticipation or conduct of
1652 litigation." This preservation obligation was not created by Rule
1653 37(e), but has been recognized by many court decisions. It may in
1654 some instances be triggered or clarified by a court order in the
1655 case. Rule 37(e)(2) identifies many of the factors that should be
1656 considered in determining, in the circumstances of a particular
1657 case, when a duty to preserve arose and what information should
1658 have been preserved.

1659 Except in very rare cases in which a party's actions cause the
1660 loss of information that irreparably deprives another party of any
1661 meaningful opportunity to present or defend against the claims in
1662 the litigation, sanctions for loss of discoverable information may
1663 only be imposed on a finding of willfulness or bad faith, combined
1664 with substantial prejudice.

1665 The amended rule therefore forecloses reliance on inherent
1666 authority or state law to impose litigation sanctions in the
1667 absence of the findings required under Rule 37(e)(1)(B). But the
1668 rule does not affect the validity of an independent tort claim for
1669 relief for spoliation if created by the applicable law. The law of
1670 some states authorizes a tort claim for spoliation. The
1671 cognizability of such a claim in federal court is governed by the
1672 applicable substantive law, not Rule 37(e).

1673 An amendment to Rule 26(f)(3) directs the parties to address
1674 preservation issues in their discovery plan, and an amendment to
1675 Rule 16(b)(3) recognizes that the court's scheduling order may
1676 address preservation. These amendments may prompt early attention
1677 to matters also addressed by Rule 37(e).

1678 **Subdivision (e)(1)(A).** When the court concludes that a party
1679 failed to preserve information that should have been preserved in
1680 the anticipation or conduct of litigation, it may adopt a variety
1681 of measures that are not sanctions. One is to permit additional
1682 discovery that would not have been allowed had the party preserved
1683 information as it should have. For example, discovery might be
1684 ordered under Rule 26(b)(2)(B) from sources of electronically
1685 stored information that are not reasonably accessible. More
1686 generally, the fact that a party has failed to preserve information
1687 may justify discovery that otherwise would be precluded under the
1688 proportionality analysis of Rule 26(b)(1) and (2)(C).

1689 In addition to, or instead of, ordering further discovery, the
1690 court may order curative measures, such as requiring the party that
1691 failed to preserve information to restore or obtain the lost
1692 information, or to develop substitute information that the court
1693 would not have ordered the party to create but for the failure to
1694 preserve. The court may also require the party that failed to
1695 preserve information to pay another party's reasonable expenses,
1696 including attorney fees, caused by the failure to preserve. Such
1697 expenses might include, for example, discovery efforts caused by
1698 the failure to preserve information. Additional curative measures
1699 might include permitting introduction at trial of evidence about
1700 the loss of information or allowing argument to the jury about the
1701 possible significance of lost information.

1702 **Subdivision (e)(1)(B)(i).** This subdivision authorizes
1703 imposition of the sanctions listed in Rule 37(b)(2)(A) for willful
1704 or bad-faith failure to preserve information, whether or not there
1705 was a court order requiring such preservation. Rule 37(e)(1)(B)(i)
1706 is designed to provide a uniform standard in federal court for
1707 sanctions for failure to preserve. It rejects decisions that have
1708 authorized the imposition of sanctions -- as opposed to measures
1709 authorized by Rule 37(e)(1)(A) -- for negligence or gross
1710 negligence. It borrows the term "sanctions" from Rule 37(b)(2),
1711 and does not attempt to prescribe whether such measures would be so
1712 regarded for other purposes, such as an attorney's professional
1713 responsibility.

1714 This subdivision protects a party that has made reasonable
1715 preservation decisions in light of the factors identified in Rule
1716 37(e)(2), which emphasize both reasonableness and proportionality.
1717 Despite reasonable efforts to preserve, some discoverable
1718 information may be lost. Although loss of information may affect
1719 other decisions about discovery, such as those under Rule 26(b)(1),
1720 (b)(2)(B) and (b)(2)(C), sanctions may be imposed only for willful
1721 or bad faith actions, unless the exceptional circumstances
1722 described in Rule 37(e)(2)(B) are shown.

The threshold under Rule 37(e)(1)(B)(i) is that the court find that lost information should have been preserved; if so, the court may impose sanctions only if it can make two further findings. First, the court must find that the loss of information caused substantial prejudice in the litigation. Because digital data often duplicate other data, 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 substantially prejudiced by the loss. Among other things, the court may consider the measures identified in Rule 37(e)(1)(A) in making this determination; if these measures can sufficiently reduce the prejudice, sanctions would be inappropriate even when the court finds willfulness or bad faith. Rule 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2) sanctions in the expectation that the court will employ the least severe sanction needed to repair the prejudice resulting from loss of the information.

Second, it must be established that the 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(e)(2).

Subdivision (e)(1)(B)(ii). This subdivision permits the court to impose sanctions in narrowly limited circumstances without making a finding of either bad faith or willfulness. The need to show bad faith or willfulness is excused only by finding an impact more severe than the substantial prejudice required to support sanctions under Rule 37(e)(1)(B)(i). It still must be shown that a party failed to preserve discoverable information that should have been preserved. In addition, it must be shown that the failure irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

The first step in determining whether a party's failure to preserve discoverable information that should have been preserved has irreparably deprived another party of any meaningful opportunity to present or defend against the claims in the litigation is to examine carefully the apparent importance of the lost information. Particularly with electronically stored information, alternative sources may often exist. The next step is to explore the possibility that curative measures under subdivision (e)(1)(A) can reduce the adverse impact. If a party loses readily accessible electronically stored information, for example, the court may direct the party to attempt to retrieve the information by alternative means. If such measures are not possible or fail to restore important information, the court must determine whether the loss has irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

1769 The "irreparably deprived" test is more demanding than the
1770 "substantial prejudice" that permits sanctions under Rule
1771 37(e)(1)(B)(i) on a showing of bad faith or willfulness. Examples
1772 might include cases in which the alleged injury-causing
1773 instrumentality has been lost. A plaintiff's failure to preserve
1774 an automobile claimed to have defects that caused injury without
1775 affording the defendant manufacturer an opportunity to inspect the
1776 damaged vehicle may be an example. Such a situation led to
1777 affirmance of dismissal, as not an abuse of discretion, in
1778 Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001).
1779 Or a party may lose the only evidence of a critically important
1780 event. But even such losses may not irreparably deprive another
1781 party of any meaningful opportunity to litigate. Remaining sources
1782 of evidence and the opportunity to challenge the evidence presented
1783 by the party who lost discoverable information that should have
1784 been preserved, along with possible presentation of evidence and
1785 argument about the significance of the lost information, should
1786 often afford a meaningful opportunity to litigate.

1787 The requirement that a party be irreparably deprived of any
1788 meaningful opportunity to present or defend against the claims in
1789 the litigation is further narrowed by looking to all the claims in
1790 the action. Lost information may appear critical to litigating a
1791 particular claim or defense, but sanctions should not be imposed —
1792 or should be limited to the affected claims or defenses — if those
1793 claims or defenses are not central to the litigation.

1794 A special situation arises when discoverable information is
1795 lost because of events outside a party's control. A party may take
1796 the steps that should have been taken to preserve the information,
1797 but lose it to such unforeseeable circumstances as flood,
1798 earthquake, fire, or malicious computer attacks. Curative measures
1799 may be appropriate in such circumstances — this is information that
1800 should have been preserved — but sanctions are not. The loss is not
1801 caused by "the party's actions" as required by (e)(1)(B).

1802 **Subdivision (e)(2).** These factors guide the court when asked
1803 to adopt measures under Rule 37(e)(1)(A) due to loss of information
1804 or to impose sanctions under Rule 37(e)(1)(B). The listing of
1805 factors is not exclusive; other considerations may bear on these
1806 decisions, such as whether the information not retained reasonably
1807 appeared to be cumulative with materials that were retained. With
1808 regard to all these matters, the court's focus should be on the
1809 reasonableness of the parties' conduct.

1810 The first factor is the extent to which the party was on
1811 notice that litigation was likely and that the information lost
1812 would be discoverable in that litigation. A variety of events may
1813 alert a party to the prospect of litigation. But often these

1814 events provide only limited information about that prospective
1815 litigation, so that the scope of discoverable information may
1816 remain uncertain.

1817 The second factor focuses on what the party did to preserve
1818 information after the prospect of litigation arose. The party's
1819 issuance of a litigation hold is often important on this point.
1820 But it is only one consideration, and no specific feature of the
1821 litigation hold -- for example, a written rather than an oral hold
1822 notice -- is dispositive. Instead, the scope and content of the
1823 party's overall preservation efforts should be scrutinized. One
1824 focus would be on the extent to which a party should appreciate
1825 that certain types of information might be discoverable in the
1826 litigation, and also what it knew, or should have known, about the
1827 likelihood of losing information if it did not take steps to
1828 preserve. The court should be sensitive to the party's
1829 sophistication with regard to litigation in evaluating preservation
1830 efforts; some litigants, particularly individual litigants, may be
1831 less familiar with preservation obligations than other litigants
1832 who have considerable experience in litigation. Although the rule
1833 focuses on the common law obligation to preserve in the
1834 anticipation or conduct of litigation, courts may sometimes
1835 consider whether there was an independent requirement that the lost
1836 information be preserved. The court should be sensitive, however,
1837 to the fact that such independent preservation requirements may be
1838 addressed to a wide variety of concerns unrelated to the current
1839 litigation. The fact that some information was lost does not
1840 itself prove that the efforts to preserve were not reasonable.

1841 The third factor looks to whether the party received a request
1842 to preserve information. Although such a request may bring home
1843 the need to preserve information, this factor is not meant to
1844 compel compliance with all such demands. To the contrary,
1845 reasonableness and good faith may not require any special
1846 preservation efforts despite the request. In addition, the
1847 proportionality concern means that a party need not honor an
1848 unreasonably broad preservation demand, but instead should make its
1849 own determination about what is appropriate preservation in light
1850 of what it knows about the litigation. The request itself, or
1851 communication with the person who made the request, may provide
1852 insights about what information should be preserved. One important
1853 matter may be whether the person making the preservation request is
1854 willing to engage in good faith consultation about the scope of the
1855 desired preservation.

1856 The fourth factor emphasizes a central concern --
1857 proportionality. The focus should be on the information needs of
1858 the litigation at hand. That may be only a single case, or
1859 multiple cases. Rule 26(b)(1) is amended to make proportionality

1860 a central factor in determining the scope of discovery. Rule
1861 37(e)(2)(D) explains that this calculation should be made with
1862 regard to "any anticipated or ongoing litigation." Prospective
1863 litigants who call for preservation efforts by others (the third
1864 factor) should keep those proportionality principles in mind.

1865 Making a proportionality determination often depends in part
1866 on specifics about various types of information involved, and the
1867 costs of various forms of preservation. The court should be
1868 sensitive to party resources; aggressive preservation efforts can
1869 be extremely costly, and parties (including governmental parties)
1870 may have limited resources to devote to those efforts. A party may
1871 act reasonably by choosing the least costly form of information
1872 preservation, if it is substantially as effective as more costly
1873 forms. It is important that counsel become familiar with their
1874 clients' information systems and digital data -- including social
1875 media -- to address these issues. A party urging that preservation
1876 requests are disproportionate may need to provide specifics about
1877 these matters in order to enable meaningful discussion of the
1878 appropriate preservation regime.

1879 Finally, the fifth factor looks to whether the party alleged
1880 to have failed to preserve as required sought guidance from the
1881 court if agreement could not be reached with the other parties.
1882 Until litigation commences, reference to the court may not be
1883 possible. In any event, this is not meant to encourage premature
1884 resort to the court; amendments to Rule 26(f)(3) direct the parties
1885 to address preservation in their discovery plan, and amendments to
1886 Rule 16(c)(3) invite provisions on this subject in the scheduling
1887 order. Ordinarily the parties' arrangements are to be preferred to
1888 those imposed by the court. But if the parties cannot reach
1889 agreement, they should not forgo available opportunities to obtain
1890 prompt resolution of the differences from the court.

1891 Questions for invitation to comment

1892 1. Should the rule be limited to sanctions for loss of
1893 electronically stored information? Current Rule 37(e) is so
1894 limited, and much commentary focuses on the preservation problems
1895 resulting from the proliferation of such information. But the
1896 dividing line between "electronically stored information" and other
1897 discoverable matter may be uncertain, and may become more uncertain
1898 in the future, and loss of tangible things or documents important
1899 in litigation is a recurrent concern in litigation today.

1900 2. Should Rule 37(b)(1)(B)(ii) be retained in the rule? This
1901 provision is focused on the possibility that one side's failure to
1902 preserve evidence may catastrophically deprive the other side of
1903 any meaningful opportunity to litigate, and permits imposition of
1904 sanctions even absent a finding of willfulness or bad faith. It

1905 has been suggested that limiting the rule to loss of electronically
1906 stored information would make (B)(ii) unnecessary. Does this
1907 provision add important flexibility to the rule?

1908 3. Should the provisions of current Rule 37(e) be retained in
1909 the rule? As stated in the Committee Note, the amended rule
1910 appears to provide protection in any situation in which current
1911 Rule 37(e) would apply.

1912 4. Should there be an additional definition of "substantial
1913 prejudice" under Rule 37(e)(1)(B)(i)? One possibility is that the
1914 rule could be augmented by directing that the court should consider
1915 all factors, including the availability of reliable alternative
1916 sources of the lost or destroyed information, and the importance of
1917 the lost information to the claims or defenses in the case.

1918 5. Should there be an additional definition of willfulness or
1919 bad faith under Rule 37(e)(1)(B)(i)? If so, what should be
1920 included in that definition?

1921 "Dirty" version of 37(e) amendment

1922 (Showing changes since January Standing Committee meeting)

1923

1924 **Rule 37. Failure to Make Disclosures or to Cooperate in**
1925 **Discovery; Sanctions**

1926 * * * * *

1927 ~~**(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.** Absent~~
1928 ~~exceptional circumstances, a court may not impose sanctions~~
1929 ~~under these rules on a party for failing to provide~~
1930 ~~electronically stored information lost as a result of the~~
1931 ~~routine, good-faith operation of an electronic information~~
1932 ~~system.~~

1933 <u>**(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.**</u>

1934 <u>**(1)** *Curative measures; sanctions.* If a party failed to</u>
1935 <u>preserve discoverable information that</u> ~~reasonably~~ <u>should</u>
1936 <u>have been preserved in the anticipation or conduct of</u>
1937 <u>litigation, the court may</u>

1938 <u>**(A)** permit additional discovery, order</u> ~~the party to~~
1939 ~~undertake~~ <u>curative measures, or order the party to</u>
1940 <u>pay the reasonable expenses, including attorney's</u>
1941 <u>fees, caused by the failure; and</u>

1942 <u>**(B)** impose any sanction listed in Rule 37(b)(2)(A) or</u>
1943 <u>give an adverse-inference jury instruction, but</u>
1944 <u>only if the court finds that the party's actions</u>

~~failure~~:

(i) caused substantial prejudice in the litigation and were ~~was~~ willful or in bad faith; or

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the ~~a~~ claims in the litigation ~~or defense~~.

(2) *Factors to be considered in assessing a party's conduct* ~~*Determining reasonableness and willfulness or bad faith*~~*.* The court should consider all relevant factors i~~I~~n determining whether a party failed to preserve discoverable information that ~~reasonably~~ should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The ~~, the court should consider all relevant~~ factors~~,~~ include~~ing~~:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith ~~engaged in good-faith consultation~~ about the scope of preservation;

(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

Draft Committee Note

In 2006, Rule 37(e) was added to provide protection against sanctions for loss of electronically stored information under certain limited circumstances, but preservation problems have nonetheless increased. The Committee has been repeatedly informed of growing concern about the increasing burden of preserving information for litigation, particularly with regard to electronically stored information. Many litigants and prospective litigants have emphasized their uncertainty about the obligation to preserve information, particularly before litigation has actually begun. The remarkable growth in the amount of information that

might be preserved has heightened these concerns. Significant divergences among federal courts across the country have meant that potential parties cannot determine what preservation standards they will have to satisfy to avoid sanctions. Extremely expensive overpreservation may seem necessary due to the risk that very serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some information later sought in discovery.

This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of guidelines for federal courts, and applying them to all discoverable information, not just electronically stored information. The amended rule ~~It~~ is not limited, as is the current rule, to information lost due to "the routine, good-faith operation of an electronic information system." The amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation 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 bright lines seem unsuited to a set of problems that is intensely context-specific. Instead, the rule focuses on a variety of considerations that the court should weigh in calibrating its response to the loss of information.

Amended Rule 37(e) supersedes the current rule because it provides protection for any conduct that would be protected under the current rule. The current rule provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The routine good faith operation of an electronic information system should be respected under the amended rule. As under the current rule, the prospect of litigation may call for altering that routine operation. And the prohibition of sanctions in the amended rule means that any loss of data that would be insulated against sanctions under the current rule would also be protected under the amended rule.

Amended Rule 37(e) applies to loss of discoverable information "that ~~reasonably~~ should have been preserved in the anticipation or conduct of litigation." This preservation obligation was not created by Rule 37(e), but has been recognized by many court decisions. ~~arises from the common law, and~~ It may in some instances be triggered or clarified by a court order in the case. Rule 37(e)(2) identifies many of the factors that should be considered in determining, in the circumstances of a particular case, when a duty to preserve arose and what information should have been ~~be~~ preserved.

Except in very rare cases in which a party's actions cause the loss of information that irreparably deprivesd another party of any meaningful opportunity to present or defend against the ~~a~~ claims in the litigation, ~~or defense,~~ sanctions for loss of discoverable information may only be imposed on a finding of willfulness or bad faith, combined with substantial prejudice.

The amended rule therefore forecloses reliance on inherent authority or state law to impose litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B). ~~displaces any other law that would authorize imposing litigation sanctions in the absence of a finding of wilfulness or bad faith, including state law in diversity cases.~~ But the rule does not affect the validity of an independent tort claim for relief for spoliation if created by the applicable law. The law of some states authorizes a tort claim for spoliation. The cognizability of such a claim in federal court is governed by the applicable substantive law, not Rule 37(e).

An amendment to Rule 26(f)(3) directs the parties to address preservation issues in their discovery plan, and an amendment to Rule 16(b)(3) recognizes that the court's scheduling order may address preservation. These amendments may prompt early attention to matters also addressed by Rule 37(e).

~~Unlike the 2006 version of the rule, amended Rule 37(e) is not limited to "sanctions under these rules." It provides rule-based authority for sanctions for loss of all kinds of discoverable information, and therefore makes unnecessary resort to inherent authority.~~

Subdivision (e)(1)(A). When the court concludes that a party failed to preserve information that should have been preserved in the anticipation or conduct of litigation, ~~it reasonably should have preserved,~~ it may adopt a variety of measures 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. For example, discovery might be ordered under Rule 26(b)(2)(B) from sources of electronically stored information that are not reasonably accessible. More generally, the fact that a party has failed to preserve information may justify discovery that otherwise would be precluded under the proportionality analysis of Rule 26(b)(1) and (2)(C).

In addition to, or instead of, ordering further discovery, the court may order ~~the party that failed to preserve information to take~~ curative measures, such as requiring the party that failed to preserve information to restore or obtain the lost information, or to develop substitute information that the court would not have

2076 ordered the party to create but for the failure to preserve. The
2077 court may also require the party that failed to preserve
2078 information to pay another party's reasonable expenses, including
2079 attorney fees, caused by the failure to preserve. Such expenses
2080 might include, for example, discovery efforts caused by the failure
2081 to preserve information. Additional curative measures might
2082 include permitting introduction at trial of evidence about the loss
2083 of information or allowing argument to the jury about the possible
2084 significance of lost information.

2085 **Subdivision (e)(1)(B)(i).** This subdivision authorizes
2086 imposition of the sanctions listed in Rule 37(b)(2)(A) for willful
2087 or bad-faith failure to preserve information, whether or not there
2088 was a court order requiring such preservation. Rule 37(e)(1)(B)(i)
2089 is designed to provide a uniform standard in federal court for
2090 sanctions for failure to preserve. It rejects decisions that have
2091 authorized the imposition of sanctions -- as opposed to measures
2092 authorized by Rule 37(e)(1)(A) -- for negligence or gross
2093 negligence. It borrows the term "sanctions" from Rule 37(b)(2),
2094 and does not attempt to prescribe whether such measures would be so
2095 regarded for other purposes, such as an attorney's professional
2096 responsibility.

2097 This subdivision protects a party that has made reasonable
2098 preservation decisions in light of the factors identified in Rule
2099 37(e)(2), which emphasize both reasonableness and proportionality.
2100 Despite reasonable efforts to preserve, some discoverable
2101 information may be lost. Although loss of information may affect
2102 other decisions about discovery, such as those under Rule 26(b)(1),
2103 (b)(2)(B) and ~~26~~(b)(2)(C), sanctions may be imposed only for
2104 willful or bad faith actions, unless the exceptional circumstances
2105 described in Rule 37(e)(2)(B) are shown.

2106 The threshold under Rule 37(e)(1)(B)(i) is that the court find
2107 that lost information ~~reasonably~~ should have been preserved; if so,
2108 the court may impose sanctions only if it can make two further
2109 findings. First, ~~it must be established that the party that failed~~
2110 ~~to preserve did so willfully or in bad faith. This determination~~
2111 ~~should be made with reference to the factors identified in Rule~~
2112 ~~37(e)(3).~~

2113 ~~Second,~~ the court must ~~also~~ find that the loss of information
2114 caused substantial prejudice in the litigation. Because digital
2115 data often duplicate other data, substitute evidence is often
2116 available. Although it is impossible to demonstrate with certainty
2117 what lost information would prove, the party seeking sanctions must
2118 show that it has been substantially prejudiced by the loss. Among
2119 other things, the court may consider the measures identified in
2120 Rule 37(e)(1)(A) in making this determination; if these measures

2121 can sufficiently reduce the prejudice, sanctions would be
2122 inappropriate even when the court finds willfulness or bad faith.
2123 Rule 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2)
2124 sanctions in the expectation that the court will employ the least
2125 severe sanction needed to repair the prejudice resulting from loss
2126 of the information.

2127 Second, it must be established that the party that failed to
2128 preserve did so willfully or in bad faith. This determination
2129 should be made with reference to the factors identified in Rule
2130 37(e)(2).

2131 **Subdivision (e)(1)(B)(ii).** This subdivision ~~Rule~~
2132 ~~37(e)(1)(B)(ii)~~ permits the court to impose sanctions in narrowly
2133 limited circumstances without making a finding of either bad faith
2134 or willfulness. The need to show bad faith or willfulness is
2135 excused only by finding an impact more severe than the substantial
2136 prejudice required to support sanctions under Rule 37(e)(1)(B)(i).
2137 It still must be shown that a party failed to preserve discoverable
2138 information that should have been preserved. In addition, it must
2139 be shown that the failure irreparably deprived a party of any
2140 meaningful opportunity to present or defend against the claims in
2141 the litigation. ~~As under Rule 37(e)(2)(A), the threshold for~~
2142 ~~sanctions is that the court find that lost information reasonably~~
2143 ~~should have been preserved by the party to be sanctioned.~~

2144 The first step in determining whether a party's failure to
2145 preserve discoverable information that should have been preserved
2146 has irreparably deprived another party of any meaningful
2147 opportunity to present or defend against the claims in the
2148 litigation is to examine carefully the apparent importance of the
2149 lost information. Particularly with electronically stored
2150 information, alternative sources may often exist. The next step is
2151 to explore the possibility that curative measures under subdivision
2152 (e)(1)(A) can reduce the adverse impact. If a party loses readily
2153 accessible electronically stored information, for example, the
2154 court may direct the party to attempt to retrieve the information
2155 by alternative means. If such measures are not possible or fail to
2156 restore important information, the court must determine whether the
2157 loss has irreparably deprived a party of any meaningful opportunity
2158 to present or defend against the claims in the litigation.

2159 The "irreparably deprived" test is more demanding than the
2160 "substantial prejudice" that permits sanctions under Rule
2161 37(e)(1)(B)(i) on a showing of bad faith or willfulness. Examples
2162 might include cases in which the alleged injury-causing
2163 instrumentality has been lost. A plaintiff's failure to preserve
2164 an automobile claimed to have defects that caused injury without
2165 affording the defendant manufacturer an opportunity to inspect the

damaged vehicle may be an example. Such a situation led to affirmance of dismissal, as not an abuse of discretion, in Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001). Or a party may lose the only evidence of a critically important event. But even such losses may not irreparably deprive another party of any meaningful opportunity to litigate. Remaining sources of evidence and the opportunity to challenge the evidence presented by the party who lost discoverable information that should have been preserved, along with possible presentation of evidence and argument about the significance of the lost information, should often afford a meaningful opportunity to litigate.

The requirement that a party be irreparably deprived of any meaningful opportunity to present or defend against the claims in the litigation is further narrowed by looking to all the claims in the action. Lost information may appear critical to litigating a particular claim or defense, but sanctions should not be imposed — or should be limited to the affected claims or defenses — if those claims or defenses are not central to the litigation.

A special situation arises when discoverable information is lost because of events outside a party's control. A party may take the steps that should have been taken to preserve the information, but lose it to such unforeseeable circumstances as flood, earthquake, fire, or malicious computer attacks. Curative measures may be appropriate in such circumstances — this is information that should have been preserved — but sanctions are not. The loss is not caused by "the party's actions" as required by (e)(1)(B).

~~Even if bad faith or willfulness is shown, sanctions may only be imposed under Rule 37(e)(2)(A) when the loss of information caused substantial prejudice in the litigation. Rule 37(e)(2)(B) permits sanctions in the absence of a showing of bad faith or willfulness only if that loss of information deprived a party of any meaningful opportunity to present a claim or defense. Examples might include cases in which the alleged injury-causing instrumentality has been lost before the parties may inspect it, or cases in which the only evidence of a critically important event has been lost. Such situations are extremely rare.~~

~~Before resorting to sanctions, a court would ordinarily consider lesser measures, including those listed in Rule 37(e)(1), to avoid or minimize the prejudice. If such measures substantially cure the prejudice, Rule 37(e)(2)(B) does not apply. Even if such prejudice persists, the court should employ the least severe sanction.~~

Subdivision (e)(2). These factors guide the court when asked to adopt measures under Rule 37(e)(1)(A) due to loss of information

2210 or to impose sanctions under Rule 37(e)(1)(B). The listing of
2211 factors is not exclusive; other considerations may bear on these
2212 decisions, such as whether the information not retained reasonably
2213 appeared to be cumulative with materials that were retained. With
2214 regard to all these matters, the court's focus should be on the
2215 reasonableness of the parties' conduct.

2216 The first factor is the extent to which the party was on
2217 notice that litigation was likely and that the information lost
2218 would be discoverable in that litigation. A variety of events may
2219 alert a party to the prospect of litigation. But often these
2220 events provide only limited information about that prospective
2221 litigation, so that the scope of discoverable information may
2222 remain uncertain.

2223 The second factor focuses on what the party did to preserve
2224 information after the prospect of litigation arose. The party's
2225 issuance of a litigation hold is often important on this point.
2226 But it is only one consideration, and no specific feature of the
2227 litigation hold -- for example, a written rather than an oral hold
2228 notice -- is dispositive. Instead, the scope and content of the
2229 party's overall preservation efforts should be scrutinized. One
2230 focus would be on the extent to which a party should appreciate
2231 that certain types of information might be discoverable in the
2232 litigation, and also what it knew, or should have known, about the
2233 likelihood of losing information if it did not take steps to
2234 preserve. The court should be sensitive to the party's
2235 sophistication with regard to litigation in evaluating preservation
2236 efforts; some litigants, particularly individual litigants, may be
2237 less familiar with preservation obligations than other litigants
2238 who have considerable experience in litigation. Although the rule
2239 focuses on the common law obligation to preserve in the
2240 anticipation or conduct of litigation, courts may sometimes
2241 consider whether there was an independent requirement that the lost
2242 information be preserved. The court should be sensitive, however,
2243 to the fact that such independent preservation requirements may be
2244 addressed to a wide variety of concerns unrelated to the current
2245 litigation. The fact that some information was lost does not
2246 itself prove that the efforts to preserve were not reasonable.

2247 The third factor looks to whether the party received a request
2248 to preserve information. Although such a request may bring home
2249 the need to preserve information, this factor is not meant to
2250 compel compliance with all such demands. To the contrary,
2251 reasonableness and good faith may not require any special
2252 preservation efforts despite the request. In addition, the
2253 proportionality concern means that a party need not honor an
2254 unreasonably broad preservation demand, but instead should make its
2255 own determination about what is appropriate preservation in light

2256 of what it knows about the litigation. The request itself, or
2257 communication with the person who made the request, may provide
2258 insights about what information should be preserved. One important
2259 matter may be whether the person making the preservation request is
2260 willing to engage in good faith consultation about the scope of the
2261 desired preservation.

2262 The fourth factor emphasizes a central concern --
2263 proportionality. The focus should be on the information needs of
2264 the litigation at hand. That may be only a single case, or
2265 multiple cases. Rule 26(b)(1) is amended to make proportionality
2266 a central factor in determining the scope of discovery. ~~Rule~~
2267 ~~26(b)(2)(C) provides guidance particularly applicable to~~
2268 ~~calibrating a reasonable preservation regime.~~ Rule 37(e)(2)(D)
2269 explains that this calculation should be made with regard to "any
2270 anticipated or ongoing litigation." Prospective litigants who call
2271 for preservation efforts by others (the third factor) should keep
2272 those proportionality principles in mind.

2273 Making a proportionality determination often depends in part
2274 on specifics about various types of information involved, and the
2275 costs of various forms of preservation. The court should be
2276 sensitive to party resources; aggressive preservation efforts can
2277 be extremely costly, and parties (including governmental parties)
2278 may have limited resources to devote to those efforts. A party may
2279 act reasonably by choosing the least costly form of information
2280 preservation, if it is substantially as effective as more costly
2281 forms. It is important that counsel become familiar with their
2282 clients' information systems and digital data -- including social
2283 media -- to address these issues. A party urging that preservation
2284 requests are disproportionate may need to provide specifics about
2285 these matters in order to enable meaningful discussion of the
2286 appropriate preservation regime.

2287 Finally, the fifth factor looks to whether the party alleged
2288 to have failed to preserve as required sought guidance from the
2289 court if agreement could not be reached with the other parties.
2290 Until litigation commences, reference to the court may not be
2291 possible. In any event, this is not meant to encourage premature
2292 resort to the court; amendments to Rule 26(f)(3) direct~~s~~ the
2293 parties to address preservation in their discovery plan, and
2294 amendments to Rule 16(c)(3) invite provisions on this subject in
2295 the scheduling order. ~~discuss and to attempt to resolve issues~~
2296 ~~concerning preservation before presenting them to the court.~~
2297 Ordinarily the parties' arrangements are to be preferred to those
2298 imposed by the court. But if the parties cannot reach agreement,
2299 they should not forgo available opportunities to obtain prompt
2300 resolution of the differences from the court.

THIS PAGE INTENTIONALLY BLANK

TAB 2D

THIS PAGE INTENTIONALLY BLANK

2301 **C. Rule 84: Action to Recommend Abrogation, Amending Rule**
2302 **4(d)(1)(D)**

2303 The Committee recommends approval to publish for comment
2304 proposals that would abrogate Rule 84 and the Official Forms,
2305 amending Rule 4(d)(1)(D) to incorporate present Forms 5 and 6 as
2306 official Rule 4 Forms.

2307 Uncertainties about the impact of the Supreme Court's still
2308 recent decisions on pleading standards on the Rule 84 official
2309 pleading forms led the Committee to broader questions about Rule 84
2310 and the Rule 84 Forms. These questions led to comparisons with the
2311 other bodies of rules. Official forms are attached to the
2312 Appellate, Bankruptcy, and Civil Rules. The Appellate and Civil
2313 Forms have been generated through the full Enabling Act Process.
2314 Bankruptcy Rule 9009 distinguishes two types of forms. "Official
2315 Forms prescribed by the Judicial Conference of the United States
2316 shall be observed and used with alterations as may be appropriate."
2317 These Forms are developed through the Enabling Act committees, but
2318 the final step is approval by the Judicial Conference without going
2319 on to the Supreme Court or Congress. Rule 9009 further recognizes
2320 that the Director of the Administrative Office "may issue
2321 additional forms for use under the Code. The forms shall be
2322 construed to be consistent with these rules and the Code." The
2323 Administrative Office produces forms for use in criminal
2324 prosecutions, but these forms are not "official." (Former Criminal
2325 Rule 58 and the official forms were abrogated in 1983; the
2326 Committee Note explained that they were unnecessary.) A
2327 subcommittee formed of representatives of the advisory committees
2328 examined these differences. It reported that forms play different
2329 roles in the different forms of litigation, and that there is no
2330 apparent reason to adopt a uniform approach across the different
2331 sets of rules and advisory committees.

2332 With this reassurance of independence, the Rule 84
2333 Subcommittee was formed to study Rule 84 and Rule 84 forms. It
2334 gathered information about the general use of the forms by informal
2335 inquiries that confirmed the initial impressions of Subcommittee
2336 members. Lawyers do not much use these forms, and there is little
2337 indication that they often provide meaningful help to pro se
2338 litigants. And as discussed further below, the pleading forms live
2339 in tension with recently developing approaches to general pleading
2340 standards.

2341 From this beginning, the Subcommittee considered several
2342 alternative approaches. The simplest would be to leave Rule 84 and
2343 the Rule 84 forms where they lie. The most burdensome would be to
2344 take on full responsibility for maintaining the forms in a way that
2345 ensures a good fit with contemporary practice and needs, and

perhaps developing additional forms to address many of the subjects that are not now illustrated by the forms. The work required to maintain the forms through the full Enabling Act process would divert the energies of all actors in the process from other work that, over the years, has seemed more important. Other approaches also were considered.

The Subcommittee came to believe that the best approach is to abrogate Rule 84 and the Rule 84 forms. Several considerations support this conclusion. One important consideration is the amount of work that would be required to assume full responsibility for maintaining the forms. Another consideration is that many alternative sources provide excellent forms. One source is the Administrative Office.

A further reason to abrogate Rule 84 is the tension between the pleading forms and emerging pleading standards. The pleading forms were adopted in 1938 as an important means of educating bench and bar on the dramatic change in pleading standards effected by Rule 8(a)(2). They — and all the other forms — were elevated in 1948 from illustrations to a status that "suffice[s] under these rules." Whatever else may be said, the ranges of topics covered by the pleading forms omit many of the categories of actions that comprise the bulk of today's federal docket. And some of the forms have come to seem inadequate, particularly the Form 18 complaint for patent infringement. Attempting to modernize the existing forms, and perhaps to create new forms to address such claims as those arising under the antitrust laws (*Twombly*) or implicating official immunity (*Iqbal*), would be an imposing and precarious undertaking. Such an undertaking might be worthwhile if in recent years the pleading reforms had provided meaningful guidance to the bar in formulating complaints, but they have not. The Committee's work has suggested that few if any lawyers consult the forms when drafting complaints.

Abrogation need not remove the Enabling Act committees entirely from forms work. The Administrative Office has a working group on forms that includes six judges and six court clerks. They have produced a number of civil forms that are quite good. The forms are available on the Administrative Office web site, some of them in a format that can be filled in, and others in a format that can be downloaded for completion by standard word-processing programs. The working group is willing to work in conjunction with the Advisory Committee. If Rule 84 is abrogated, a conservative initial approach would be to appoint a liaison from the Advisory Committee to work with the working group. New and revised forms could be reviewed, perhaps by a Forms Subcommittee. Experience with this process would shape the longer-term relationships. The forms for criminal prosecutions have been developed successfully with

only occasional review by the Criminal Rules Committee. Similar success may be hoped for with the Civil Rules. The Administrative Office forms, moreover, would have to win their way by intrinsic merit, unaided by official status. A court dissatisfied with a particular form would not be obliged to accept it.

Two forms require special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver is not required, but is closely tied to Form 5. It would be possible simply to remove this requirement, perhaps substituting a recital in the rule of the elements that must be included in the request and in the waiver. The corresponding Administrative Office forms are identical to Form 5 and virtually identical to Form 6. But without something in Rule 4(d) to mandate their use, the Administrative Office forms might not be uniformly employed. An alternative would be to adopt a request form and a waiver form, as part of Rule 4. These forms were carefully developed as part of creating Rule 4(d), and might be carried forward into Rule 4 without change.

These questions were discussed with the Standing Committee last January. With the support provided by that discussion, the Advisory Committee has concluded that the best course is to abrogate Rule 84. Forms 5 and 6 should be preserved by amending Rule 4(d)(1)(D) to incorporate them, recast as Rule 4 Forms and attached directly to Rule 4. These changes are accomplished by the rule texts, Committee Notes, and Forms set out below. The Committee recommends that they be approved for publication this summer.

Rule 84. Forms

Rule 84. [Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).] ~~The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.~~

Committee Note

Rule 84 was adopted when the Civil Rules were established in 1938 "to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate." The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled. Accordingly, recognizing that there are many excellent alternative sources for forms, including the Administrative Office of the United States Courts, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated.

APPENDIX OF FORMS

Abrogated [(Apr. __, 2015, eff. Dec. 1, 2015).]

Rule 4. Summons

* * *

(d) WAIVING SERVICE.

(1) *Requesting a Waiver.* * * * The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must: * * *

(C) be accompanied by a copy of the complaint, 2 copies of ~~a~~ the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using ~~text prescribed in Form 5~~ the form appended to this Rule 4, of the consequences of waiving and not waiving service; * * *

Committee Note

Abrogation of Rule 84 and the other official forms requires that former Forms 5 and 6 be directly incorporated into Rule 4.

~~Form 5.~~ Rule 4 Notice of a Lawsuit and Request to Waive Service of Summons.

(Caption ~~— See Form 1~~.)

To (name the defendant or — if the defendant is a corporation, partnership, or association — name an officer or agent authorized to receive service):

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within (give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may

2472 keep the other copy.

2473 **What happens next?**

2474 If you return the signed waiver, I will file it with the
2475 court. The action will then proceed as if you had been served on
2476 the date the waiver is filed, but no summons will be served on you
2477 and you will have 60 days from the date this notice is sent (see
2478 the date below) to answer the complaint (or 90 days if this notice
2479 is sent to you outside any judicial district of the United States).

2480 If you do not return the signed waiver within the time
2481 indicated, I will arrange to have the summons and complaint served
2482 on you. And I will ask the court to require you, or the entity you
2483 represent, to pay the expenses of making service.

2484 Please read the enclosed statement about the duty to avoid
2485 unnecessary expenses.

2486 I certify that this request is being sent to you on the date
2487 below.

2488

2489 Date: (Date)(Signature of the attorney or unrepresented party)

2490

2491 ____

2492 (Printed name)

2493 (Address)

2494 (E-mail address)

2495 (Telephone number)

2496

2497

2498 ~~Form 6.~~ Rule 4 Waiver of the Service of Summons.

2499

2500 To (name the plaintiff's attorney or the unrepresented plaintiff):

2501 I have received your request to waive service of a summons in
2502 this action along with a copy of the complaint, two copies of this
2503 waiver form, and a prepaid means of returning one signed copy of
2504 the form to you.

2505 I, or the entity I represent, agree to save the expense of
2506 serving a summons and complaint in this case.

2507

2508 I understand that I, or the entity I represent, will keep all
2509 defenses or objections to the lawsuit, the court's jurisdiction,
2510 and the venue of the action, but that I waive any objections to the
2511 absence of a summons or of service.

2512 I also understand that I, or the entity I represent, must file
2513 and serve an answer or a motion under Rule 12 within 60 days from
2514 ____________________, the date when this request was sent (or 90
2515 days if it was sent outside the United States). If I fail to do
2516 so, a default judgment will be entered against me or the entity I
2517 represent.

2518

2519 Date: (Date)

2520

2521 (Signature of the attorney or unrepresented party)

2522

2523 ____

2524 (Printed name)

2525 (Address)

2526 (E-mail address)(Telephone number)

2527

2528 **Duty to Avoid Unnecessary Expenses of Serving a Summons**

2529 Rule 4 of the Federal Rules of Civil Procedure requires
2530 certain defendants to cooperate in saving unnecessary expenses of
2531 serving a summons and complaint. A defendant who is located in the
2532 United States and who fails to return a signed waiver of service
2533 requested by a plaintiff located in the United States will be
2534 required to pay the expenses of service, unless the defendant shows
2535 good cause for the failure.

2536 "Good cause" does *not* include a belief that the lawsuit is

2537 groundless, or that it has been brought in an improper venue, or
2538 that the court has no jurisdiction over this matter or over the
2539 defendant or the defendant's property.

2540 If the waiver is signed and returned, you can still make these
2541 and all other defenses and objections, but you cannot object to the
2542 absence of a summons or of service.

2543 If you waive service, then you must, within the time specified
2544 on the waiver form, serve an answer or a motion under Rule 12 on
2545 the plaintiff and file a copy with the court. By signing and

2546 returning the waiver form, you are allowed more time to respond
2547 than if a summons had been served.

THIS PAGE INTENTIONALLY BLANK

TAB 2E

THIS PAGE INTENTIONALLY BLANK

2548 **PART II: INFORMATION ITEMS**

2549 **A. Rule 17(c)(2): Information — Duty of Inquiry**

2550 Rule 17(c)(2) directs that "The court must appoint a guardian
2551 ad litem — or issue another appropriate order — to protect a minor
2552 or incompetent person who is unrepresented in an action."

2553 In *Powell v. Symons*, 680 F.3d 301 (3d Cir.2012), the court
2554 struggled to identify the circumstances that might oblige a judge
2555 to initiate an inquiry into the competence of an unrepresented
2556 litigant. It concluded that the duty of inquiry arises only if
2557 there is "verifiable evidence of incompetence," and that the duty
2558 is not triggered simply by bizarre behavior. At the same time, it
2559 lamented "the paucity of comments on Rule 17" and observed that "We
2560 will respectfully send a copy of this opinion to the chairperson of
2561 the Advisory Committee to call its attention to" the question.

2562 Preliminary discussion emphasized the difficulty of this
2563 question. Rule 17(c)(2) could be read to direct that a court must
2564 inquire into the competence of an unrepresented party whenever
2565 there is any sign that competence may be in doubt. It could be read
2566 to say that a court need act only when informed of an existing
2567 adjudication of incompetence. It can be read to create a duty of
2568 inquiry at some indeterminate point in between these alternatives.
2569 An expansive duty of inquiry could impose onerous burdens, not only
2570 in making the inquiry but also in finding representatives.

2571 A set of empirical questions underlies these abstract
2572 questions. The most fundamental is also the most obvious: how often
2573 do pro se litigants who are "incompetent" within the meaning of
2574 Rule 17(c)(2) go through litigation without appointment of a
2575 guardian or entry of another "appropriate order"? How many of them
2576 are competent to function as clients if an attorney is appointed as
2577 representative? How many need a guardian who can function as the
2578 client — with or without appointment of counsel? What resources are
2579 available to support the inquiry into competence, and to support
2580 appointment of a guardian or other protective action? It seems
2581 likely that it will be difficult to obtain reliable answers to
2582 these questions.

2583 The Committee has concluded that the next step should be a
2584 careful survey of current decisions that address whatever duty of
2585 inquiry into competence is recognized. A Committee member
2586 volunteered to supervise the research over the course of the
2587 summer.

2588 **B. Rule 62: Information**

2589 The Appellate Rules Committee may undertake a study of the
2590 Appellate and Civil Rules provisions governing stays pending
2591 appeal, including the provisions for security. The Civil Rules
2592 Committee stands ready to work with the Appellate Rules Committee
2593 on such projects as the Appellate Rules Committee decides to take
2594 up.

2595 **C. Court Administration and Case Management Projects:**
2596 **Information**

2597 The Court Administration and Case Management Committee has
2598 raised a number of topics that may lead to Civil Rules amendments.
2599 Action on all of these topics has been deferred pending further
2600 development by CACM.

2601 Judge Sentelle, Chair of the Judicial Conference Executive
2602 Committee, referred one of these questions to the Civil Rules
2603 Committee and to CACM simultaneously. The question comes from a
2604 district judge who volunteers to manage cases in other districts by
2605 videoconference from his own district. There is substantial
2606 experience with pretrial management in this mode; there may not be
2607 any need for rules amendments to guide or direct what is already
2608 going on. But there may be more difficult questions if a judge in
2609 one district undertakes to use videoconferencing to conduct a trial
2610 physically held in a courthouse in another district. The question
2611 put to the committees assumes that only a bench trial would be
2612 conducted in this manner. Even then, Rule 43(a) illustrates the
2613 questions that must be addressed. Rule 43(a) now allows testimony
2614 in open court by "contemporaneous transmission from a different
2615 location" only "for good cause in compelling circumstances and with
2616 appropriate safeguards." It is a fair question whether Rule 43(a)
2617 is automatically satisfied by the advantages of allowing
2618 interdistrict assignments without travelling to the actual trial.
2619 It also is a fair question whether Rule 43(a) should be amended to
2620 ensure that videoconferencing across district lines is a generally
2621 proper means of conducting even a bench trial.

2622 Two issues relating to e-filing have been raised in the
2623 process of developing the next generation CM/ECF system. One is
2624 whether the Notice of Electronic Filing can automatically be
2625 treated as a certificate of service. The other is whether an
2626 electronic signature in the CM/ECF system can be prima facie
2627 evidence of a valid signature. The Committee recommends appointment
2628 of a joint committee of all the advisory committees to study these
2629 issues and a number of other issues relating to electronic filing
2630 and service.

2631

2632 Another issue also grows out of the next generation CM/ECF
2633 system. The system will include a national database, available only
2634 to "designated court users," that identifies "restricted filers."
2635 Two examples of restricted filers are prisoners subject to
2636 restrictions under the Prisoner Litigation Reform Act and disbarred
2637 attorneys. The concern is that restricted filers are identified by
2638 name and address, thwarting identification when — as often happens
2639 with pro se litigants — a litigant changes addresses. CACM
2640 recommends that this problem be addressed by amending Rule
2641 4(a)(1)(C) to require that a summons "state the name and address of
2642 the plaintiff's attorney or — if unrepresented — the plaintiff's
2643 <u>name, address, and last four digits of the social-security number</u>
2644 <u>of the plaintiff</u>." In this day of rampant identity theft,
2645 discussion in the Committee raised substantial doubts about
2646 requiring pro se plaintiffs to provide even the last four digits of
2647 their social security numbers. This topic will be pursued further
2648 with CACM.

2649 **D. Pleading; Class Actions: Information**

2650 The Rule 23 Subcommittee deferred further work pending
2651 decisions in a substantial number of class-action cases on the
2652 Supreme Court docket this Term. It plans to resume work when they
2653 have been decided, aiming first to sort through an intimidating
2654 list of possible questions to produce an agenda identifying the
2655 most important. It seems likely that it will be important to hold
2656 a miniconference with experienced lawyers, judges, and academics to
2657 inform this process. There is no firm sense yet whether the result
2658 will be an agenda of issues that seem ripe for proposing Rule 23
2659 amendments.

2660 Pleading standards have held a constant place on the agenda
2661 for the last twenty years without yet generating any closely
2662 focused proposals for reform. The Committee does not sense any
2663 circumstances that point toward immediate consideration of the
2664 practices that continue to evolve in the aftermath of the *Twombly*
2665 and *Iqbal* decisions. The Federal Judicial Center is conducting a
2666 study of dispositions by all forms of dispositive motions. The
2667 completion of that study will prompt a renewed inquiry whether
2668 rules proposals should be developed.

2669 **E. Dismissal by Parties' Stipulation: Information**

2670 Rule 41(a)(1)(A)(ii) allows a plaintiff to "dismiss an action
2671 without a court order by filing * * * a stipulation of dismissal
2672 signed by all parties who have appeared." Rule 41(a)(1)(B) provides
2673 that unless the stipulation states otherwise, the dismissal is
2674 without prejudice.

2675

2676 A question about this provision was raised by a judge who,
2677 after twice refusing a request by all parties to defer a firm trial
2678 date so that the parties might seek to settle some 500 related
2679 cases, most of them pending before other judges, was confronted by
2680 a joint stipulation dismissing the action without prejudice. The
2681 concern is that allowing the parties to do this will frustrate
2682 effective case management and dissipate the value of the investment
2683 in managing the case up to the dismissal.

2684 The Committee concluded that there is no need to amend Rule 41
2685 on this account. There can be compelling circumstances that prevent
2686 parties bent on settlement from settling within a tight time frame,
2687 yet hold real promise of eventual settlement. That is what happened
2688 with these cases — the parties were in fact able to reach a
2689 comprehensive settlement.

2690 Beyond the specifics of this particular case, the Committee
2691 believes that private litigation does not generate such strong
2692 public interests as to require the parties to continue to litigate
2693 after an action is once filed. Settlement moots an action,
2694 depriving the court of jurisdiction to proceed further. The wish of
2695 all parties to conclude an action without yet being able to settle
2696 deserves equal respect.

2697 Concerns about frustrating effective case management and
2698 squandering the investment of scarce judicial resources up to the
2699 point of dismissal also seem overstated. Committee members do not
2700 believe that there is any general problem of joint dismissals
2701 followed by revival in a new action.

2702 **F. Hague Convention: Prompt Return of Children: Information**

2703 *Chafin v. Chafin*, 133 S.Ct. 1017 (2013), ruled that return of
2704 mother and child to the habitual residence determined by the
2705 district court under the Hague Convention on the Civil Aspects of
2706 International Child Abduction did not moot the father's appeal. The
2707 Court emphasized the need for prompt decision in the trial court
2708 and on appeal, pointing to the express terms of the Convention,
2709 common judicial practice, and a Federal Judicial Center guide for
2710 handling Convention cases. Justice Ginsburg repeated these themes
2711 in a concurring opinion, including a footnote suggesting that the
2712 Appellate and Civil Rules Advisory Committees might consider
2713 "whether uniform rules for expediting [Convention] proceedings are
2714 in order." 133 S.Ct. at 1029 n. 3.

2715 The Committee has concluded that there is no real need to
2716 adopt a civil rule specific to Hague Convention cases. Courts
2717 already recognize the need for resolving matters affecting child
2718 custody as promptly as possible. The Court's opinions in the *Chafin*
2719 case will reinforce this understanding.

2720 Not only is there no need for a rule. The Judicial Conference
2721 has an entrenched policy opposing statutes or court rules that give
2722 docket priority to specific categories of litigation. One priority
2723 can interfere with wise management of a particular docket. A small
2724 number of competing priorities can cause serious interference. And
2725 a welter of conflicting priorities can lead to chaos.

2726 In a real sense, the very importance of achieving expeditious
2727 disposition of international child abduction disputes undermines
2728 the need for a specific court rule. The importance is manifest.
2729 Courts recognize the need and rise to meet it.

THIS PAGE INTENTIONALLY BLANK

TAB 2F

THIS PAGE INTENTIONALLY BLANK

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 11-12, 2013

1 The Civil Rules Advisory Committee met at the University of
2 Oklahoma College of Law on April 11 and 12, 2013. Participants
3 included Judge David G. Campbell, Committee Chair, and Committee
4 members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Hon.
5 Stuart F. Delery; Judge Paul S. Diamond (by telephone); Parker C.
6 Folse, Esq. (by telephone); Judge Paul W. Grimm; Peter D. Keisler,
7 Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Scott M.
8 Matheson, Jr.; Chief Justice David E. Nahmias (by telephone); Judge
9 Solomon Oliver, Jr.; and Judge Gene E.K. Pratter. Professor Edward
10 H. Cooper participated as Reporter, and Professor Richard L. Marcus
11 participated as Associate Reporter. Judge Jeffrey S.Sutton, Chair,
12 Judge Diane P. Wood, and Professor Daniel R. Coquillette, Reporter,
13 represented the Standing Committee. Judge Arthur I. Harris
14 participated as liaison from the Bankruptcy Rules Committee. Laura
15 A. Briggs, Esq., the court-clerk representative, also participated
16 by telephone. The Department of Justice was further represented by
17 Theodore Hirt. Emery Lee participated for the Federal Judicial
18 Center. Jonathan C. Rose, Andrea Kuperman, Benjamin J. Robinson,
19 and (by telephone) Julie Wilson represented the Administrative
20 Office. Emery Lee represented the Federal Judicial Center. Steven
21 S. Gensler, a former committee member, managed the meeting.
22 Professor Thomas D. Rowe, Jr., another former committee member,
23 also attended. Observers included Joseph D. Garrison, Esq.
24 (National Employment Lawyers Association); John K. Rabiej (Duke
25 Center for Judicial Studies); Jerome Scanlan (EEOC); Alex Dahl,
26 Esq. and Robert Levy, Esq. (Lawyers for Civil Justice); John Vail,
27 Esq. (American Association for Justice); Thomas Y. Allman, Esq. (by
28 telephone); Kenneth Lazarus, Esq. (American Medical Association);
29 Ariana Tadler, Esq., Henry Kelston, Esq., William P. Butterfield,
30 Esq., Maura Grossman, Esq., and John J. Rosenthal (Sedona
31 Conference); Professor Gordon V. Cormack; and Ian J. Wilson.

32 Judge Campbell opened the meeting by welcoming the Committee
33 and observers to the beautiful Oklahoma campus and the impressive
34 Law School building. Dean Joseph Harroz, Jr., in turned welcomed
35 the Committee to the Law School, noting the School's delight that
36 Jonathan Rose and Professor Gensler had suggested that the
37 Committee meet in Norman.

38 Judge Campbell noted that three new members have been
39 appointed to replace Chief Justice Shepard, Judge Colloton, and
40 Anton Valukas, who have rotated off the Committee — Judge Colloton
41 is chairing the Appellate Rules Committee, however, making it
42 likely that he will be involved in projects that join the two
43 committees. Chief Justice Nahmias of the Georgia Supreme Court is
44 a graduate of Duke and of the Harvard Law School. He clerked for
45 Judge Silberman on the D.C. Circuit and then for Justice Scalia. He

46 practiced with Hogan & Hartson, in the U.S. Attorney's office in
47 Atlanta, as Deputy Assistant Attorney General in the Criminal
48 Division, and as United States Attorney for the Northern District
49 of Georgia. He was appointed to the Georgia Supreme Court in 2009.
50 Judge Matheson is a graduate of Stanford, Oxford as a Rhodes
51 Scholar, and Yale Law School. He practiced with Williams &
52 Connally, and as district attorney. He was Dean of the University
53 of Utah Law School for eight years, and held a chair at the Law
54 School when he was appointed to the Tenth Circuit. Parker Folse is
55 a graduate of Harvard and the University of Texas Law School. He
56 clerked for Judge Sneed in the Ninth Circuit and for Chief Justice
57 Rehnquist. He founded the Seattle office of Susman Godfrey in 1995.
58 He has been active in the ABA Antitrust Section. He represents both
59 plaintiffs and defendants in complex litigation, often involving
60 antitrust and patents. He has been named lawyer of the year for
61 "bet-the-company" litigation. A personal commitment prevented his
62 attendance at this meeting.

63 Judge Campbell also noted that this will be the last meeting
64 for Judge Wood as liaison from the Standing Committee. Her term on
65 the Standing Committee concludes this fall, and she will promptly
66 become Chief Judge of the Seventh Circuit. She has been more a
67 member of the Civil Rules Committee than a liaison. She has always
68 been fully prepared on all agenda items, and participates as an
69 active member.

70 Judge Campbell also noted that "we still miss Mark Kravitz."
71 Professor-Reporter Coquillette reported that rules committee
72 members had given generously to establish funds in Judge Kravitz's
73 memory at the Connecticut Bar Foundation and the Friends School for
74 Disadvantaged Children in New Haven.

75 Judge Campbell reported on the Standing Committee's January
76 meeting. The Committee approved Rule 37(e) for publication,
77 understanding that some revisions would be made and presented for
78 review at their June meeting. They like the rule. They also
79 responded favorably to a presentation of the Duke Rules package.
80 They approved for publication minor revisions of Rules 6(d) and
81 55(c), and a technical correction of Rule 77. The Judicial
82 Conference approved the Rule 77 correction as a consent calendar
83 item.

84 The Supreme Court has approved the proposed amendments of Rule
85 45. There is no reason to expect that Congress will be moved to
86 make revisions.

87 *November 2012 Minutes*

88 The draft minutes of the November 2012 Committee meeting were
89 approved without dissent, subject to correction of typographical

90 and similar errors.

91 *Legislative Activity*

92 There is little legislative activity to report in these early
93 days of the new Congress. The House Subcommittee will continue to
94 look at the work of this Committee.

95 *"Duke Rules" Package*

96 Judge Koeltl, chair of the Duke Conference Subcommittee,
97 recalled that three main themes were repeatedly stressed at the
98 Duke Conference. Proportionality in discovery, cooperation among
99 lawyers, and early and active judicial case management are highly
100 valued and, at times, missing in action. The Subcommittee has
101 worked on various means of advancing these goals. The package of
102 rules changes has evolved through many drafts and meetings. The
103 Subcommittee is unanimous in proposing that each part of the rules
104 be recommended for publication.

105 The rules proposals are grouped in three sets. One set looks
106 to improve early and effective case management. The second seeks to
107 enhance the means of keeping discovery proportional to the action.
108 The third hopes to advance cooperation.

109 **CASE-MANAGEMENT PROPOSALS**

110 The case-management proposals reflect a perception that the
111 early stages of litigation often take far too long. "Time is
112 money." The longer it takes to litigate an action, the more it
113 costs. And delay is itself undesirable.

114 Rule 4(m): Rule 4(m) would be revised to shorten the time to serve
115 the summons and complaint from 120 days to 60 days. The Department
116 of Justice has reacted to this proposal by suggesting that, by
117 shortening the time to serve, it will exacerbate a problem it now
118 encounters in condemnation actions. Rule 71.1(d)(3)(A) directs that
119 service of notice of the proceeding be made on defendant-owners "in
120 accordance with Rule 4." This wholesale incorporation of Rule 4 may
121 seem to include Rule 4(m). Invoking Rule 4(m) to dismiss a
122 condemnation proceeding for failure to effect service within the
123 required time, however, is inconsistent with Rule 71.1(i)(C), which
124 directs that if the plaintiff "has already taken title, a lesser
125 interest, or possession of" the property, the court must award
126 compensation. This provision protects the interests of owners, who
127 would be disserved if the proceeding is dismissed without awarding
128 compensation but leaving title in the plaintiff. The Department
129 regularly finds it necessary to explain to courts that dismissal
130 under Rule 4(m) is inappropriate in these circumstances, and fears
131 that this problem will arise more frequently because it is

132 frequently difficult to identify and serve all owners even within
133 120 days.

134 The need to better integrate Rule 4(m) with Rule 71.1 can be
135 met by amending Rule 4(m)'s last sentence: "This subdivision (m)
136 does not apply to service in a foreign country under Rule 4(f) or
137 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A)." The
138 Department of Justice believes that this amendment will resolve the
139 problem. The Department does not believe that there is any further
140 need to consider the integration of Rule 4 with Rule 71.1(d)(3)(A).

141 Rule 16(b)(2): Time for Scheduling Order: Rule 16(b)(2) currently
142 directs that a scheduling order must issue within the earlier of
143 120 days after any defendant has been served or 90 days after any
144 defendant has appeared. Several Subcommittee drafts cut these times
145 in half, to 60 days and 45 days. The recommended revision, however,
146 cuts the times to 90 days after any defendant is served or 60 days
147 after any defendant appears. The reduced reductions reflect
148 concerns that in many cases it may not be possible to be prepared
149 adequately for a productive scheduling conference in a shorter
150 period. These concerns are further reflected in the addition of a
151 new provision that allows the judge to extend the time on finding
152 good cause for delay. The Subcommittee believes that even this
153 modest reduction in the presumed time will do some good, while
154 affording adequate time for most cases.

155 But the Department of Justice expressed some concerns about
156 accelerating time lines at the onset of litigation. There is room
157 to be skeptical that shortening the time to serve and the time to
158 enter a scheduling order will do much to advance things. It is
159 important that lawyers have time at the beginning of an action to
160 think about the case, and to discuss it with each other. More time
161 to prepare will make for a better scheduling conference, and for
162 more effective discovery in the end. The Note should reflect that
163 extensions should be liberally granted for the sake of better
164 overall efficiency.

165 A judge responded to the Department's concern by offering
166 enthusiastic support for the proposed limits. "Lawyers will do
167 things only when they have to; government lawyers may be the worst,
168 perhaps because they are overworked." It is proving necessary to
169 micromanage the case-management rules "because judges don't
170 manage." Reducing the up-front times is a good idea.

171 In response to a question, the Department of Justice said that
172 its experience with the "rocket docket" in the Eastern District of
173 Virginia is that at times it gets relief from the stringent time
174 limits, and at other times it does not get relief. Agencies that
175 get sued there allocate their resources to give priority to Eastern
176 District cases; this is known to be a special situation. The result

177 is to do these cases instead of some others. A judge observed that
178 "the Eastern District is free riding on the lack of comparable time
179 constraints elsewhere."
180
181 Rule 16(b)(1)(B): Contemporaneous Conference: Rule 16(b)(1)(B) now
182 provides for a scheduling conference "by telephone, mail, or other
183 means." The reference to mail is clear, but loses the advantages of
184 direct contemporaneous communication. The reference to other means
185 is unclear — resort to a ouija board is not contemplated, but other
186 possibilities are vague. The proposal strikes these words, but the
187 Committee Note makes it clear that "conference" includes any mode
188 of direct simultaneous exchange. A conference telephone call
189 suffices. Skype or other technologies also suffice. The
190 Subcommittee considered the possibility of requiring an actual
191 conference by these means in all cases subject to the scheduling
192 order requirement, but in the end accepted the views of several
193 participants in the Dallas miniconference that there are cases in
194 which the parties' Rule 26(f) report provides a suitable foundation
195 for an order without needing a conference with the court.

196 Rule 16(b)(3) [26(f)]: Preserving ESI, Evidence Rule 502: The
197 proposals add two subjects to the "permitted contents" of a
198 scheduling order and to the Rule 26(f) discovery plan. One is the
199 preservation of electronically stored information. The other is
200 agreements under Evidence Rule 502 on [non]waiver of privilege or
201 work-product protection. Emphasizing the importance of discussing
202 preservation of electronically stored information addresses a
203 problem that touches on the broader issues addressed by the
204 proposal to amend Rule 37(e) that has been approved for publication
205 and will be discussed later in this meeting. Adding Evidence Rule
206 502 responds to the concern of the Evidence Rules Committee that
207 lawyers simply have not come to realize the value — or perhaps even
208 the existence — of Rule 502.

209 An observer said that it is good to add these references to
210 Rule 502. "We need more acknowledgment of how it works."

211 Another observer said that the Rule 16 and 26(f) dialogue
212 about preserving ESI "should not become a case-by-case discussion
213 of a party's preservation methods, procedures, systems." Different
214 companies have general systems they should be allowed to use in all
215 their cases.

216 Rule 16(b)(3): Conference Before Discovery Motion: The third
217 subject proposed to be added to the list of permitted topics is a
218 direction "that before moving for an order relating to discovery
219 the movant must request a conference with the court." About one-
220 third of federal judges now require a pre-motion conference before
221 a discovery motion. Their experience is that most discovery
222 disputes can be effectively resolved at an informal conference,

223 often by telephone, saving much time and expense. The Subcommittee
224 considered making the pre-motion conference mandatory, but put the
225 idea aside for fear that there may be some courts that are not in
226 a position to implement a mandatory rule.

227 A judge member of the committee observed that the premotion
228 conference is widely used and "is inspiring in practice. A
229 telephone call can clear the disputatious sky."

230 Rule 26(d), 34(b)(2)(A): Early Requests to Produce: This proposal
231 would revise the discovery moratorium imposed by Rule 26(d) to
232 allow delivery of a Rule 34 request before the parties' Rule 26(f)
233 conference. Delivery does not have the effect of service. The
234 request would be considered served at the first Rule 26(f)
235 conference. A parallel amendment to Rule 34 starts the time to
236 respond at the first Rule 26(f) conference, not the time of
237 delivery. The goal is to provide a more specific focus for
238 discussion at the conference. In part the change would reflect a
239 puzzling experience with present practice — many lawyers seem
240 unaware of the moratorium, either serving discovery requests before
241 the 26(f) conference or asking for a stay of discovery during a
242 time when a stay is not needed because the moratorium remains in
243 effect. The proposal does not authorize delivery of Rule 34
244 requests with the complaint. A request may be delivered by the
245 plaintiff to a party more than 21 days after serving the summons
246 and complaint on that party. The party to whom delivery is made may
247 deliver requests to the plaintiff or any other party that has been
248 served. Some lawyers who generally represent plaintiffs are
249 enthusiastic about this proposal. And at the Dallas miniconference,
250 some lawyers who generally represent defendants thought this
251 practice would be useful "so we can begin talking."

252 The Department of Justice noted concerns about allowing early
253 Rule 34 requests. Early discussion of discovery plans is useful,
254 but early delivery of formally developed requests may have the
255 effect of backing parties into positions before they have a chance
256 to talk. This concern is felt in different parts of the Department.
257 "This could be a step backward." The purpose of generating focused
258 discussion might be better served by adding to the subjects for
259 discussion at a Rule 26(f) conference the categories of documents
260 that will be requested.

261 In responding to a question, the Subcommittee and Reporter
262 recognized that no thought had been given to the role of Rule 6(d)
263 in measuring the time to respond to an early discovery request
264 considered to have been served at the first Rule 26(f) conference.
265 If, for example, the request was delivered by mail, would it also
266 be considered to have been served by mail, allowing 3 extra days to
267 respond? This question could be addressed in the Committee Note,
268 but it may be as well to leave it to the parties and courts to

269 figure out that the mode of delivery should carry through. One
270 reason for letting the issue lie may be that Rule 6(d) is due for
271 reconsideration in the rather near future.

272 Expediting the Early Stages: General Observations: Discussion of
273 the case-management proposals began with the observation that it is
274 disappointing that there is a continuing need to micro-manage the
275 rules that address case management. It would be better to promote
276 effective case management by better educating judges in the
277 opportunities created by simpler rules. But that does not seem to
278 work. The package achieves a good balance. "Lawyers may not like
279 it, but their clients will." It is important that the FJC continue
280 its education efforts.

281 An observer said that it is a great thing to work toward
282 earlier district-court involvement in litigation.

283 **PROPORTIONALITY**

284 Three major changes are proposed for Rule 26(b)(1).

285 "Subject matter" Discovery: Rule 26(b)(1) was amended in 2000 to
286 distinguish between discovery of matter "relevant to any party's
287 claim or defense" and discovery of matter "relevant to the subject
288 matter involved in the action." Subject-matter discovery can be had
289 only by order issued for good cause. This distinction between
290 lawyer-managed and court-managed discovery will be ended by
291 eliminating the provision for subject-matter discovery. Discovery
292 will be limited to the parties' claims and defenses. This will
293 further the longstanding belief that discovery should be limited to
294 the parties' claims and defenses, a position that can readily be
295 found even in the pre-2000 rule language. Of course it remains open
296 to ask whether that is too narrow.

297 A former Committee member observed that in the late 1990s he
298 had argued against the separation of "subject matter" discovery
299 from the scope of lawyer-controlled discovery. "Now I think it's
300 the right thing." The present provision for court-controlled
301 subject-matter discovery does not seem to make a difference. It was
302 adopted in part in the hope that it would get judges more involved
303 in managing discovery through motions for subject-matter discovery.
304 That has not much happened. There were, and remain, many cases in
305 which judges are actively involved. The attempt to expand these
306 numbers did not matter much.

307 Proportionality Factors: The proposals limit the scope of discovery
308 to matter "proportional to the reasonable needs of the case,"
309 considering the factors described in present Rule 26(b)(2)(C)(iii).
310 "People never get to Rule 26(b)(2)(C)(iii)." Experience shows that
311 it is left to the judge to invoke these limits. Rule 26(b)(2)

312 imposes a duty on the judge to raise these issues without motion,
313 but it is important that they be directly incorporated in the scope
314 of discovery to reinforce the parties' obligations to conduct
315 proportional discovery. Rule 26(g)(1)(B)(iii) will continue to
316 reinforce the parties' obligations in these directions. Some early
317 comments have addressed this proposal. One question, reflecting
318 comments on earlier drafts that simply referred to proportionality,
319 is how to define proportionality. Related questions seem to ask for
320 reconsideration of the factors now included in (b)(2)(C)(iii) —
321 should account be taken of the parties' resources? Of the balance
322 between burden or expense and likely benefit? Judges have been
323 required to consider these elements since 1983. They are better
324 brought directly into the scope of discovery defined by (b)(1).

325 Early comments by a number of plaintiffs' lawyers protest the
326 plan to relocate the (b)(2)(C)(iii) factors to become part of
327 (b)(1). They believe it should be the court's duty, not the
328 parties' duty, to consider these proportionality factors. Imposing
329 this duty on the lawyers will, they argue, lead to increased fights
330 about discovery.

331 The Department of Justice expressed support for this part of
332 the Rule 26(b)(1) proposal.

333 An observer suggested that while proportionality is a worthy
334 concept, it must be refined so that it is not used to limit access
335 to justice.

336 A Subcommittee member reported feeling pleased by the FJC
337 closed-case survey finding that about two-thirds of the lawyers who
338 responded thought that discovery was reasonably proportioned to
339 their case. But then a friend observed that if one-third of lawyers
340 think discovery has been disproportional to the needs of the case,
341 something should be done. "The challenge is not to overhaul the
342 entire system, but to keep what is good and deal with cases where
343 cost is disproportionate." The Subcommittee understands that access
344 to the courts is important. But one part of access is cost. It is
345 hard to cope with that. Lawyers may react with equanimity to the
346 FJC finding that median costs per case are $15,000 or $20,000. But
347 in a prior case the figure was $5,000 less. "How many middle-class
348 Americans can afford to spend that to go to court? They cannot."
349 More than 20% of the cases filed in the Southern District of New
350 York are pro se cases. In some courts the figure is higher. Cost is
351 an important deterrent that needs to be addressed. An observer
352 added a comment that the FJC cost figures look to lawyer costs.
353 They do not include the internal costs borne by the parties, an
354 often important cost.

355 An observer who worked with the Sedona Working Group # 1
356 recalled that the Group spent two years in discussing these issues.

357 They submitted a proposal to the Committee last October. For now,
358 comments seem most important on proportionality and preservation.
359 Rule 26(b)(1) should refer to proportionality in preservation. Rule
360 26(b)(2)(C) also should address proportional preservation. These
361 rules should be embellished by detailed Committee Notes. The Rule
362 26(f) proposal should be expanded to address not only preservation
363 of ESI but to suggest the details of preservation that should be
364 discussed, and also to include plans to terminate preservation. And
365 the parties should be required to report any remaining disputes
366 after the Rule 26(f) conference. So too, the Rule 16 proposals
367 should be expanded to include a purpose to resolve disputes about
368 preservation.

369 The proportionality proposal was questioned. The rules have
370 had a proportionality requirement in Rule 26(b)(2)(C)(iii) for
371 nearly 30 years. It has become routine to protest that requested
372 discovery is "too much." Proportionality is a rough measure. The
373 proposed rule changes the burden — under it, the proponent of
374 discovery must prove the requests are proportionate in order to be
375 entitled to discovery. "That's a wrong step. 'Proportionality' will
376 become the new 'burdensomeness.'" It will be the requester's duty
377 to establish proportionality. There are many problems with that.
378 Consider an action with one or two natural persons as plaintiffs
379 suing a large entity. One deposition is enough to glean all the
380 discoverable information a natural person has. Many depositions may
381 be needed to retrieve the information held by an entity.

382 A direct response was offered to the observation about the
383 burden to show proportionality. Rule 26(g)(1)(B)(iii) provides that
384 the person who propounds a discovery request automatically
385 certifies that it is proportional.

386 <u>"Reasonably calculated to lead to the discovery of admissible
387 evidence"</u>: Rule 26(b)(1) was amended more than 60 years ago by
388 adding the sentence that now reads: "Relevant information need not
389 be admissible at the trial if the discovery appears reasonably
390 calculated to lead to the discovery of admissible evidence." This
391 provision was meant only to respond to admissibility problems; a
392 common illustration is discovery of hearsay that may pave the way
393 to admissible forms of the same information. But "reasonably
394 calculated" has taken on a life of its own. Many lawyers seek to
395 use it to expand the scope of discovery, arguing that virtually
396 everything is discoverable because it might lead to admissible
397 evidence. Preliminary research by Andrea Kuperman has uncovered
398 hundreds if not thousands of cases that explore this phrase; many
399 of them seem to show that courts also think it defines the scope of
400 discovery. "Relevant" was added as the first word in 2000. The
401 Committee Note reflects concern that this sentence "might swallow
402 any other limitation on the scope of discovery." The same concern
403 continues today. Current cases seem to ignore the 2000 amendment

404 and its purpose. The Subcommittee proposal amends Rule 26(b)(1) to
405 make it clear that this sentence properly addresses only the
406 discoverability of information in forms that may not be admissible
407 in evidence, and does not expand the scope of discovery defined by
408 the first sentence: "Information within this scope of discovery
409 need not be admissible in evidence to be discoverable."

410 Early comments by a number of plaintiffs' lawyers protest this
411 proposal, arguing that the "reasonably calculated" concept is the
412 cornerstone of discovery. A Committee member, on the other hand,
413 commented that it is stunning how many courts overlook the 2000
414 amendment. The purpose of this amendment is to achieve what the
415 Committee thought it had accomplished with the 2000 amendment.

416 The Department of Justice believes that the "reasonably
417 calculated" formula should be retained as it is in the present
418 rule. This is a familiar phrase. Even though some courts may
419 misread this sentence now, amending it will be seen by many as
420 narrowing the scope of discovery. That perception should be
421 addressed in the Committee Note if the proposal carries through,
422 but there still may be unintended limiting effects.

423 Another Committee member expressed concern that "we should
424 think hard" about deleting the "reasonably calculated" sentence.

425 Rule 26(c): Allocation of Expenses: Another proposal adds to Rule
426 26(c)(1)(B) an explicit recognition of the authority to enter a
427 protective order that allocates the expenses of discovery. This
428 power is implicit in Rule 26(c), and is being exercised with
429 increasing frequency. The amendment will make the power explicit,
430 avoiding arguments that it is not conferred by the present rule
431 text.

432 An observer said that shifting costs "will continue to limit
433 discovery."

434 Presumptive Limits: Rules 30 and 31: Rules 30 and 31 now set a
435 presumptive limit of 10 depositions by the plaintiffs, by the
436 defendants, or by third-party defendants. Rule 30(d)(1) sets a
437 presumptive time limit of one day of 7 hours for a deposition. The
438 proposal reduces the presumptive number to 5 depositions, and the
439 presumptive time limit to one day of 6 hours. Criticisms have been
440 made, especially by plaintiffs' lawyers, of the reduction to 5
441 depositions. The Subcommittee considered the criticisms, but
442 decided that the 5-deposition figure is reasonable. The FJC study
443 shows a reasonable number of cases with more than 5 depositions per
444 side. When this happens, a good share of lawyers think the
445 discovery is too costly; it may be that discovery costs in those
446 cases went up for other reasons as well, but increasing the number
447 of depositions feeds the sense of disproportionality. The number,

448 moreover, is only presumptive. The parties can stipulate to more.
449 If the parties fail to agree, the court must grant leave for more
450 depositions to the extent consistent with Rules 26(b)(1) and (2).
451 Reducing the presumptive number provides another tool for judicial
452 case management, and promotes dialogue among the lawyers.

453 Emery Lee described his research on the numbers of depositions
454 in practice. He used the data base for the 2009 Civil Rules Survey.
455 The survey drew from all cases closed in the final quarter of 2008.
456 the sample excluded cases that concluded in less than 60 days, and
457 categories of cases that typically have no discovery. He looked for
458 counts of depositions in cases that had any discovery, in cases
459 that had at least one deposition (fact depositions were more common
460 than expert-witness depositions), and in cases that actually went
461 to trial (trial cases were over-sampled in the whole set, so as to
462 have a meaningful number for evaluation). The report is set out at
463 pages 125 to 133 of the agenda materials. Table 1 reflects the
464 number of cases with more than 5 depositions from the group of
465 cases that had any discovery. The estimates by plaintiffs and
466 defendants are close enough to conclude with some confidence that
467 more than 5 depositions were taken in about 10% of these cases. The
468 numbers increase dramatically for cases with depositions of expert
469 trial witnesses. Table 2 shows that among the cases with any
470 depositions, fewer than 5 depositions were the most common count,
471 with 6 to 10 not far behind. More than 10 depositions were taken in
472 no more than 5% of this group of cases. Table 3 shows that still
473 higher numbers of depositions were taken in cases that went to
474 trial — the range from 6 to 10 was around 25% for depositions taken
475 by plaintiffs, and close to 15% for depositions taken by
476 defendants. The ranges were around 10% for more than 10 depositions
477 by plaintiffs, and somewhat less for 10 depositions taken by
478 defendants. Tables 4 and 5 show that as the number of depositions
479 increased, attorneys were more likely to think that discovery costs
480 were disproportionate to the stakes. But it is fair to suspect that
481 as compared to lawyers’ estimates, clients are rather more likely
482 to think the costs of discovery are disproportionate to the stakes.

483 The value of these data in projecting the costs of discovery
484 in the future was questioned on the ground that they come from a
485 time when, as the FJC studies showed, discovery of electronically
486 stored information was avoided in many cases. The FJC study may
487 understate the actual costs of discovery today. Often there was no
488 discussion of electronically stored information in the Rule 16
489 conference; a significant number of cases had no litigation hold on
490 ESI; indeed many cases did not involve any discovery of ESI. As
491 practice as evolved since then, discovery of electronically stored
492 information is common, and commonly expensive. Another comment was
493 that it is particularly striking that in cases with more than 5
494 depositions on both sides about 45% of the lawyers thought that
495 discovery costs were too high in relation to the stakes.

496 The Department of Justice expressed concerns about reducing
497 presumptive limits on discovery. Department lawyers who litigate on
498 the "affirmative side" are particularly concerned. Five depositions
499 may not be enough, and they fear it will be difficult to get leave
500 to take more. Several branches, including those that litigate
501 antitrust, environment, civil rights, multiple violations of
502 workplace safety requirements at multiple facilities of a single
503 employer, and others report real difficulty in getting leave to
504 take more than 10 depositions. At the least, the Committee Note
505 should say more about the importance of sympathetic consideration
506 of the need to take more than 5 depositions in many types of cases.
507 Responding to a question, the Department recognized that it does
508 not yet have the kind of empirical data that would document the
509 extensive anecdotal reports. The reports, however, are based on
510 real experience with many judges who seem to view 10 depositions as
511 a fixed limit, not a point that suggests the need for involved case
512 management.

513 A Committee member enthusiastically supported the 5-deposition
514 presumptive limit. His experience as a judge is that when one side
515 wants to take more than 10 depositions, the other side usually also
516 wants to take more than 10. Usually the need is obvious. A 5-
517 deposition limit will work as well as the 10-deposition works.

518 Another Committee member expressed reservations about
519 tightening presumptive numerical limits. It may be that managing up
520 from lower numbers will prove more expensive than managing down
521 from higher numbers. It may be worth asking whether it would work
522 better to adopt a concept of reasonable numbers, to be measured by
523 proportionality. And there can be problems with Rule 30(b)(6)
524 depositions.

525 An observer said that limiting discovery limits the ability to
526 prove the case. As pleading standards become more demanding,
527 limiting discovery risks premature decisions on the merits.
528 Tightening numerical limits may be unnecessary — the statistics
529 seem to show that generally people are behaving reasonably. "I am
530 concerned there are many judges who are literalists, who will not
531 let us negotiate upward." Six-hour depositions may lead to requests
532 for an extra day; my own practice is to start early and finish on
533 time. If tighter limits are adopted, depositions of expert trial
534 witnesses and Rule 30(b)(6) depositions of an entity should be
535 exempted from the limits. She was asked whether her experience with
536 the present rules is that leave is readily given to take more than
537 10 depositions. She replied that in most large cases leave is
538 given. "But most of my cases are with forward-looking judges. I did
539 not like the 10-deposition limit, but learned to live with it. But
540 the lower the number, the more difficult it will be to negotiate
541 upward."

542 Another observer suggested that presumptive limits provide a
543 framework for discussion. The parties can work it out without
544 involving the court.

545 Presumptive Limits: Rule 33: The proposals reduce the presumptive
546 number of Rule 33 interrogatories from 25 to 15. There have been
547 some comments that interrogatories are critical to discovery, and
548 that the reduction will gut the rule. The Southern District of New
549 York, however, has for years set a general limit at 5 categories of
550 information at the outset of the litigation. The limit in part
551 results from the collective wisdom of experienced judges that
552 lawyers write questions seeking vast amounts of information and
553 other lawyers respond by writing answers designed to disguise, not
554 reveal, information.

555 Presumptive Limits: Rule 36: The proposals establish for the first
556 time a presumptive numerical limit of 25 on Rule 36 requests to
557 admit. Requests to admit the genuineness of documents are excluded
558 from the limit. The proposal responds to a concern that Rule 36 has
559 been abused in some cases. Early comments support the proposal,
560 although a few express doubts.

561 Responding to a question about the basis for settling on 25 as
562 the presumptive number of requests to admit, Judge Koeltl said that
563 25 was chosen by analogy to present Rule 33, drawing from the
564 thoughts of the Subcommittee and the experience of the Committee.
565 The comments received so far support the number — indeed the letter
566 from the leadership of the ABA Litigation Section suggests that
567 requests to admit the genuineness of documents might be included in
568 the limit. The employment lawyers have focused more on Rule 33, but
569 some of them have supported the limit proposed for Rule 36. Emery
570 Lee added that the FJC report for the Duke Conference found that
571 plaintiffs and defendants both reported that plaintiffs requested
572 22 admissions per case; defendants reported that defendants
573 averaged 13.2 per case, while plaintiffs reported that defendants
574 averaged 21 per case. The proposed presumptive limit of 25 is
575 higher than average case experience.

576 An observer said it is helpful to carve requests to admit the
577 genuineness of documents out from the presumptive limit.

578 Rule 34 Responses: The Rule 34 proposals address widespread
579 perceptions of abuses in responding. The Standing Committee
580 reviewed these proposals with enthusiasm. A common response to a
581 Rule 34 request is a boilerplate litany of objections, concluding:
582 "to the extent not objected to, any relevant documents will be
583 produced." The requesting party has no sense whether anything has
584 been withheld. The proposals require that a response state the
585 grounds for objecting to a request "with specificity." These words
586 are borrowed from Rule 33(b)(4). If an objection is made, it must

587 state whether any responsive materials are being withheld on the
588 basis of the objection. The Committee Note observes that this
589 obligation can be met, when relevant, by stating the scope of the
590 search — for example, that the search has been limited to documents
591 created after a specified date, or to identified sources.

592 The Department of Justice "completely endorses" the need to
593 get beyond boilerplate objections to find whether anything has been
594 withheld.

595 An observer noted that "a party cannot tell you what they do
596 not know about documents they are not looking for." It might be
597 better to move into rule text the Committee Note statement that it
598 suffices to state the limits of the responding party's search.

599 Rule 34 Production: Rule 34 speaks, almost at random, of permitting
600 inspection and of producing. The proposals provide that a party who
601 responds that it will produce copies of documents or electronically
602 stored information must complete production no later than the time
603 for inspection stated in the request or a later reasonable time
604 stated in the response. The Committee Note, drawing from discussion
605 at the Dallas miniconference, recognizes that "rolling" production
606 may be made in stages, within a time frame specified in the
607 response.

608 The Department of Justice expressed concerns that it can be a
609 challenge to do a production and to figure out the appropriate time
610 frame for rolling production. It must be made clear that responders
611 often need time to get on top of production obligations. An
612 observer offered a similar comment that the end-date for production
613 should be kept flexible.

614 Multitrack System: An observer asked whether the Committee had
615 considered recommending a multitrack system, working toward
616 proportionality by steering simpler cases toward reduced discovery.
617 The Committee has considered simplified procedure proposals in the
618 past. The Subcommittee considered it briefly in developing the new
619 rules proposals, but concluded that it is not yet time to move in
620 this direction. Still, the time may come. Utah, for example, has
621 adopted a tiered discovery approach, and allocates a total number
622 of hours for depositions rather than a limit on the number of
623 depositions. Texas has adopted a mandatory program. Further
624 discussion noted that differentiated case tracks have not proved
625 successful in federal courts. "Parties do not want to say that
626 their cases are simple." The Northern District of California speedy
627 trial project has had no takers.

628 **COOPERATION**

629 Rule 1: The Subcommittee considered drafts that would amend Rule 1

to add an explicit duty of cooperation by the parties. Participants at the Dallas miniconference and others expressed concerns about this direct approach. One concern was that Rule 1 would become a source of frequent collateral litigation, in the way of Rule 11 in the form it took from 1983 to 1993. Another was that this new duty might become entangled with obligations of professional responsibility, and might trench too far on providing vigorous advocacy. Responding to these concerns, the proposal would amend Rule 1 to provide that these rules "should be construed, ~~and~~ administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." The Committee Note observes that "[e]ffective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure."

An observer said it is good to encourage cooperation. A similar observation said that the proposed rule and Note "are terrific."

Another observer noted that the Sedona Conference working group had recommended that Rule 1 be amended to provide that the rules should be "complied with" to achieve their goals. Their suggested Note stated that cooperation does not conflict with the duty of vigorous representation.

PACKAGE

These proposals form a package greater than the sum of the parts. Some parts appeal more to plaintiffs than to defendants, while others appeal more to defendants than to plaintiffs. Some sense of balance may be lost if changes appear to go in one direction only. Still, each part must be scrutinized and stand, be modified, or fall on its own. The proposals are not interdependent in the sense that all, or even most, must be adopted to achieve meaningful gains.

And, inevitably, some style issues remain. And, as always, vigilance is required to search out absent-minded errors. As one example, the draft fails to renumber present Rule 26(d)(2) as (3) to reflect the insertion of a new paragraph (2).

It was noted that this package has stimulated an unusual number of pre-publication comments by some groups that have been closely following the Committee's work. The most recent tally counts 249 comments. Most of them come from plaintiffs' employment lawyers, with some reflecting concerns for civil-rights litigation more generally. They have not yet been distributed to the Committee. It seems unwise to start revising a carefully developed package in response to comments from one segment of the bar that has been more diligent than others. These comments of course will

674 be considered. Many of them focus on the presumptive limitations on
675 depositions and other discovery. A frequent theme is that "the
676 system is not broken, and does not need to be fixed." Plaintiffs
677 say that employers have most of the information needed to litigate
678 discrimination claims. They fear that judges will see presumptive
679 limits as firm limits. They note that when providing representation
680 on a contingent-fee basis they have built-in incentives to limit
681 the costs of discovery. And they fear that stricter limits on
682 discovery will leave them unable to survive summary judgment. And
683 they respond to the suggestion that it is easier to manage up than
684 to manage down by arguing that the limits will generate more
685 disputes and increase the need for judicial management in place of
686 responsible self-regulation by the parties. All of these concerns
687 will be taken into account, but after publication provides a spur
688 to other segments of the bench and bar that may provide offsetting
689 views.

690 An observer repeated the prediction that the package will
691 stimulate a large number of comments. It will be important to
692 remember that many people think the system is not broken, and to
693 articulate the problems the proposals address.

694 A letter signed by many in the leadership of the ABA
695 Litigation Section largely supports the package of proposals.

696 A judge member of the Committee observed that the package is
697 good. "A lot of this is common sense." Many of the proposals
698 reflect practices that have been adopted by local rules or in
699 standing orders. The Committee will continue to balance all
700 comments that come in, as it has balanced everything it has heard
701 so far. Some of the early letters seem to reflect a fear that there
702 would be no public hearings; these concerns will be assuaged as the
703 public comment period plays out in its usual full course.

704 Another judge commented that this is an important package. "We
705 will hear a great deal about it, more even than we heard about the
706 Rule 56 proposals." The Rule 56 experience shows that the Committee
707 is eager to learn from public comments. One of the important
708 changes made in response to testimony and written comments was to
709 abandon the "point-counterpoint" procedure. The Committee will be
710 equally eager to learn from comments about this package. It is
711 difficult to foresee what changes may be made, but cogent arguments
712 will be evaluated with great respect.

713 The next comment was that the Subcommittee took its work very
714 seriously. "Bring the comments on." This is a good-faith package of
715 proposals to reduce cost and delay.

716 Yet another committee member observed that "If we don’t figure
717 out ways to address cooperation, proportionality, and increased

718 management, we're in trouble." The package seems to make real
719 strides. It is exciting to have proposals to recommend for
720 publication just three years after the Duke Conference, even if it
721 is only in the context of careful rulemaking that three years seems
722 like speed.

723 The Department of Justice comments noted that the Subcommittee
724 and Committee have taken account of the Department comments made as
725 the package has been developed. It makes sense to publish the
726 package for comment. "There is much that is excellent. We are
727 bedeviled by the cost of discovery, and often by the difficulty of
728 getting it." The Department is sympathetic to the pursuit of
729 proportionality, to the Rule 34 proposals on objections and
730 response time, and to early case management. It continues, however,
731 to have the concerns addressed to several of the proposals as noted
732 above.

733 A Committee member observed that this is "an impressive
734 package. The whole is greater than the sum of the parts." It will
735 generate a great debate. A similar view was expressed by another
736 member. This is great work. It makes sense to publish the package
737 as a whole.

738 Another Committee member suggested that the proposals are
739 affected by a relatively uniform conclusion that initial
740 disclosures under Rule 26(a)(1)(A) are not particularly useful. A
741 recent conversation with lawyers in Florida showed that average
742 cases take a year and a quarter in the Northern and Southern
743 Districts, but only 4 months in the Middle District. Lawyers at the
744 conference said that the difference is the judge. Extensive public
745 comments can be expected on the package — "Everyone will have a dog
746 in this race." Initial reactions may be overblown. It will be
747 important to allow the dust to settle to provide a better picture.

748 This prediction of extensive public comment provoked mixed
749 reactions. One suggestion was that it is easy to assume that a
750 package as important as this one will get the attention of the bar
751 and draw extensive comments. But sometimes experience belies
752 expectations, perhaps because not all parts of the bar become aware
753 of published proposals. "We should be sure to get word out to all
754 parts of the bar." But a contrary suggestion was that the
755 outpouring of comments from a relatively narrow segment of the bar
756 may presage thousands of comments after publication. "We may be
757 entering a brave new public-comment world." It will be desirable to
758 consider the possibility of establishing a site for public comments
759 that allows participants to channel their comments by subject-
760 matter, easing the task of compiling, comparing, and learning from
761 them. Some such approach could facilitate the important task of
762 making sure that the Committee takes maximum advantage of comments
763 from all parts of the profession, and that no group feel left out

764 of the process.

765 An observer said that "we all could do better" in working to
766 reduce the cost of litigation and to promote resolutions on the
767 merits.

768 An observer said that this is a good overall package. "The
769 system *is* broke in terms of cost." The scope-of-discovery proposals
770 are especially good. Presumptive limits are positive, whether the
771 limit is 10, 5, or 7 depositions. Depositions usually end late, so
772 the reduction from 7 to 6 hours is good. "Proportionality is
773 great." But it would be good to add a presumptive numerical limit
774 on the number of custodians whose records must be searched in
775 discovering electronically stored information.

776 An observer suggested reservations about characterizing these
777 proposals as a "package." Earlier sets of proposals have been
778 whittled down. For example, a proposal to adopt a presumptive limit
779 of 25 Rule 34 requests to produce carried a long way through the
780 process, only to be stripped out. The Committee should not be
781 reluctant to abandon further particular parts that the public
782 comment process shows to be unwise.

783 Another observer said that there is a crisis in discovery
784 today, caused by an exponential growth in the volume of data. In a
785 significant number of cases the system is driven by the cost of
786 discovery, not the merits. The best answer is to be found in clear,
787 self-executing rules.

788 A Committee member recalled that when Chief Justice Roberts
789 approved the idea of holding the Duke Conference he urged that it
790 not be just another academic exercise. This package of rules
791 proposals provides a real, practical outcome, admirably advancing
792 the pragmatic hopes for the conference.

793 Another Committee member suggested that these are
794 transsubstantive rules. Committee members tend to speak from "a
795 privileged experience, where we negotiate and work it out." Limits
796 on the number of depositions, for example, are readily worked
797 around. But we will be hearing from people experienced with very
798 different kinds of cases, where there is no MDL judge on the scene,
799 where discovery is uniquely addressed to a single case. It is an
800 open question whether the system is broke for some types of cases.

801 A motion to recommend approval of the Duke Rules package for
802 publication passed by unanimous vote.

803 Judge Campbell noted that the Committee should promote a
804 wealth of comments from all segments of the bar. This is a package,
805 but it is not an unseverable package. Each of the individual

806 proposals must be able to stand independently of any proposals that
807 are found to be unwise by the testimony-and-comment process.

808 *Rule 37(e): Preservation and Sanctions*

809 Judge Grimm noted the long progress of Rule 37(e), beginning
810 immediately after the Duke Conference panel suggested that a
811 detailed rule should be adopted to set standards for preserving
812 electronically stored information for discovery. The Committee
813 approved a proposed rule in November. The Subcommittee resolved
814 questions that were left open by the Committee. It considered
815 suggestions by the Style Consultant, adopting many of them. In
816 January the Standing Committee approved the rule for publication,
817 recognizing that it had left some questions for further work with
818 a report back to the June meeting. It also suggested some questions
819 that should be specifically flagged in the request for comment.

820 The Subcommittee has considered the questions left open after
821 the Standing Committee meeting, finding ready answers to most. One,
822 dealing with the loss of information that irreparably deprives a
823 party of a meaningful opportunity to litigate, has presented
824 drafting challenges that need careful attention today.

825 Four principles shape the proposal. Curative measures are
826 available to address the loss of information even if no fault was
827 involved in the loss. Sanctions are not appropriate if the party
828 acted reasonably and proportionally. Sanctions are appropriate if
829 the party acted willfully or in bad faith and the loss causes
830 substantial prejudice. And sanctions also are proper if the loss
831 irreparably deprives another party of a meaningful opportunity to
832 present or defend against the claims in the action, meaning the
833 core of the action rather than incidental claims or defenses, and
834 if the loss resulted from some measure of fault, described in the
835 proposal as negligence or gross negligence. It is this final
836 provision that has caused continuing debate, in large part because
837 it stirs fears that some judges will find a party has been
838 irreparably deprived of a meaningful opportunity to claim or defend
839 in circumstances that would not even support a finding of
840 substantial prejudice, all for the purpose of imposing sanctions
841 for negligence or gross negligence. What is intended to require
842 super-prejudice as a condition for sanctions absent willfulness bad
843 faith might come to restore the negligence standard the Committees
844 intend to reject. At the least, uncertainty in predicting
845 implementation of this exception could defeat the purpose to
846 provide reassurance against the uncertainties of present practice
847 that cause many large enterprises to overpreserve vast amounts of
848 information for fear of sanctions rested on hindsight evaluations
849 of what was reasonable.

850 Five sets of issues raised in the November Advisory Committee

851 meeting were considered by the Subcommittee after the meeting.

852 (1) The argument that Erie doctrine requires that federal
853 courts defer to state law on spoliation is not persuasive. The
854 questions involve discovery procedure in federal courts. Some
855 states recognize an independent tort remedy for spoliation. The
856 Committee Note recognizes that Rule 37(e) does not affect those
857 rights.

858 (2) One observer suggested expansion of the role played by the
859 list of factors in Rule 37(e)(2). They might be brought to bear in
860 determining what curative measures or what sanctions to employ, and
861 to measure the prejudice or irreparable deprivation element. The
862 Subcommittee concluded that these factors should be confined, as
863 they have been, to measuring whether discoverable information
864 should have been preserved and whether the failure was willful or
865 in bad faith. They were not developed to measure other things, and
866 do not seem well adapted to serve other purposes.

867 (3) The punctuation of(e)(1)(B)(i) created a possible
868 ambiguity. It has been reorganized to eliminate any ambiguity.

869 (4) It was suggested that the list of factors in (e)(2) should
870 be prefaced with two additional words: "should consider all
871 relevant factors, including <u>when appropriate</u> * * *." These words
872 seem unnecessary. The list is suggestive, not exclusive, and it is
873 apparent on casual inspection that some items in the list need not
874 be considered in a particular case. For example, if there was no
875 request to preserve information, that factor disappears from the
876 underlying calculations.

877 (5) Many drafts of the list of factors included litigation
878 holds. This factor was deleted from concern that it might prove
879 misleading in practice. Holds are nuanced. They come in many
880 shapes, and what is appropriate in particular circumstances may be
881 inapposite in other circumstances. Including holds as a factor
882 might cause a court to give too much weight to some particular
883 method.

884 The Standing Committee discussion raised seven questions that
885 were considered by the Subcommittee.

886 (1) The Note to the January draft referred to "displacing"
887 state law requiring preservation. One thought was that this might
888 seem to displace statutory preservation obligations. "We displaced
889 displaced." The Committee Note now says that Rule 37(e) rests on
890 the duty to preserve that has been recognized by the common law of
891 court decisions. Rule 37(e) itself does not create an obligation to
892 preserve.

April 23, 2013 version

893 (2) It was suggested that the very word "sanctions" is risky
894 because it overlaps the duty of professional responsibility to
895 self-report "sanctions." The Note was revised to address this
896 concern, stating that Rule 37(e) does not address professional
897 responsibility duties. The "sanctions" term is adopted from Rule
898 37(b)(2), the rule incorporated here.

899 (3) The provision for sanctions when a loss of information
900 irreparably deprives a party of a meaningful opportunity to present
901 a claim or defense stirred concern arising from the experience that
902 many actions combine central claims or defenses with incidental or
903 peripheral claims or defenses that lack any real importance.
904 Depriving a party of an opportunity to litigate the lesser issues
905 should not warrant sanctions. This concern led to redrafting that
906 refers to deprivation of any meaningful opportunity to present or
907 defend against the claims in the action. The Committee Note
908 underscores the point: "Lost information may appear critical to a
909 given claim or defense, but that claim or defense may not be
910 central to the overall action."

911 (4) It was possible to read the January draft to mean that
912 sanctions could be imposed absent any fault for loss of information
913 that should have been preserved if the loss irreparably deprived a
914 party of a meaningful opportunity to present or defend against a
915 claim. Among the examples was a hospital that lost records stored
916 in a basement that was flooded by Superstorm Sandy, an
917 unforeseeable event. This came to be referred to as the "Act of
918 God" problem. The January draft was not intended to support
919 sanctions in such circumstances. The revised draft requires
920 negligence or gross negligence to support sanctions. The idea is
921 that the "irreparably deprived" standard requires super-prejudice,
922 something more than the "substantial prejudice" that supports
923 sanctions for willful or bad-faith loss of information. Greater
924 prejudice would justify sanctions on a lesser showing of fault,
925 described as negligence or gross negligence. Although the reference
926 to "gross negligence" seems redundant, it was included to fill in
927 the gap and, by implication, to demonstrate that greater fault is
928 required to show willfulness or bad faith. The Subcommittee has
929 remained divided on this question, however, for the reason noted
930 above. Some courts might seize on this provision as an excuse to
931 impose sanctions for merely negligent behavior in circumstances
932 that at worst involve only substantial prejudice, and that might
933 come to involve still lower levels of harm.

934 (5) The concept of a "meaningful" opportunity to present or
935 defend against a claim was thought to lack precision. But none of
936 the words considered as a substitute seemed satisfactory.
937 "Meaningful" was retained.

938 (6) The Department of Justice expressed concern that present

939 Rule 37(e) should be retained, either independently or within the
940 body of what is proposed as an amended Rule 37(e). But the present
941 rule provides only a limited safe harbor; the Committee Note
942 suggests that a party may have to intervene to halt the routine
943 operation of an electronic information system because of present or
944 reasonably anticipated litigation. The Subcommittee concluded that
945 the proposed Rule 37(e) confers all the protection conferred by the
946 present rule, and more. It should suffice to inform people that the
947 new rule provides greater protection. The new Committee Note
948 addresses this question in a full paragraph that, among other
949 things, states that the routine, good-faith operation of an
950 electronic information system should be respected under the rule.
951 And one of the ways in which the new rule confers greater
952 protection is that it is not limited to ousting sanctions "under
953 these rules." Present case law, in a loose and imprecise way,
954 frequently relies on inherent authority to justify sanctions. The
955 Committee Note expressly forecloses reliance on inherent authority.

956 The Department renewed this suggestion during later
957 discussion. It has proved helpful in dealing with information
958 technology systems specialists during the design of new information
959 systems.

960 (7) The Department of Justice has expressed concern that
961 "substantial prejudice" should be defined more expansively. But
962 the Subcommittee concluded that it is not helpful to attempt
963 greater precision outside the context of a particular case. Courts
964 are good, with the help of the parties, in measuring the impact a
965 loss of information has on a particular case.

966 The Department renewed this suggestion during later
967 discussion. It would be useful to ask for comments during the
968 publication process. Various elements that bear on prejudice could
969 be offered as examples — the availability of other sources of
970 information, the materiality of the lost information, and the like.
971 It was pointed out that Question 4, at p. 163 of the agenda
972 materials, is sketched in terms that anticipate possible expansion
973 along these lines.

974 The Subcommittee worked out the present proposal through a
975 great number of conference calls. The level of participation by
976 Subcommittee members was extraordinary. The Subcommittee believes
977 that it has effectively addressed all of the potential problems
978 just described, apart from finding suitable language to protect
979 against sanctions when discoverable information is lost without a
980 party's fault but the result is great prejudice. Any reference to
981 negligence or gross negligence in rule text causes real anxiety to
982 many participants and observers.

983 In addition to the questions posed by the Advisory Committee

and Standing Committee, the Subcommittee made three changes on its own.

(1) "reasonably" was deleted in describing the duty to preserve: "If a party failed to preserve discoverable information that ~~reasonably~~ should have been preserved * * *." The factors in (e)(2) provide better direction in this dimension, most obviously in (e)(2)(B) — "the reasonableness of the party's efforts to preserve the information."

(2) The provision for curative measures was expanded by deleting these words: "order ~~the party to undertake~~ curative measures * * *." The change was made to support curative actions taken without court order. A party, for example, could be permitted to introduce evidence of another party's failure to preserve, and to argue that adverse inferences should be drawn from the failure. The party's argument would not be an adverse-inference instruction subject to the limits imposed by (1)(B). Such measures can help to level the playing field.

Later discussion asked why an adverse-inference instruction is treated as a sanction — why is it not also a curative measure? The response was that there is a continuum of available tools along this dimension. The most powerful is an instruction by the judge that the jury must find the lost information was harmful to the case of the party who lost it. A less powerful version instructs the jury that it may infer the information was harmful. Still another version may leave it to the jury to determine whether any information was lost, and then to determine what inferences might be drawn from the loss. These inferences logically flow only from knowing that the information was harmful. They do not flow from being sloppy or disorganized. Willfulness or bad faith is the key. Another Committee member observed that Wigmore referred to "a consciousness of a weak case." Another participant noted that an adverse-inference instruction was given in the Zubulake case. The fear of these instructions is one of the fears that drives prospective parties to over-preserve. "We need to limit this nuclear weapon."

Another Committee member continued the discussion. There are many possible versions of adverse-inference instructions or arguments. It is difficult to define a precise line. It is desirable to preserve flexibility that enables a court to avoid too much direction. Although it has not proved possible to draft a clear distinction between an instruction that amounts to a sanction and lesser measures that qualify as curative measures, the distinction remains important. "There should be no dispositive inferences without fault."

An observer suggested that asking the jury to decide what

1029 inferences to draw "asks the jury to decide a side issue, not the
1030 merits of the case."

1031 (3) "in the anticipation or conduct of litigation," an
1032 important element of (e)(1), was added to the (e)(2) reference to
1033 failure to preserve information that "should have been preserved in
1034 the anticipation or conduct of litigation." The Subcommittee was
1035 worried about failures to preserve information as required by
1036 independent duties imposed by statute or regulation; such failures
1037 might not reasonably bear on the duty to preserve for litigation.
1038 The change helps to focus the (e)(2) factors on preservation for
1039 litigation.

1040 "Act of God": Successive drafts have provided for sanctions when
1041 discoverable information is lost without willfulness or bad faith,
1042 but the effect is to irreparably deprive a party of any meaningful
1043 opportunity to present or defend against the claims in the action.
1044 This provision reflects situations that came, in Subcommittee
1045 discussions, to be identified with the Silvestri case in the Fourth
1046 Circuit. The owner of the automobile in which the plaintiff was
1047 injured allowed it to be destroyed before the defendant
1048 manufacturer had any opportunity to inspect it. The court of
1049 appeals affirmed a dispositive sanction imposed by the district
1050 court, finding there was no abuse of discretion. This decision, and
1051 others like it, are part of the common law. The purpose of Rule
1052 37(e) is to recognize the common-law duty to preserve. The
1053 Subcommittee has believed that the rule text should reflect these
1054 decisions. The Standing Committee, however, feared that as drafted
1055 the rule would authorize sanctions when discoverable information
1056 was destroyed without any fault, as by an "Act of God." The
1057 Subcommittee agreed that while sanctions should not be imposed,
1058 curative measures should be available. That created a drafting
1059 problem. It would not do to suggest in the Committee Note that loss
1060 by an Act of God does not amount to a party's failure to preserve,
1061 since that interpretation of the rule text would bar not only
1062 sanctions but also curative measures. The same difficulty arises
1063 with any attempt to limit the meaning of "should have been
1064 preserved. The solution was to add a limiting element: sanctions
1065 could be imposed only if the failure to preserve "was negligent or
1066 grossly negligent." The Subcommittee recognized that "grossly
1067 negligent" was redundant — any grossly negligent failure also would
1068 be negligent. But it thought that including these words in
1069 (e)(1)(B)(ii) would help to prevent concepts of gross negligence
1070 from bleeding into the "willfulness" that suffices to support
1071 sanctions when loss of discoverable information causes substantial
1072 prejudice.

1073 Discussion within the Subcommittee repeatedly reflected a
1074 concern that any reference to negligence or gross negligence in the
1075 rule text would suggest a sliding scale that balances degrees of

1076 culpability against degrees of prejudice. A judge reluctant to
1077 brand a lawyer with bad faith might "skitter off" into finding
1078 negligence that irreparably deprived another party of any
1079 meaningful opportunity to litigate.

1080 The cases that present the "no-fault" failure seem to involve
1081 tangible evidence. The Subcommittee could not find a case where a
1082 loss of electronically stored information effectively put another
1083 party out of court unless there was willfulness or bad faith. "ESI,
1084 like cockroaches and styrofoam, is something you cannot get rid
1085 of." This thought suggested that it might be better to avoid the
1086 question by addressing Rule 37(e) only to the loss of
1087 electronically stored information and requiring willfulness or bad
1088 faith, as well as substantial prejudice, and omitting any provision
1089 addressing extreme prejudice but no willfulness or bad faith. Given
1090 the speed of change in electronic information systems, however, the
1091 Subcommittee was uncertain whether that is prudent. Accordingly it
1092 chose to maintain the draft that allows sanctions for irreparable
1093 deprivation if there is only negligence or gross negligence, but
1094 also to prepare for publication of an alternative draft that
1095 focuses only on electronically stored information and omits the
1096 irreparable deprivation provision.

1097 The alternative draft is set out in an appendix to the draft
1098 rule and Committee Note. It may be an advantage that it does not
1099 attempt to regulate the loss of tangible evidence, or traditional
1100 documents. Common-law sanctions would remain available for loss of
1101 discoverable information that is not electronically stored. This
1102 approach is less complete, less elegant. But this project was
1103 launched in response to complaints that parties and prospective
1104 parties feel forced to over-preserve electronically stored
1105 information, in part for want of any common nationwide standards.
1106 Public comments can test the hypothesis that ESI is so often
1107 recoverable by curative measures that irreparable deprivation is
1108 unlikely, apart from cases of willfulness or bad faith. This
1109 alternative approach avoids any concern that no-fault losses of
1110 information will be sanctioned. It avoids the risk that parallel
1111 rule provisions would encourage a creeping tendency to import
1112 negligence concepts into willfulness.

1113 The Committee was reminded that the Standing Committee has
1114 approved publication of Rule 37(e) this summer. The questions open
1115 for discussion are those that have not yet been explored in this
1116 Committee, including the question whether the rule should be
1117 limited to loss of electronically stored information.

1118 The Committee also was pointed to the list of questions that
1119 will be flagged in transmitting the rule for public comment. Are
1120 these the right questions? Are they properly framed?

1121 Discussion of the ESI-only alternative began with the
1122 observation that usually the Committee publishes a preferred
1123 version, raising questions about potential changes without
1124 publishing a full alternative draft. The question whether Rule
1125 37(e) should be limited to loss of electronically stored
1126 information was discussed repeatedly in the Subcommittee and with
1127 the Committee, and the choice always has been to stick with a
1128 comprehensive rule that applies to all forms of discoverable
1129 information. One consideration is that the line between
1130 electronically stored information and other information is
1131 uncertain, and may become more uncertain with further advances in
1132 technology. And it is better to adhere to general principles absent
1133 some convincing reason to believe that different standards may
1134 properly apply. Still, the most recent rounds of discussion may
1135 shake faith in that conclusion. The problems encountered in
1136 attempting to recognize problems of irreparable loss that do not
1137 seem to be encountered with electronically stored information may
1138 be so great as to narrow the focus to loss of electronically stored
1139 information. The original concern was over-preservation of
1140 electronically stored information. Publishing the alternative might
1141 provoke comments showing instances in which loss of electronically
1142 stored information has irreparably deprived a party of a meaningful
1143 opportunity to litigate, contrary to the tentative belief that this
1144 event is unlikely.

1145 Support for publishing the alternative was expressed in more
1146 positive terms. "Residential Funding" is a problem with respect to
1147 the pre-litigation duty to preserve. There is a serious risk that
1148 concepts of negligence and gross negligence will prove expansive.
1149 Adding them to proposed (e)(1)(B)(ii) threatens to expand the risk.

1150 A similar observation suggested the ESI-only version in the
1151 appendix may be desirable. The reliance on negligence or gross
1152 negligence is troubling. This project began to give clear guidance
1153 in the use of curative measures and sanctions, and in the process
1154 to overrule cases that employ sanctions for negligence or gross
1155 negligence. The ESI-only version avoids the "Act of God" problem by
1156 requiring willfulness or bad faith for any sanctions. Resort to the
1157 negligence or gross negligence standard from concern that loss of
1158 other forms of discoverable information may have more severe
1159 consequences may cause problems.

1160 A more general observation was that it is important to seek
1161 comment during the publication period on every alternative the
1162 Committee sees as possible. Whether by publishing an appendix or
1163 posing questions, the issues should be clearly identified so as to
1164 reduce the risk that the comments will suggest changes so profound
1165 as to require republication to ensure full opportunity to comment.

1166 Another observation expressed concern that the amendments give

1167 judges tools to use if information is lost without fault. As
1168 information storage moves into the cloud, there will be increasing
1169 risks that information will be lost without fault. The main draft
1170 gives clear guidance, both as to curative measures and as to
1171 sanctions.

1172 The Department of Justice understands the impetus to get away
1173 from sanctions for negligence or gross negligence, but has thought
1174 that a rule covering all types of evidence is preferable. It may be
1175 best to publish the alternative rule addressing only ESI. Comments
1176 may show a way to reconcile these concerns.

1177 Another comment suggested that another approach would be to
1178 retain a rule that applies to all forms of information, not
1179 electronically stored information alone, but to require willfulness
1180 or bad faith for sanctions. That would overrule the negligence or
1181 gross negligence cases even when the negligent behavior irreparably
1182 deprived another party of any meaningful opportunity to litigate.
1183 No one has wanted to do that. Adopting an ESI-only rule that
1184 requires willfulness or bad faith would be defended on the ground
1185 that loss of ESI will not have such irreparable consequences.

1186 An observer noted that after struggling with this problem, the
1187 Sedona working group chose to rely on an "absent exceptional
1188 circumstances" limit on sanctions. It would be a mistake to adopt
1189 a negligence or gross negligence standard. Multiple standards will
1190 generate incredible problems. No one thinks negligence or gross
1191 negligence should be the standard.

1192 Another observer said that adopting a negligence or gross
1193 negligence test would inject a tort standard into a rule of
1194 procedure. The true issue is whether the rule should apply to ESI
1195 only. Publishing an all-information rule that includes negligence
1196 or gross negligence will focus comments on that problem, reducing
1197 the level of comments on the question whether the rule should be
1198 limited to loss of ESI alone.

1199 An interim summary was attempted. These are tough questions.
1200 The "Act of God" concern led to incorporating a negligence or gross
1201 negligence standard to ensure that sanctions are not available for
1202 a no-fault loss of discoverable information, while sanctions remain
1203 available if the loss irreparably deprived a party of a meaningful
1204 opportunity to litigate. The hospital servers in a basement
1205 inundated by Superstorm Sandy became a running example: should
1206 sanctions be imposed when records are unavailable in the next
1207 malpractice action? The January draft could be read to authorize
1208 sanctions even absent negligence or gross negligence, imposing
1209 liability because the information was lost and it was information
1210 that "should" have been preserved. Subsequent discussions focused
1211 mostly on loss of ESI, but it is difficult today to distinguish

1212 between ESI and other forms of information, and the difficulty may
1213 well increase as technology evolves. Is a print-out of information
1214 lost from an electronic storage system ESI? What about the
1215 information recorder in an automobile damaged in a collision and
1216 then scrapped?

1217 Would it do to omit any reference to negligence or gross
1218 negligence, falling back to the January draft, and rely on a
1219 statement in the Committee Note that loss to an Act of God is not
1220 a party's failure to preserve? But how would that square with the
1221 desire to allow curative measures in such circumstances?

1222 A Committee member agreed that it is artificial to distinguish
1223 between ESI and other forms of information-evidence. The
1224 distinction is difficult to explain in theory, and it may become
1225 increasingly difficult to apply in practice. Another member was
1226 enthusiastic about deleting any reference to negligence or gross
1227 negligence, but retaining a rule that applies to all forms of
1228 information. The Committee Note could provide assurance enough for
1229 the Act of God situation.

1230 Discussion returned to the possibility that (e)(1)(B)(ii)
1231 could be dropped entirely, even from a rule that applies to loss of
1232 any form of discoverable information. That would mean that no
1233 sanctions are available absent willfulness or bad faith, no matter
1234 how severe the prejudice to the party who never had the information
1235 and never had any opportunity to preserve it, and no matter now
1236 negligent the party who had the information was. But it may be
1237 better to publish (B)(ii); it will be easier to delete it in the
1238 face of adverse comments than to add it back. The alternative of
1239 adopting a rule limited to loss of ESI, requiring willfulness or
1240 bad faith for any sanctions, can still be flagged in requesting
1241 comments.

1242 An alternative to "negligent or grossly negligent" was
1243 suggested as a way out of distaste for the tort-like aura of these
1244 words. The failure to preserve irreparably depriving another party
1245 of any meaningful opportunity to litigate might be described as
1246 "culpable." The Committee Note could explain that culpability is
1247 intended to distinguish the "Act of God" loss.

1248 These suggestions foundered on the reminder that curative
1249 measures, unlike sanctions, should be available even when no fault
1250 at all was involved in the loss of information that should have
1251 been preserved. A Committee Note cannot give different meanings to
1252 "failure to preserve" for curative measures than for sanctions. As
1253 an example, loss of the servers flooded in the basement might be
1254 cured by spending $50,000 to retrieve the same information from a
1255 backup system. Ordering restoration is an appropriate response.

1256 The concern persists: which party should bear the consequences
1257 of an irreparable loss of information?

1258 Seeking ways to protect the party who had no opportunity to
1259 preserve the information led to other suggestions. Would it be
1260 possible to define loss by an "act" of a party, and distinguish an
1261 Act of God? This could be done by revising (e)(1)(B): "impose any
1262 sanction * * * but only if the court finds that the ~~failure~~ actions
1263 of the party * * *." This rule text would provide a functional
1264 foundation for Committee Note discussion of the no-fault loss of
1265 information.

1266 Further discussion emphasized the importance of coming to rest
1267 on the version that seems best to the Committee. That version can
1268 be published for comment. All of the issues can be raised as
1269 questions addressed to the rule text that is preferred for now.
1270 There is no need to publish an alternative version that is limited
1271 to electronically stored information — the rule text changes are
1272 minimal, and the question can be clearly focused without cluttering
1273 the proposal for comment. What is important is to raise all
1274 foreseeable issues clearly, so that all participants have an
1275 opportunity to comment. That will reduce the risk that dramatic
1276 changes in response to public comments will require republication
1277 for a second round of comments. There is continuing interest in
1278 allowing sanctions, not mere curative measures, when loss of
1279 information as a result of a party's negligence irreparably limits
1280 another party's opportunity to litigate. This threshold of injury
1281 is higher than the substantial prejudice that justifies sanctions
1282 when information is lost because of willfulness or bad faith.
1283 Despite some continuing support for dropping the irreparably
1284 deprived provision entirely, it is better to publish it.

1285 Discussion of Rule 37(e) resumed on the second day of the
1286 meeting. The Subcommittee convened early and explored several
1287 alternatives. In the end, it agreed unanimously to abandon
1288 publication of an ESI-only alternative as an appendix, and to
1289 revise proposed (e)(1)(B) as follows:

1290 (B) impose any sanction listed in Rule 37(b)(2)(A) or give an
1291 adverse-inference jury instruction, but only if the court
1292 finds that the party's actions ~~failure~~:
1293 (i) caused substantial prejudice in the litigation and
1294 was willful or in bad faith; or
1295 (ii) irreparably deprived a party of any meaningful
1296 opportunity to present or defend against the claims
1297 in the litigation ~~action and was negligent or~~
1298 ~~grossly negligent~~.

1299 The Subcommittee agreed that "actions" include inaction, a
1300 failure to act. The focus is on what a party did or did not do, and

April 23, 2013 version

1301 on "irreparably deprived." The Note will focus the "Act of God"
1302 concern by discussing events beyond a party's control. Such events
1303 as a fire, earthquake, or severe storm are not a party's act.
1304 Sanctions will not be available. But curative measures will remain
1305 available.

1306 A motion to recommend that the Standing Committee approve
1307 publication of proposed Rule 37(e) as thus revised was unanimously
1308 approved.

1309 *Rule 84*

1310 The tentative conclusion that Rule 84 should be abrogated was
1311 not listed as an action item on the agenda for this meeting in
1312 deference to the other matters calling for prompt action. But it
1313 would be useful to reconfirm the conclusion to prepare the way for
1314 publication as part of a single package with the other proposals
1315 that have been approved for publication this summer or will be
1316 recommended for approval. The Standing Committee is increasingly
1317 interested in assembling packages of proposals for periodic
1318 publication, rather than confront the bench and bar with smaller
1319 sets of amendments every year.

1320 Judge Pratter noted that the Rule 84 Subcommittee initially
1321 thought that abrogation is the obvious right answer. But rather
1322 than act quickly, it took a step back to make sure abrogation is
1323 the right answer. One important consideration, as discussed in
1324 earlier Committee meetings, is that the Rules Enabling Act process
1325 is not well adapted to generating, maintaining, and revising a good
1326 and useful set of forms. The Working Group on Forms working with
1327 the Administrative Office does good work, with a more flexible
1328 process. The Committee can support their work, perhaps with a
1329 liaison to ensure a reliable means of communication.

1330 Andrea Kuperman has provided a careful analysis of the
1331 question whether the Forms would continue to influence practice
1332 after formal abrogation. She found that courts readily respond by
1333 recognizing that abrogated rules no longer control. Habits of
1334 thought formed under the Forms' influence may carry forward, but
1335 there is nothing wrong with that. The most sensitive questions are
1336 likely to involve pleading. The process of weaving together the
1337 notice pleading traditions embodied in the pleading Forms and more
1338 recent Supreme Court decisions will continue either way.

1339 Forms 5 and 6 present a unique question. Rule 4(d)(1)(D)
1340 directs that a request to waive service must "inform the defendant,
1341 using text prescribed in Form 5, of the consequences of waiving and
1342 not waiving service." Although this text does not refer to Form 6,
1343 Form 6 is embedded in Form 5. It likely will prove desirable to
1344 maintain waiver forms that are, in some way, "official." The

1345 Subcommittee will consider this question further and circulate a
1346 proposed solution to the Committee in time for action to be
1347 submitted to the Standing Committee in June.

1348 The Committee unanimously approved abrogation of Rule 84,
1349 subject to adopting an appropriate resolution of the questions
1350 posed by Forms 5 and 6.

1351 *Rule 17(c)(2)*

1352 Rule 17(c)(2) provides: "The court must appoint a guardian ad
1353 litem — or issue another appropriate order — to protect a minor or
1354 incompetent person who is unrepresented in an action."

1355 This seemingly innocent provision presents a difficult
1356 question. When is a court obliged to inquire into the competence of
1357 an unrepresented party? It would be possible to read the rule to
1358 require an inquiry in every case, to ensure that its purpose is
1359 fulfilled. It also is possible to read the rule in a quite
1360 different way, requiring appointment of a guardian only if an
1361 unrepresented party has been adjudicated incompetent in a separate
1362 proceeding and the adjudication is in fact brought to the court's
1363 attention. A wide range of alternatives lie between these readings.
1364 The court wrestled with this mid-range of alternatives in *Powell v.*
1365 *Symons*, 680 F.3d 301 (3d Cir.2012). It lamented "the paucity of
1366 comments on Rule 17," and adopted an approach that raises a duty of
1367 inquiry only when there is "verifiable evidence of incompetence."
1368 "[B]izarre behavior alone is insufficient to trigger a mandatory
1369 inquiry * * *." Judge Sloviter, a former member of the Standing
1370 Committee, concluded by noting that "We will respectfully send a
1371 copy of this opinion to the chairperson of the Advisory Committee
1372 to call to its attention the paucity of comments on Rule 17." 680
1373 F.3d at 311 n. 10.

1374 Discussion began with the observation that the cost of
1375 appointing a guardian or other representative is a problem. Who
1376 will pay? This is not merely an academic concern. It is a serious
1377 problem.

1378 Another judge thought it likely that many judges have not
1379 thought of this. "We get a lot of pro se cases." Many are
1380 frivolous; "we evaluate the case, not the litigant." If a case
1381 seems to have potential merit, his court has funds that can be used
1382 to pay court costs and makes an effort to find representation. But
1383 the possible need to inquire into the party's competence is not
1384 considered.

1385 Another judge echoed the concern that this is a difficult
1386 question. The rate of pro se filings continues to grow. It has
1387 reached 40% in the District of Arizona, including many actions by

1388 prisoners. The rate approaches 50% in the Eastern District of
1389 California. Inquiring into competence is a difficult undertaking.
1390 The Third Circuit recognizes that "once the duty of inquiry is
1391 satisfied, a court may not weigh the merits of claims beyond the §
1392 1915A or § 1915(e)(2) screening if applicable." It is uncertain
1393 what amounts to "verifiable evidence of incompetence." The Ninth
1394 Circuit appears to find a duty of inquiry when there is a
1395 "substantial question." That may impose a greater obligation on the
1396 district court. This question may arise with some frequency — the
1397 Third Circuit opinion has already been cited by at least six
1398 district courts. The question is whether it is better to leave this
1399 question for further development in the genius of the common-law
1400 process, or to take it into the Enabling Act process now?

1401 A Committee member suggested that as a practical matter, the
1402 immediate reaction is to appoint counsel. That makes the issue go
1403 away. Then counsel has to wrestle with the question whether the
1404 party is competent to function as a client — there still may be a
1405 need for an actual representative. It might help to survey lawyers
1406 who represent pro se litigants to see whether a rule change is
1407 needed.

1408 Another judge asked how the Committee could go about gathering
1409 useful information. One example appears in the statutory command to
1410 appoint a guardian for a child involved in a child pornography
1411 case. The statute commands, but there is no money to pay for it.
1412 "Learning more may suggest a rule."

1413 Yet another judge offered an analogy to the "fairly high
1414 standard" for referring a criminal defendant for a determination of
1415 competency. There will be a mine-field of problems if some
1416 analogous practice is adopted for pro se civil litigants.

1417 A Committee member suggested that the case law seems to
1418 address the problem when a person who appears without a guardian
1419 later appears to be not competent. Perhaps the common law should be
1420 allowed to develop. At the same time, it might be useful to reach
1421 out to groups who work with people who might become enmeshed in
1422 this problem.

1423 A judge suggested that "there is a huge set of people out
1424 there who are not known to be incompetent." The rulemaking problems
1425 overlap with state law. Perhaps it is better to put these problems
1426 aside for now?

1427 A different judge observed that the rule appears to be written
1428 to say this is the court's responsibility. That can be onerous.

1429 Another analogy was offered. These problems arise in
1430 proceedings to remove aliens to other countries. Screening for

1431 incompetence is a real problem.

1432 The question was put by framing three alternatives: (1) These
1433 issues could be left to continued development in the courts, a
1434 "common-law" solution. (2) We could undertake a thorough survey of
1435 the cases to form a comprehensive understanding of the approaches
1436 taken to define a standard for a duty of inquiry. Or (3) We could
1437 undertake a broader inquiry by reaching out to others to attempt to
1438 reach some understanding of the extent and frequency of litigation
1439 by unrepresented incompetents.

1440 These alternatives were supplemented by a fourth: the question
1441 could be kept on the long-term agenda for future consideration.

1442 A motion was made to take the topic up again in a year, after
1443 doing a survey of the case law. One question to put to the cases is
1444 how often the issue of competence is addressed "up front," compared
1445 to how often it is raised only later in the proceedings.

1446 An earlier theme returned. "This is a world of limited
1447 resources." There is no present proposal to change the rule. "We're
1448 not likely to be able to do anything about it." It is best to
1449 attempt nothing now, but to keep the question on the agenda.

1450 A similar view was expressed. The question should be kept on
1451 the agenda, within a broader system that attempts to keep track of
1452 everything on the agenda that affects pro se litigation.

1453 Another suggestion was that the Committee could ask for advice
1454 from the Committee on Court Administration and Case Management.

1455 These questions returned on the second day of the meeting.
1456 Three approaches were again suggested: (1) Take it off the table.
1457 (2) Keep it in the cupboard, to be revisited next year. (3) Keep it
1458 on a more active list, looking into the case law and perhaps asking
1459 whether the Committee on Court Administration and Case Management
1460 is interested.

1461 A Committee member confessed to reading 20 Rule 17(c)(2) cases
1462 overnight. "The fact patterns are quite varied." And there are many
1463 more cases. Courts recognize that there must be some basis to make
1464 a decision, not just a party's assertion. Perhaps we should wait a
1465 year.

1466 The Committee was reminded that the question is not the
1467 standard for appointing a representative once the issue is raised.
1468 The question is to identify the circumstances that oblige the court
1469 to raise the issue of competence without a motion. Is there a duty
1470 to inquire simply because a party is behaving in a way that
1471 suggests issues about competence? How high should the threshold be?

1472 Remember that at least as articulated, the Ninth Circuit threshold
1473 may be lower, imposing the duty of inquiry more frequently, than in
1474 at least some other circuits.

1475 Another member suggested that it would be helpful to have some
1476 research to support further consideration of a problem that likely
1477 goes by without being considered in many cases.

1478 The relation between screening and Rule 17(c)(2) was brought
1479 back into the discussion. "There are cases that are delusional."
1480 But "no one expects an amendment to be enacted in the near term. We
1481 have many other things to do." There likely will be a tide of
1482 comments on the proposals the Committee is recommending for
1483 publication this summer. Why undertake further research now?

1484 A judge volunteered to commission research by a summer intern.
1485 The research could help decide whether to move these questions up
1486 for further attention in the near future. This offer was accepted.
1487 The target will be to get a memorandum out to the Committee by late
1488 summer.

1489 *Rule 41(a): Dismissal by All Parties*

1490 Judge Martone, District of Arizona, brought to the Committee's
1491 attention a possible source of dissatisfaction with the provisions
1492 of Rule 41(a)(1)(A)(ii) and (a)(1)(B) that combine to enable all
1493 parties to a litigation to stipulate to dismissal without
1494 prejudice. The parties in a case before him asked to vacate a firm
1495 trial date so they could complete the details of anticipated
1496 settlements. He refused. The parties then sought to reopen the
1497 question and he again refused. Three days later the parties filed
1498 a stipulation dismissing the action without prejudice.

1499 Judge Martone's order in that case directed the parties to
1500 address two questions. First, is the district plan for setting firm
1501 trial dates, adopted under the Civil Justice Reform Act, an
1502 "applicable federal statute" that, under the express terms of Rule
1503 41(a)(1)(A), limits the right to dismiss without prejudice by
1504 stipulation of all the parties? And second, was the stipulation in
1505 this case such improper conduct or collusion as to authorize an
1506 exercise of inherent power to reject it?

1507 The express language of Rule 41 provides that the stipulation
1508 is effective "without a court order." It responds to a long and
1509 deep tradition of party control. Just as the parties can moot an
1510 action by settlement, so they can agree to dismiss on terms that do
1511 not bar a second action on the same claim. The simple acts of
1512 filing an action and litigating it even deep into the pretrial
1513 process do not create such court interests as to warrant denial of
1514 the right to dismiss without prejudice.

1515 This traditional understanding may be subject to challenge in
1516 an era of increasing judicial responsibility for case management.
1517 Setting a firm trial date has proved a valuable and effective
1518 management tool. Increasing management responsibilities, moreover,
1519 increase the court's investment in the action. Allowing the parties
1520 to thwart the control exercised in setting a firm trial date, and
1521 to waste the court's investment, might seem too high a price to pay
1522 to preserve the traditional freedom to dismiss without prejudice
1523 when all parties agree to do so.

1524 This introduction was elaborated by a description of the
1525 litigation that confronted Judge Martone. Many parallel cases were
1526 pending before other judges in the same court. The parties were
1527 undertaking to settle some 500 cases. The circumstances made it
1528 imperative to get all of the cases virtually settled before they
1529 could reach final settlements in any. Other judges, confronted with
1530 this problem, agreed to continue the cases, requiring periodic
1531 progress reports every 60 days. Settlements actually were
1532 accomplished. That approach worked.

1533 A broader question was asked: Is there a general problem
1534 around the country with parties who stipulate to dismiss without
1535 prejudice in order to escape a particular case-management program?
1536 How frequently does this happen? And how often is the dismissal in
1537 fact followed by a new action? If there is a new action, how often
1538 is it possible to salvage much, or most, of the management invested
1539 in the first action?

1540 A Committee member replied that he had never heard of a
1541 stipulated dismissal followed by reinstatement. This is not like
1542 the old practice of settling a case pending appeal and asking that
1543 the district-court judgment be vacated. The judgment is a public
1544 act that should not be subject to undoing by the parties. But
1545 before judgment the case is the parties' property. "We can rely on
1546 the defendant to protect the public interest. The defendant does
1547 not want to be hit with another action."

1548 Another member agreed. It will be a rare event to find that
1549 the parties "are in the same place" in a complex case. Stipulated
1550 dismissals without prejudice do not happen often.

1551 A third member observed that statutes of limitations provide
1552 a disincentive. The risk of losing the claim to a limitations bar
1553 falls entirely on the plaintiff. "There is not a vast reservoir of
1554 actions that will spring" back to life after a stipulated
1555 dismissal.

1556 A fourth member said that the defendant's agreement to the
1557 dismissal "should do it."

1558 A judge noted that the risk of judge shopping is reduced by
1559 the rules in many courts that would reassign a refiled case to the
1560 judge who was assigned to the original case.

1561 Another judge said that in nine years on the bench he had
1562 never had a case where he thought the parties were colluding to
1563 achieve an improper result through dismissal. There have been cases
1564 where the parties need time to settle. They can be resolved by
1565 placing the case in suspense and denying all pending motions
1566 without prejudice.

1567 A third judge said he had never seen a problem. The right to
1568 a stipulated dismissal is not abused. And it is important to
1569 remember that courts are established to serve the public.

1570 And a fourth judge reported that sixteen years of experience
1571 with settlement conferences shows many reasons why parties need to
1572 suspend proceedings while working out a settlement. It works to
1573 suspend the case while requiring regular progress reports. And it
1574 may help to reflect that fewer than 2% of civil actions go to
1575 trial. There will not be many cases in which a stipulated dismissal
1576 is followed by revival in a new action that actually goes to trial.

1577 The Committee agreed that there is no need to explore this
1578 question further. It will be removed from the agenda.

1579 *Questions Referred from CACM*

1580 The Committee on Court Administration and Case Management has
1581 referred a number of questions about possible changes in the Civil
1582 Rules.

1583 Videoconferencing for Civil Trials. Judge Sentelle, Chair of the
1584 Judicial Conference Executive Committee, referred this question to
1585 both the Committee on Court Administration and Case Management and
1586 the Committee on Rules of Practice and Procedure. The question was
1587 asked by a judge who helps out courts in other districts "by
1588 handling civil cases remotely through our videoconferencing
1589 facilities." He observes that videoconferencing can work to
1590 "remotely handle the pre-trial aspects of a variety of civil cases
1591 and even try jury waived cases * * *." Any limits that may be
1592 imposed by the statutes that define the places where a district
1593 judge can exercise judicial functions are outside the Enabling Act
1594 process. But it is a fair question whether the Civil Rules might be
1595 amended to support this kind of cooperation.

1596 The most immediately relevant rule appears to be Rule 43(a).
1597 Rule 43(a) directs that testimony be taken in open court, but
1598 concludes: "For good cause in compelling circumstances and with
1599 appropriate safeguards, the court may permit testimony in open

1600 court by contemporaneous transmission from a different location."
1601 This standard was deliberately set very high. Should it be relaxed
1602 in some way to enable a judge in one district to better participate
1603 in proceedings in another district without leaving the home
1604 district?

1605 The first observation was that the pending amendments of Rule
1606 45 raised questions about the distance witnesses should be
1607 compelled to travel to attend a hearing or trial. The Committee
1608 concluded that the current limits should remain undisturbed, even
1609 though the 100-mile rule goes back to the Eighteenth Century. Rule
1610 43 is extremely cautious about the circumstances that justify live
1611 testimony without travelling to the hearing or trial. Starting down
1612 the road to greater use of remote transmission "is a big deal." We
1613 should be careful.

1614 The next observation was that nothing in the rules inhibits
1615 conferences with attorneys by telephone or video. That practice is
1616 routine. District judges in Alaska and Hawaii regularly participate
1617 in actions pending in Arizona by these means. Even in criminal
1618 cases, where confrontation is an important consideration, video
1619 hearings can be used in determining competence. It is a fair
1620 question whether judges should be permitted to do anything that
1621 rules now prevent.

1622 Another judge focused on the suggestion that a bench trial
1623 might be held in one courtroom while the judge is in another
1624 courtroom. That is quite different from using video or like means
1625 when communicating directly with one person or with a few more in
1626 a conference, not a contested proceeding.

1627 A similar observation was that remote witnesses are heard
1628 regularly in criminal competency hearings.

1629 A Committee member with extensive arbitration experience said
1630 that international arbitrations often involve participation by
1631 people in all corners of the earth, and in circumstances that make
1632 it prohibitively expensive to bring them all to one place. Remote
1633 transmission has proved workable in such circumstances, and is
1634 often useful in less complex situations.

1635 It was suggested that one useful step would be to foster an
1636 exchange of techniques that courts are using now. The FJC could
1637 gather the information and put it in a bench book or in educational
1638 programs.

1639 The early stages of these topics means that CACM has not yet
1640 determined whether there are things courts should be allowed to do
1641 but that are prevented by current rules, or that could be guided
1642 and encouraged by well-thought rules amendments. The Committee

1643 concluded that a report should be made to CACM that current rules
1644 seem sufficiently flexible to support many useful practices, but
1645 that the Committee will be pleased to consider any recommendations
1646 that CACM may advance.

1647 E-Filing Issues: CACM has urged consideration of two issues that
1648 arise in conjunction with development of the next generation of the
1649 CM/ECF system for case management and electronic case filing.

1650 The first issue is whether the Notice of Electronic Filing
1651 that court systems automatically generate should be recognized as
1652 a certificate of service. CACM endorses the concept and asks
1653 consideration "whether the federal rules of procedure should be
1654 amended to allow an NEF to constitute a certificate of service when
1655 the recipient is registered for electronic filing and has consented
1656 to receive notice electronically." This approach would not apply to
1657 litigants that have not registered for electronic filing or have
1658 not consented to electronic service.

1659 The second issue goes to retention of records requiring a
1660 third party's "wet signature." A number of alternatives are
1661 possible. CACM prefers "a national rule specifying that an
1662 electronic signature in the CM/ECF system is *prima facie* evidence
1663 of a valid signature." A person challenging the validity of the
1664 signature would have the burden of proving invalidity.

1665 The introduction of these questions concluded by asking
1666 whether the time has come to establish, under auspices of the
1667 Standing Committee, an all-committees group to work on a variety of
1668 issues that may arise with respect to e-filing. Rule 5(d)(3), for
1669 example, provides for e-filing only according to a local court
1670 rule, and further provides that a local rule may require e-filing
1671 only if reasonable exceptions are allowed. Should this be
1672 reexamined in conjunction with the new CM/ECF system and the
1673 continuing development of electronic communication? Another example
1674 that has been noted repeatedly is Rule 6(d), which allows an
1675 additional 3 days to act after being served by electronic means.
1676 Whatever the situation when this provision was added, is it still
1677 sensible to add the 3 days? No doubt other issues will be
1678 identified. Many of them will be common to several different sets
1679 of rules. When the time comes to address them, a joint enterprise
1680 seems valuable. And the time may be now, or soon.

1681 Discussion began with a report that the Bankruptcy Rules
1682 Committee has proposed a rule on e-signatures that treats e-filings
1683 as if signed in ink. A scanned copy of a paper document signed
1684 under penalty of perjury has the same effect as a wet signature.
1685 The filer does not have to retain the originals. "These are
1686 sensitive issues." The Bankruptcy Rules Committee hopes for
1687 guidance on a trans-committee level. There is a great value in

1688 uniformity across the different sets of rules.

1689 It was further noted that there is a federal e-signing
1690 statute, and a Uniform Act that has been adopted in 46 states. Many
1691 federal agencies have e-signature rules. There is a statute for the
1692 IRS. One possibility may be that study by the rules committees will
1693 show problems so general as to warrant a recommendation for
1694 additional legislation. But that possibility lies in the future, as
1695 something the joint enterprise may conclude is useful more than as
1696 something to be pursued at the outset.

1697 The discussion of e-signing provoked a reminder that there are
1698 many issues in addition to e-signatures. Changes in e-filing rules
1699 may well prove desirable. Much will depend on the final shape of
1700 the next-generation CM/ECF system.

1701 Discussion concluded by endorsing the value of launching a
1702 project that brings all the advisory committees together under the
1703 guidance of the Standing Committee.

1704 Restricted Filers: The next generation of the CM/ECF system will
1705 include a national database, available only to "designated court
1706 users," that identifies "restricted filers." Examples of restricted
1707 filers are prisoners subject to restrictions under the Prisoner
1708 Litigation Reform Act and attorneys who have been subject to
1709 disciplinary action. The question arises from the requirement in
1710 Rule 4(a)(1)(C) that a summons must "state the name and address of
1711 the plaintiff's attorney or — if unrepresented — of the plaintiff."
1712 Many restricted filers appear pro se. And many pro se plaintiffs
1713 change addresses frequently. Changed addresses will frustrate
1714 identification. A new address will mark the filer as "new" in the
1715 system. CACM suggests that Rule 4(a)(1)(C) be amended to read: "(C)
1716 state the name and address of the plaintiff's attorney or — if
1717 unrepresented — the plaintiff's name, address, and last four digits
1718 of the social-security number of the plaintiff."

1719 Discussion began with an expression of real concern about
1720 requiring the plaintiff to disclose part of the social security
1721 number. "We need to reflect on the mental makeup of pro se
1722 plaintiffs." Many of them will resist this requirement. There also
1723 is a risk with public availability: it is often easy to get the
1724 first five digits of the number from public data. "We should
1725 require redacting — it will be a real burden."

1726 Safer alternatives might be considered, such as part of a
1727 passport number, or a driver's license number, or the number in a
1728 state-issued identification card. This might be added to the face
1729 of the complaint form. It might be feasible to ask the clerk to
1730 inspect the document. And it may be feasible to find a work-around
1731 for plaintiffs who lack any of these documents.

April 23, 2013 version

1732 The discomfort with using social-security numbers was
1733 expressed by another participant, who suggested that it might help
1734 to require a plaintiff to disclose all names the plaintiff has ever
1735 been known by. And better use of "match technology" might be part
1736 of the solution.
1737
1738 It was asked how often these problems arise: how many
1739 disbarred attorneys attempt to file, how many prisoners who have
1740 maxed-out?

1741 The clerk answered that her office always checks attorneys;
1742 about once a year they catch one who has been disbarred. Her court
1743 has not had much of a problem with maxed-out prisoners. A judge
1744 agreed that his court has a much greater problem with disbarred
1745 attorneys than with other restricted filers.

1746 It was pointed out that the Seventh Circuit's private site can
1747 identify restricted filers with "the press of a button." This
1748 feature could be nationalized. Or party identification can be
1749 sought through PACER.

1750 Bankruptcy courts have similar problems, but they are dealt
1751 with through such means as withdrawing e-filing privileges. It is
1752 not apparent that there is a need for added protections.

1753 These questions seem best addressed initially to those who are
1754 working directly with the next generation CM/ECF system. The
1755 concerns about requiring disclosure of even part of a social-
1756 security number can be conveyed to them. It seems premature to
1757 attempt judgments about Civil Rules amendments before there is a
1758 better sense of how the new CM/ECF system will work, what burdens
1759 may be placed on clerks' offices, and what burdens may be placed on
1760 plaintiffs. These reactions will be communicated to the Committee
1761 on Court Administration and Case Management.

1762 *Rule 62*

1763 The Appellate Rules Committee is carrying forward work on
1764 stays pending appeal and appeal bonds. It is recognized that the
1765 work is likely to involve Rule 62. The questions involve such
1766 matters as the fit between the 14-day automatic stay, the 28-day
1767 period after judgment to move for relief under Rules 50, 52, and
1768 59, and the 30-day period to file a notice of appeal. Other
1769 questions also are being studied. There are not yet any specific
1770 proposals to amend the Civil Rules.

1771 It was agreed that the Civil Rules Committee should designate
1772 someone to work with the Appellate Rules Committee. Depending on
1773 the choices of the Appellate Rules Committee, it may prove
1774 desirable to appoint a joint subcommittee in the form that has

1775 proved useful in past projects that require the integration of
1776 Civil Rules with Appellate Rules.

1777 *International Child Abduction: Prompt Return*

1778 *Chafin v. Chafin*, 133 S.Ct. 1017 (2013), ruled that return of
1779 a mother and child to the habitual residence determined by the
1780 district court under the Hague Convention on the Civil Aspects of
1781 International Child Abduction did not moot the father's appeal. The
1782 Court's opinion emphasized that courts nonetheless "should take
1783 steps to decide these cases as expeditiously as possible * * *.
1784 Many courts already do so." Justice Ginsburg also emphasized the
1785 need for speedy decision, and in footnote suggested that "the
1786 Advisory Committees on Federal Rules of Civil and Appellate
1787 Procedure might consider whether uniform rules for expediting
1788 [Convention] proceedings are in order." 133 S.Ct. at 1029 n. 3.

1789 Justice Ginsburg's suggestion was introduced with full
1790 agreement that these cases should be treated with all possible
1791 dispatch. The question is whether that goal is better furthered by
1792 adopting encouraging provisions in court rules or by other means.

1793 The need for court rules may be examined in light of the
1794 Court's recognition that most courts understand the need for prompt
1795 decision and do their best to move these cases as quickly as
1796 possible. The Court's encouragement will add force to this common
1797 approach. Judicial education efforts can supplement the Court's
1798 urging. The Federal Judicial Center International Litigation Guide,
1799 for example, includes a 2012 volume on the Hague Convention; the
1800 chapter on procedural issues begins with four pages stressing that
1801 expeditious handling is required by Article 11 of the Convention
1802 and provided by the courts.

1803 Given these alternative resources, there is added reason to
1804 consider the reasons that may weigh against adopting a Convention-
1805 specific court rule. State courts have concurrent jurisdiction of
1806 these proceedings, so a federal court rule would not cover all
1807 cases. More importantly, the Judicial Conference has a longstanding
1808 and regularly renewed policy opposing statutes or rules that give
1809 docket priority to specific types of litigation. One priority, or
1810 a few priorities, could easily interfere with management of
1811 conflicting needs for immediate attention by a court burdened by
1812 many cases of many different types. The road from one priority to
1813 many priorities, moreover, is all too easy to follow. Conflicting
1814 priority commands would inevitably emerge, confusing and impeding
1815 wise allocation of scarce judicial resources.

1816 Discussion began with a judge's suggestion that FJC education
1817 of judges will work better than a court rule.

1818 Another judge recalled spending a year with a Hague Convention
1819 case, involving two parents "who hate each other." The need for
1820 prompt disposition is well understood. The problems with
1821 implementing it are not susceptible to resolution by court rule.
1822 But at least one parent will provide constant reminders of the need
1823 for speed. And a court of appeals can expedite matters by deciding,
1824 "opinion to follow."

1825 Still another judge observed that "ten minutes of reading will
1826 instruct any judge on the need for expedition. I cannot imagine a
1827 judge who will not understand the need." His court gets these cases
1828 constantly, and although it is one of the busiest courts in the
1829 country the judges manage to resolve these cases promptly.

1830 Still another judge reported that discussion with the Mass
1831 Torts group at the Judicial Conference meeting in March found
1832 agreement that a rule will not help. The Supreme Court has resolved
1833 the mootness problem. Any court of appeals will expedite the
1834 appeals now that they are not open to dismissal for mootness if
1835 return to the home country has been accomplished.

1836 The Committee decided that no action should be taken on this
1837 matter.

1838 *Rule 23*

1839 Dean Klonoff reported for the Rule 23 Subcommittee. Last
1840 November,the Subcommittee identified a list of issues that may
1841 deserve study. The issues were divided between "front burner" and
1842 "back burner" categories. The lists are tentative, both in
1843 determining what issues deserve study and in assigning priorities
1844 among whatever issues come to be studied. Further work has been
1845 stayed pending disposition of the several class-action cases
1846 pending in the Supreme Court.

1847 The 5:4 decision in the *Comcast* case rewrote the question
1848 presented and went off on narrow grounds. It is a technical
1849 decision, followed by a grant-vacate-remand disposition of a couple
1850 of similar cases. It does not provide the guidance that some had
1851 hoped to come from the Court. The Subcommittee will need to study
1852 the impact of this decision. The *Amgen* decision is largely limited
1853 to securities class actions. The Subcommittee will resume
1854 deliberations, and at some point will want to consult with the
1855 bench and bar on what issues should be studied in depth. A
1856 miniconference is a likely means of gathering views. But a
1857 miniconference or similar venture is not likely in the near future.

1858 A Subcommittee member pointed out that the Appellate Rules
1859 Committee is considering whether rules should be adopted to govern
1860 settlement by an objector pending appeal from a class-action

1861 judgment. "This is a problem. There has been a lot of discussion.
1862 The Subcommittee will want to work on this." And it will be
1863 important to see what impact *Comcast* has, "if any."

1864 *Pleading*

1865 It was noted that the agenda continues to hold a place for
1866 consideration of pleading standards as they evolve in reaction to
1867 the *Twombly* and *Iqbal* decisions. The Federal Judicial Center is
1868 working on a study of all dispositive motions, advancing — among
1869 other things — its initial study of the impact of these decisions.
1870 No decision has been made as to the appropriate time to return to
1871 these questions.

1872 *Publicizing Rules Amendments*

1873 It has been suggested that the Committee should consider
1874 whether more should be done to publicize rules amendments as they
1875 happen. The seeming widespread disregard of Evidence Rule 502 in
1876 its early years provides an object lesson on the occasional — or
1877 perhaps more frequent — failure of rules amendments to be
1878 recognized and implemented by the bar.

1879 A first effort might be made to draw attention to the pending
1880 revisions of Rule 45. It will be important to help the bench and
1881 bar understand how they will work. Technically, a lawyer who on
1882 December 2 issues a subpoena from a district court in California
1883 for discovery in an action pending in the district court in Arizona
1884 will issue a nonbinding instrument. Under revised Rule 45 the
1885 subpoena must issue from the Arizona court where the action is
1886 pending.

1887 Another example of a rule change that will affect many lawyers
1888 is the impending change of the Appellate Rules to collapse separate
1889 statements of the case and of the facts into a single statement. It
1890 will be important to educate lawyers in this change.

1891 Initial suggestions were that the Federal Judicial Center
1892 might be helpful in communicating rules changes to the federal
1893 courts. There might be some way for the Committee to draw attention
1894 to new rules by an open letter, or by an article prepared by some
1895 appropriate person or entity. The Evidence Rules Committee, for
1896 example, became concerned that Evidence Rule 502 is underutilized.
1897 It held a conference and the Reporter, Professor Capra, wrote it up
1898 as a law review article. But any such efforts must be tempered by
1899 concern about the Committee’s proper role. There is a real risk
1900 that works that seem to be sponsored by the Committee may generate
1901 post hoc and spurious "legislative history," giving unintended
1902 meaning to the new rules.

1903 A Committee member said that "web site practitioners"
1904 regularly visit the sites of the FJC and the Judicial Panel on
1905 Multidistrict Litigation. These lawyers would read new rules,
1906 whether the full text is posted on the site or whether instead
1907 there is a simple "alert" that new rules have been adopted.

1908 Another member noted that the Civil Procedure ListServ can be
1909 used to draw the attention of law professors.

1910 The ABA Litigation Section was suggested as another source to
1911 reach many lawyers. The Litigation Section is the largest ABA
1912 section, and regularly holds CLE programs. A Committee member said
1913 that Rule 45 would be included in upcoming programs — that it is
1914 easy to accomplish this form of education.

1915 Beyond the ABA, the Federal Bar Association could be notified
1916 of rules changes, expecting that the chapters in large cities will
1917 be an effective means of communication.

1918 The courts of appeals have regular conferences. It should be
1919 possible to include a ten-minute identification of new rules on
1920 their programs.

1921 A more adventuresome suggestion from an observer was that
1922 perhaps CM/ECF systems could be programmed to provide an automatic
1923 notice of rules changes to lawyers the first time each lawyer signs
1924 into the system.

1925 A practical note was sounded by the observation that new rules
1926 generally apply to pending cases. The Administrative Office Forms
1927 Group has begun work on a new subpoena form for bankruptcy cases.
1928 These forms have been sent to the Civil Rules Committee, and are
1929 being considered here as well. And the bankruptcy courts have a
1930 "blast e-mail" system that is sent to all e-filers whenever a rule
1931 or form is changed, with links to the new version. All federal
1932 courts could be urged to do this.

1933 The Administrative Office staff noted that the package of
1934 rules amendments the Supreme Court sends to Congress is sent to all
1935 federal judges. The Administrative Office can ask court clerks and
1936 executives to send notice to all e-filers. The notice could simply
1937 advise consulting the e-file versions of new rules on the AO web
1938 site. And proposed amendments are sent to legal publishers.

1939 A still more intriguing observation was that the Advisory
1940 Committee may have submitted an amicus brief to the Supreme Court
1941 in the case considering the validity of Rule 35, *Sibbach v. Wilson*.

1942 Cautions were sounded about the extent to which the FJC might
1943 be involved. The FJC regularly engages in many efforts to keep

1944 federal judges current on new developments, including rules
1945 amendments. Court attorneys are included in these efforts. But it
1946 has not taken on the role of continuing education for the bar in
1947 general.

1948 *Impending Publication*

1949 Educating bench and bar on newly adopted rules is important.
1950 It also is important to the process to encourage widespread
1951 participation in the public comment process when proposed rules are
1952 published for comment. Notices are sent to all state bars, and to
1953 a goodly number of other groups and individuals that have indicated
1954 interest in the process. Committee members were encouraged to think
1955 of ways to stimulate interest that might be adopted if, as
1956 recommended, extensive sets of amendments are approved for
1957 publication this summer.

1958 *Technology Assisted Review*

1959 Computers are being put to the task of sorting through vast
1960 amounts of computer-based information to reduce the burdens of
1961 discovery. Much attention focuses on retrieving information to
1962 respond to discovery requests, but computers can be used for other
1963 discovery-related purposes as well. A party receiving responses to
1964 discovery requests, for example, may use computer searches to
1965 extract the useful information from the produced documents and also
1966 to search for leads to other responsive and relevant materials that
1967 were not included in the responses. The most sophisticated of these
1968 computer-assisted methods have come to be referred to as
1969 "technology assisted review." One of these methods, called
1970 "predictive coding," relies on humans familiar with the litigation
1971 to "teach" a computer how to identify relevant and responsive
1972 documents.

1973 To assist the Committee in becoming familiar with the
1974 opportunities to advance the cause of proportional discovery
1975 through advanced computer search techniques, The Duke Law School
1976 Center for Judicial Studies presented a panel on predictive coding.
1977 The panel presentation was an introduction to a day-long program to
1978 be presented by the Center on April 19. The panel was moderated by
1979 John K. Rabiej, Director of the Center, and included Gordon V.
1980 Cormack, Maura R. Grossman, John J. Rosenthal, and Ian J. Wilson.

1981 The panel presentation was followed by questions. The
1982 questions and answers reflected several points. Many lawyers,
1983 litigants, and courts are unfamiliar with TAR or uneasy about it.
1984 At its best, it can recall a higher fraction of relevant documents
1985 than human reviewers find, and at lower cost. One source of cost
1986 saving can be greater precision in selecting only relevant
1987 documents; fewer documents to review for privilege,

1988 confidentiality, or other protections means lower cost for a
1989 process that most litigants prefer to conduct by human review. It
1990 is important to recognize that properly implemented search methods
1991 are at least as good as human review, but to accept that neither
1992 approach achieves perfection. "It is not easy to defend a discovery
1993 response process that yields 80% recall." And it must be recognized
1994 that not every process that may be labeled as technology assisted
1995 review is equal to every other process. The market of providers is
1996 likely to sort itself out in the coming years.

1997 *Next Meeting*

1998 The next meeting is set for November 7 and 8 in Washington,
1999 D.C. If the recommendations to publish rules proposals are approved
2000 — Rule 37(e) changes and some less important proposals have already
2001 been approved — that will be a good time to schedule the first
2002 public hearing on the proposals. Given the history of past November
2003 hearings, and the likelihood that the November agenda will be
2004 relatively light in order to conserve energy for the work that will
2005 remain in digesting comments and testimony on the published
2006 proposals, it seems safe to set aside the first day, November 7,
2007 for the hearing. If the hearing occupies the first full day, it may
2008 be necessary to anticipate a full day for the meeting on November
2009 8.

2010 *A Thank You*

2011 Judge Campbell concluded the meeting by expressing warm thanks
2012 to the University of Oklahoma and the Law School for being
wonderful hosts.

Respectfully submitted

Edward H. Cooper
Reporter

April 23, 2013 version

TAB 3

THIS PAGE INTENTIONALLY BLANK

TAB 3A

THIS PAGE INTENTIONALLY BLANK

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

From: Honorable Reena Raggi, Chair
Advisory Committee on Federal Rules of Criminal Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Criminal Rules

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Advisory Committee") met on April 25, 2013, in Durham, North Carolina, and took action on a number of proposals. The Draft Minutes are attached. (Tab D).

This report presents two action item for Standing Committee consideration:

(1) approval to transmit to the Judicial Conference a proposed amendment to Rule 12 (pretrial motions), and a conforming amendment to Rule 34; and

(2) approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (adding consular notification).

II. Action Items – Recommendations to Transmit Amendments to the Judicial Conference

1. ACTION ITEM – Rules 12 and 34

The Advisory Committee recommends approval of amendments to Rules 12 and 34. To facilitate consideration of this proposal, the following materials are attached:

Tab B.1 - 2013 Submitted Rule 12 Amendment – "clean" version (shows how Rule 12 would look if the Standing Committee approves of the Advisory Committee's proposed changes)
Tab B.2 - Blackline comparison of Current and Submitted Rule 12, showing proposed amendments
Tab B.3 - Blackline comparison of Current and Submitted Rule 34, showing proposed amendments
Tab B.4 - Reporters' 2013 Memorandum to Advisory Committee on Development of Rule 12 Amendment
Tab B.5 - 2011 Published Amendments to Rules 12 and 34

The proposed amendments originate in a 2006 request from the Department of Justice that "failure to state an offense" be deleted from current Rule 12(b)(3) as a defect that can be raised "at any time," in light of the Supreme Court's decision in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002), holding that "failure to state an offense" is not a jurisdictional defect.

The Advisory Committee's efforts to effect such an amendment sparked extensive discussion within the Advisory Committee and between the Advisory and Standing Committees regarding various aspects of Rule 12. This resulted in three separate amendment proposals being presented to the Standing Committee, the third of which was approved for publication in August 2011. See Tab B.5. In response to the thoughtful public comments received and upon its own further review, the Advisory Committee has revised its third proposal for amendment further. These revisions will not require republication. A detailed chronology of the amendment's evolution, including the public comments received and changes made following publication, is contained in the Reporters' 2013 Memorandum to the Advisory Committee, a copy of which is attached. See Tab B.4.[1]

---

[1]After publication, the Committee made the following six changes to the published amendment of Rule 12:

(1) restored language that had been removed from 12(b)(2) as to purpose of rule, and relocated it to (b)(1);
(2) deleted double jeopardy claims from the proposed list of 12(b)(3) claims that must be raised before trial;
(3) deleted statute of limitations from the proposed list of 12(b)(3) claims that must be raised before trial;
(4) added 12(c)(2) making explicit district courts' authority to extend or reset deadline for

The Advisory Committee now presents to the Standing Committee proposed amendments to Rules 12 and 34 that effect the original deletion requested by the Justice Department, clarify other aspects of the rules, and take into account public comments. See Tab B.1, B.2. The submitted proposals have the unanimous approval of the Advisory Committee.

The substantive features of the submitted amendment to Rule 12 (which also restyle these rules) can be summarized as follows:

(1) By contrast to current Rule 12(b)(1), which starts with an unexplained cross-reference to Rule 47 (discussing form, content, and timing of motions), submitted Rule 12(b)(1) achieves greater clarity by stating the rule's general purpose—the filing of pretrial motions (relocated from current rule 12(b))—before cross-referencing Rule 47.

(2) Submitted Rule 12(b)(2) identifies motions that may be made at any time separately from Rule 12(b)(3), which identifies motions that must be made before trial. This provides greater clarity—visually as well as textually—than current Rule 12(b)(3), which identifies motions that may be made at any time only in an ellipsis exception to otherwise mandatory motions alleging defects in the indictment or information.

(3) Submitted Rule 12(b)(2) recognizes lack of jurisdiction as the only motion that may be made "at any time while the case is pending," thus effecting the Justice Department's request not to accord that status to failure to state an offense.

(4) Submitted Rule 12(b)(3) provides clearer notice with respect to motions that must be made before trial.

   (a) At the start, it clarifies that its motion mandate is dependent on two conditions:

      i. the basis for the motion must be reasonably available before

---

pretrial motions;

(5) deleted language referencing Rule 52;

(6) deleted proposed new language requiring showing of "cause and prejudice" and restored current "good cause" as standard for hearing late filed motions.

The third and sixth changes, made by the Advisory Committee at its April meeting, are not covered in the Reporter's March 2013 memo, but are explained in the draft minutes of the April meeting.

The Advisory Committee has amended the published Committee Note to reflect these changes to the rule's text and to state explicitly that the rule does not change statutory deadlines under provisions such as the Jury Selection and Service Act. See Tab B.1, B.2.

trial, and

ii. the motion must be capable of resolution before trial.

This ensures that motions are raised pretrial when warranted while safeguarding against a rigid filing requirement that could be unfair to defendants.

(b) Submitted Rule 12(b)(3)(A)-(B) provide more specific notice of the motions that must be filed pretrial if the just referenced twin conditions are satisfied. While the general categories of "defect[s] in instituting the prosecution" (current Rule 12(b)(3)(A)) and "defect[s] in the indictment or information (current Rule 12(b)(3)(B)) are retained, they are now clarified with illustrative non-exhaustive lists.

Submitted Rule 12(b)(3)(A) thus lists as defects in instituting the prosecution that must be raised before trial:

i. improper venue,
ii. preindictment delay,
iii. violation of the constitutional right to a speedy trial,
iv. selective or vindictive prosecution, and
v. error in grand jury or preliminary hearing proceedings.

Submitted Rule 12(b)(3)(B) lists as defects in the indictment or information that must be raised before trial the following:

i. duplicity,
ii. multiplicity,
iii. lack of specificity,
iv. improper joinder, and
v. failure to state an offense.

The noted inclusion of failure to state an offense in Rule 12(b)(3)(B) completes the amendment originally sought by the Department of Justice.

The submitted rule does not include double jeopardy or statute of limitations challenges among required pre-trial motions in light of concerns raised in public comments. The Advisory Committee is of the view that subjecting such motions to a rule mandate is premature, requiring further consideration as to the appropriate standards for review for untimely filings.

(c) Submitted Rule 12(b)(3)(C)-(E) duplicate the current rule in continuing to

require that motions to suppress evidence, to sever charges or defendants, and to seek Rule 16 discovery must be made before trial.

(5) Submitted Rule 12(c) identifies both the deadlines for filing motions and the consequences of missing those deadlines. Grouping these two subjects together in one section is a visual improvement over the current rule, which discusses deadlines in (c) and consequences in later provision (e). More specifically,

(a) Submitted Rule 12(c)(1) tracks the current rule's language in recognizing the discretion afforded district courts to set motion deadlines. Nevertheless, it now adds a default deadline—the start of trial—if the district court fails to set a motion deadline. This affords defendants the maximum time to make mandatory pretrial motions, but it forecloses an argument that, because the district court did not set a motion deadline, a defendant need not comply with the rule's mandate to file certain motions before trial.

(b) Submitted Rule 12(c)(2) explicitly acknowledges district court discretion to extend or reset motion deadlines at any time before trial. This discretion, which is implicit in the current rule, permits district courts to entertain late-filed motions at any time before jeopardy attaches as warranted. It also allows district courts to avoide subsequent claims that defense counsel was constitutionally ineffective for failing to meet a filing deadline.

(c) Submitted Rule 12(c)(3)(A) retains current Rule 12(e)'s standard of "good cause" for review of untimely motions (with the exception of failure to state an offense discussed separately in submitted Rule 12(c)(3)(B)). At the same time, the submitted rule does not employ the word "waiver" as in the current rule because that term, in other contexts, is understood to mean a knowing and affirmative surrender of rights.

With respect to "good cause," the proposed Advisory Committee Note indicates that courts have generally construed those words, as used in current Rule 12(e), to require a showing of both cause and prejudice before an untimely claim may be considered. The published proposed amendment substituted cause and prejudice for good cause, thinking to achieve greater clarity, but after reviewing public comments and its own further consideration of the issue, the Advisory Committee decided to retain the term "good cause," to avoid both any suggestion of a change from the current standard and arguments based on some constructions of "cause and prejudice" in other contexts, notably, the miscarriage of justice exception to this standard in habeas corpus jurisprudence, not apt to Rule 12.

The amended rule, like the current one, continues to make no reference to

Rule 52 (providing for plain error review of defaulted claims), thereby permitting the Courts of Appeals to decide if and how to apply Rules 12 and 52 when arguments that should have been the subject of required Rule 12(b)(3) motions are raised for the first time on appeal.

(d) Insofar as the submitted amendment, at Rule 12(b)(3)(B), would now require a defendant to raise a claim of failure to state an offense before trial, submitted Rule 12(c)(3)(B) provides that the standard of review when such a claim is untimely is not "good cause" (i.e., cause and prejudice) but simply "prejudice." The Advisory Committee thinks this standard provides a sufficient incentive for a defendant to raise such a claim before trial, while also recognizing the fundamental nature of this particular claim and closely approximating current law, which permits review without a showing of "cause."

A conforming amendment to Rule 34 that omits language requiring a court to arrest judgment if "the indictment or information does not charge an offense," is also presented for approval.

Recommendation: The Advisory Committee recommends that amendments to Rule 12 and 34 be transmitted to the Judicial Conference as amended following publication.

2. ACTION ITEM – Rules 5 and 58

The Advisory Committee recommends approval of its second proposal to amend Rules 5 and 58 to provide for advice concerning consular notification, as amended following publication. To facilitate review of this proposal, the following materials are attached:

Tab C.1 - 2013 Submitted Rules 5 and 58 Amendments – "clean" version (shows how Rules 5 and 58 would look if the Standing Committee approves of the Advisory Committee's proposed changes)
Tab C.2 - Blackline comparison of Current and Submitted Rules 5 and 58, showing proposed amendments
Tab C.3 - 2012 Published Amendments to Rules 5 and 58
Tab C.4 - Amendment Proposal Returned from the Supreme Court

In 2010, the Justice Department, at the urging of the State Department, proposed amendments to Rules 5 and 58, the rules specifying procedures for initial proceedings in felony and misdemeanor cases respectively, to provide notice to defendants of consular notification obligations arising under Article 36 of the multilateral Vienna Convention on Consular Relations ("Vienna Convention"), as well as various bilateral treaties.

The first proposed amendments responding to this request were published for public comment and subsequently approved by the Advisory Committee, the Standing Committee, and the

Judicial Conference. In April 2012, however, the Supreme Court returned the amendments to the Advisory Committee for further consideration. See Tab C.4.

At its April 2012 meeting, the Advisory Committee identified two possible concerns with the returned proposal: (1) perceived intrusion on executive discretion in conducting foreign affairs, both generally and specifically as it pertains to deciding how, or even if, to carry out treaty obligations; and (2) perceived conferral on persons other than the sovereign signatories to treaties—specifically, criminal defendants—of rights to demand compliance with treaty provisions.[2]

The amendments were redrafted to respond to these concerns. The redrafted amendments were carefully worded to provide notice without any attending suggestion of individual rights or remedies. Indeed, the Committee Note emphasizes that the proposed rules do not themselves create any such rights or remedies. The Standing Committee approved publication of the redrafted amendments in June 2012. See Tab C.3.

Upon review of received public comments, as well as its own further consideration, the Advisory Committee has made the following changes to the proposed amendments, none of which requires further publication. See Tab C.1-C.2.

(1) The introductory phrase of Submitted Rule 5(d)(1) and 58(b)(2), now provides for the specified advice to be given to all defendants, by contrast to the published rule, which had provided for consular notification to be given "if the defendant is held in custody and is not a United States citizen." See Tab C.3.

The change was made at the suggestion of the Federal Magistrate Judges Association ("FMJA") and the National Association of Criminal Defense Attorneys. The FMJA, in particular, observed that the quoted language could be construed to require the arraigning judicial officer to ascertain a defendant's citizenship, an inquiry that could involve self-incrimination. Providing consular notice to all defendants without such an inquiry parallels Rule 11(b)(1)(O) (which the Supreme Court has now transmitted to Congress), which provides for all defendants to be given notice at sentencing of possible immigration consequences without specific inquiry into their nationality or status in the United States.

As for the "in custody" requirement, interested parties disagreed as to when a defendant was

---

[2]Insofar as Article 36 of the Vienna Convention provides for signatory nations to advise detained foreign nationals of other signatory nations of an opportunity to contact their home country's consulate, litigation has not yet resolved whether such a provision gives rise to any individual rights or remedies. *See Sanchez-Llamas v. Oregon,* 548 U.S. 331 (2006) (holding that suppression of evidence was not appropriate remedy for failure to advise foreign national of ability to have consulate notified of arrest and detention regardless of whether Vienna Convention conferred any individual rights). Thus, the Advisory Committee concluded that the remand of the amendment proposal from the Supreme Court could be understood to suggest that the rule may have gotten ahead of settled law on this matter.

"in custody" or "detained." Providing notice to all defendants at their initial appearance not only avoids the need to resolve this question, it avoids the need to consider a further notice requirement when defendants initially admitted to bail are subsequently remanded. Thus, while the Advisory Committee is mindful of the need to avoid adding unnecessary notice requirements to rules governing initial appearances, sentences, etc., it concludes, as now stated in the proposed Committee Note, that "the most effective and efficient method of conveying this [consular notification] information is to provide it to every defendant, without attempting to determine the defendant's citizenship."

(2) At Professor Coquillette's recommendation, the published Committee Note deletes a reference to the Code of Federal Regulations, which might become outdated if the regulation were revised.

Recommendation: The Advisory Committee recommends that the amendments to Rules 5 and 58 be transmitted to the Judicial Conference as amended following publication.

III. Information Item

The Department of Justice has urged amendment of Rule 4 to facilitate service of process on foreign corporations. It submits that the current rule impedes prosecution of foreign corporations that have committed offenses punishable in United States, but that cannot be served for lack of a last known address or principal place of business in the United States. It argues that this has created a "growing class of organizations, particularly foreign corporations" that have gained "'an undue advantage' over the government relating to the initiation of criminal proceedings." The Advisory Committee has referred the matter to a subcommittee for further study and report.

TAB 3B

THIS PAGE INTENTIONALLY BLANK

TAB 3B.1

THIS PAGE INTENTIONALLY BLANK

1 **Rule 12. Pleadings and Pretrial Motions**

2 * * * * *

3 **(b) Pretrial Motions.**

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

7 **(2)** ***Motions That May Be Made at Any Time.*** A motion that the court lacks
8 jurisdiction may be made at any time while the case is pending.

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

12 (A) a defect in instituting the prosecution, including:

13 (i) improper venue;

14 (ii) preindictment delay;

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

16 (iv) selective or vindictive prosecution; and

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

18 (B) a defect in the indictment or information, including:

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

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

22 (iii) lack of specificity;

23 (iv) improper joinder; and

24 (v) failure to state an offense;

25 (C) suppression of evidence;

26 (D) severance of charges or defendants under Rule 14; and

27 (E) discovery under Rule 16.

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

29 (A) *At the Government's Discretion*. At the arraignment or as soon afterward
30 as practicable, the government may notify the defendant of its intent to use

31 specified evidence at trial in order to afford the defendant an opportunity to object
32 before trial under Rule 12(b)(3)(C).
33 (B) *At the Defendant's Request*. At the arraignment or as soon afterward as
34 practicable, the defendant may, in order to have an opportunity to move to
35 suppress evidence under Rule 12(b)(3)(C), request notice of the government's
36 intent to use (in its evidence-in-chief at trial) any evidence that the defendant may
37 be entitled to discover under Rule 16.
38 **(c) Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.**
39 **(1)** ***Setting the Deadline.*** The court may, at the arraignment or as soon afterward as
40 practicable, set the deadline for the parties to make pretrial motions and may also
41 schedule a motion hearing. If the court does not set one, the deadline is the start of trial.
42 **(2)** ***Extending or Resetting the Deadline.*** At any time before trial, the court may extend
43 or reset the deadline for pretrial motions.
44 **(3)** ***Consequences of Not Making a Timely Motion Under Rule 12(b)(3).*** If a party does
45 not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a
46 court may consider the defense, objection, or request if:
47 (A) the party shows good cause; or
48 (B) for a claim of failure to state an offense, the defendant shows prejudice.
49 **(d) Ruling on a Motion.** The court must decide every pretrial motion before trial unless it
50 finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the
51 deferral will adversely affect a party's right to appeal. When factual issues are involved in
52 deciding a motion, the court must state its essential findings on the record.
53 **(e)** **[Reserved]**
54
55 **Committee Note**
56
57 **Rule 12(b)(1).** The language formerly in (b)(2), which provided that "any defense**,**
58 objection, or request that the court can determine without trial of the general issue" may be
59 raised by motion before trial, has been relocated here. The more modern phrase "trial on the

60 merits" is substituted for the more archaic phrase "trial of the general issue." No change in
61 meaning is intended.
62
63 **Rule 12(b)(2).** As revised, subdivision (b)(2) states that lack of jurisdiction may be
64 raised at any time the case is pending. This provision was relocated from its previous placement
65 at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.
66
67 **Rule 12(b)(3).** The amendment clarifies which motions must be raised before trial.
68
69 The introductory language includes two important limitations. The basis for the motion
70 must be one that is "reasonably available" and the motion must be one that the court can
71 determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally
72 will be available before trial and they can – and should – be resolved then. The Committee
73 recognized, however, that in some cases, a party may not have access to the information needed
74 to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to
75 trial. The "then reasonably available" language is intended to ensure that a claim a party could
76 not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3).
77 Additionally, only those issues that can be determined "without a trial on the merits" need be
78 raised by motion before trial. Just as in (b)(1), the more modern phrase "trial on the merits" is
79 substituted for the more archaic phrase "trial of the general issue." No change in meaning is
80 intended.
81
82 The rule's command that motions alleging "a defect in instituting the prosecution" and
83 "errors in the indictment or information" must be made before trial is unchanged. The
84 amendment adds a nonexclusive list of commonly raised claims under each category to help
85 ensure that such claims are not overlooked. The Rule is not intended to and does not affect or
86 supersede statutory provisions that establish the time to make specific motions, such as motions
87 under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).
88

89 Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any
90 time while the case is pending to hear a claim that the "indictment or information fails . . . to
91 state an offense." This specific charging error was previously considered fatal whenever raised
92 and was excluded from the general requirement that charging deficiencies be raised prior to trial.
93 The Supreme Court abandoned any jurisdictional justification for the exception in *United States*
94 *v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar
95 as it held that a defective indictment deprives a court of jurisdiction").
96
97 **Rule 12(c).** As revised, subdivision (c) governs both the deadline for making pretrial
98 motions and the consequences of failing to meet the deadline for motions that must be made
99 before trial under Rule 12(b)(3).
100
101 As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the
102 existing provisions for establishing the time when pretrial motions must be made, and adds a
103 sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start
104 of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the
105 present rule contains the language "or by any extension the court provides," which anticipates
106 that a district court has the discretion to extend the deadline for pretrial motions. New paragraph
107 (c)(2) recognizes this discretion explicitly and relocates the Rule's mention of it to a more logical
108 place - after the provision concerning setting the deadline and before the provision concerning
109 the consequences of not meeting the deadline.
110
111 New paragraph (c)(3) governs the review of untimely claims, previously addressed in
112 Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set
113 under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to
114 the intentional relinquishment of a known right, Rule 12(e) has never required any determination
115 that a party who failed to make a timely motion intended to relinquish a defense, objection, or
116 request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the
117 Committee decided not to employ the term "waiver" in new paragraph (c)(3).
118

119 The standard for review of untimely claims under new paragraph 12(c)(3) depends on the
120 nature of the defense, objection, or request. The general standard for claims that must be raised
121 before trial under Rule 12(b)(3) is stated in (c)(3)(A), which – like the present rule -- requires
122 that the party seeking relief show "good cause" for failure to raise a claim by the deadline. The
123 Supreme Court and lower federal courts have interpreted the "good cause" standard under Rule
124 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice"
125 resulting from the error. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v.*
126 *United States*, 371 U.S. 341, 363 (1963).
127
128 New subparagraph (c)(3)(B) provides a different standard for one specific claim: the
129 failure of the charging document to state an offense. The Committee concluded that judicial
130 review of these claims, which go to adequacy of the notice afforded to the defendant, and the
131 power to bring a defendant to trial or to impose punishment, should be available without a
132 showing of "good cause." Rather, review should be available whenever a defendant shows
133 prejudice from the failure to state a claim. Accordingly, subparagraph (c)(3)(B) provides that the
134 court can consider these claims if the party "shows prejudice." Unlike plain error review under
135 Rule 52(b), the standard under Rule (12)(c)(3)(B) does not require a showing that the error was
136 "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial
137 proceedings." Nevertheless, it will not always be possible for a defendant to make the required
138 showing of prejudice. For example, in some cases in which the charging document omitted an
139 element of the offense, the defendant may have admitted the element as part of a guilty plea after
140 having been afforded timely notice by other means.
141
142 **Rule 12(e).** The effect of failure to raise issues by a pretrial motion have been relocated
143 from (e) to (c)(3).
144
145 **DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES**
146 **CHANGES MADE AFTER PUBLICATION**
147

148 Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and
149 relocated in (b)(1). The change begins the Rule's treatment of pretrial motions with an
150 appropriate general statement and responds to concerns that the deletion might have been
151 perceived as unintentionally restricting the district courts' authority to rule on pretrial motions.
152 The references to "double jeopardy" and "statute of limitations" were dropped from the
153 nonexclusive list in (b)(3)(A) to permit further debate over the treatment of such claims. New
154 paragraph (c)(2) was added to state explicitly the district court's authority to extend or reset the
155 deadline for pretrial motions; this authority had been recognized implicitly in language being
156 deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was omitted as
157 unnecessarily controversial. In subparagraph (c)(3)(A), the current language "good cause" was
158 retained. In subparagraph (c)(3)(B), the reference to "double jeopardy" was omitted to mirror the
159 omission from (b)(3)(A), and the word "only" was deleted from the phrase "prejudice only"
160 because it was superfluous. Finally, the Committee Note was amended to reflect these post-
161 publication changes and to state explicitly that the rule is not intended to change or supersede
162 statutory deadlines under provisions such as the Jury Selection and Service Act.
163
164 **PUBLIC COMMENTS**
165
166 **Assistant Attorney General Lanny Breuer (11-CR-003)** supported the amendment
167 because it requires claims of failure to state an offense to be raised before trial; provides clarity
168 by listing specific claims and defenses that must be raised before trial; includes language stating
169 that a motion must be made before trial only when the basis for the motion is "reasonably
170 available"; eliminates the confusing term "waiver" and clarifies the good cause standard,
171 specifying that "cause and prejudice" must generally be shown; and provides a more lenient
172 standard for the review of objections based upon double jeopardy and failure to state a claim.
173
174 **The Federal Magistrate Judges Association (FMJA) (11-CR-004)** endorsed the
175 amendment to clarify when certain motions must be made and the consequences of failure to
176 raise the issues in a timely manner.
177

178 **The New York Council of Defense Lawyers (NYCDL) (11-CR-007)** noted that the
179 amendment would bring "valuable clarity to many facets of Rule 12," but urged significant
180 changes before adoption. NYCDL (1) objected to requiring that defendants raise before trial
181 claims alleging double jeopardy, statute of limitations, multiplicity, duplicity, and other
182 constitutional claims; and (2) argued that the "cause and prejudice" standard for claims presented
183 for the first time in the district court and on appeal "is unduly harsh and prejudicial to
184 defendants."
185
186 **The Federal Public Defenders (FPD) (11-CR-008**) opposed the amendment on the
187 ground that it would create uncertainty regarding what motions can be decided before trial and
188 "potentially alter existing settled law" in this regard; increase litigation; "[c]reate an impossibly
189 high and confusing standard for defendants"; "[u]nduly circumscribe traditional and necessary
190 judicial discretion in the handling of courtroom proceedings"; and "[p]otentially" violate their
191 clients' Fifth and Sixth Amendment rights "by allowing grand jury indictments to be broadened
192 through the use of jury instructions."
193
194 **The National Association of Criminal Defense Lawyers (NACDL) (11-CR-010)**
195 praised certain aspects of the amendment, but urged that it should not be adopted without
196 multiple significant changes: deleting the list of claims and defenses that must be raised before
197 trial; clarifying that the rule does not affect statutory time limits for filing certain motions;
198 retaining failure to state an offense as an claim that can be raised at any time; and altering the
199 showing required for untimely motions, which should vary depending on the procedural stage at
200 which the motion is first made.

THIS PAGE INTENTIONALLY BLANK

TAB 3B.2

THIS PAGE INTENTIONALLY BLANK

1 **Rule 12. Pleadings and Pretrial Motions**

2 * * * * *

3 **(b) Pretrial Motions.**

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

7 **(2)** ~~***Motions That May Be Made Before Trial.*** A party may raise by pretrial motion~~
8 ~~any defense, objection, or request that the court can determine without a trial of the~~
9 ~~general issue.~~***Motions That May Be Made at Any Time.*** A motion that the court lacks
10 jurisdiction may be made at any time while the case is pending.

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

14 (A) ~~a motion alleging~~ a defect in instituting the prosecution, including:
15 (i) improper venue;
16 (ii) preindictment delay;
17 (iii) a violation of the constitutional right to a speedy trial;
18 (iv) selective or vindictive prosecution; and
19 (v) an error in the grand-jury proceeding or preliminary hearing;

20 (B) ~~a motion alleging~~ a defect in the indictment or information, including:
21 (i) joining two or more offenses in the same count (duplicity);
22 (ii) charging the same offense in more than one count
23 (multiplicity);
24 (iii) lack of specificity;
25 (iv) improper joinder; and
26 (v) failure to state an offense;

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

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

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

31 and

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

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

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

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

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

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

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

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

53 (A) the party shows good cause; or

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

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

59 **(e) [Reserved]** ~~**Waiver of a Defense, Objection, or Request.** A party waives any Rule~~
60 ~~12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c)~~

~~or by any extension the court provides. For good cause, the court may grant relief from the waiver~~

Committee Note

Rule 12(b)(1). The language formerly in (b)(2), which provided that "any defense**,** objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial, has been relocated here. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

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

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

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

91 The rule's command that motions alleging "a defect in instituting the prosecution" and
92 "errors in the indictment or information" must be made before trial is unchanged. The
93 amendment adds a nonexclusive list of commonly raised claims under each category to help
94 ensure that such claims are not overlooked. The Rule is not intended to and does not affect or
95 supersede statutory provisions that establish the time to make specific motions, such as motions
96 under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).
97
98 Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any
99 time while the case is pending to hear a claim that the "indictment or information fails . . . to
100 state an offense." This specific charging error was previously considered fatal whenever raised
101 and was excluded from the general requirement that charging deficiencies be raised prior to trial.
102 The Supreme Court abandoned any jurisdictional justification for the exception in *United States*
103 *v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar
104 as it held that a defective indictment deprives a court of jurisdiction").
105
106 **Rule 12(c).** As revised, subdivision (c) governs both the deadline for making pretrial
107 motions and the consequences of failing to meet the deadline for motions that must be made
108 before trial under Rule 12(b)(3).
109
110 As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the
111 existing provisions for establishing the time when pretrial motions must be made, and adds a
112 sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start
113 of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the
114 present rule contains the language "or by any extension the court provides," which anticipates
115 that a district court has the discretion to extend the deadline for pretrial motions. New paragraph
116 (c)(2) recognizes this discretion explicitly and relocates the Rule's mention of it to a more logical
117 place - after the provision concerning setting the deadline and before the provision concerning
118 the consequences of not meeting the deadline.
119

120 New paragraph (c)(3) governs the review of untimely claims, previously addressed in
121 Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set
122 under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to
123 the intentional relinquishment of a known right, Rule 12(e) has never required any determination
124 that a party who failed to make a timely motion intended to relinquish a defense, objection, or
125 request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the
126 Committee decided not to employ the term "waiver" in new paragraph (c)(3).
127
128 The standard for review of untimely claims under new paragraph 12(c)(3) depends on the
129 nature of the defense, objection, or request. The general standard for claims that must be raised
130 before trial under Rule 12(b)(3) is stated in (c)(3)(A), which – like the present rule -- requires
131 that the party seeking relief show "good cause" for failure to raise a claim by the deadline. The
132 Supreme Court and lower federal courts have interpreted the "good cause" standard under Rule
133 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice"
134 resulting from the error. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v.*
135 *United States*, 371 U.S. 341, 363 (1963).
136
137 New subparagraph (c)(3)(B) provides a different standard for one specific claim: the
138 failure of the charging document to state an offense. The Committee concluded that judicial
139 review of these claims, which go to adequacy of the notice afforded to the defendant, and the
140 power to bring a defendant to trial or to impose punishment, should be available without a
141 showing of "good cause." Rather, review should be available whenever a defendant shows
142 prejudice from the failure to state a claim. Accordingly, subparagraph (c)(3)(B) provides that the
143 court can consider these claims if the party "shows prejudice." Unlike plain error review under
144 Rule 52(b), the standard under Rule (12)(c)(3)(B) does not require a showing that the error was
145 "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial
146 proceedings." Nevertheless, it will not always be possible for a defendant to make the required
147 showing of prejudice. For example, in some cases in which the charging document omitted an
148 element of the offense, the defendant may have admitted the element as part of a guilty plea after
149 having been afforded timely notice by other means.

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

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES
CHANGES MADE AFTER PUBLICATION

Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and relocated in (b)(1). The change begins the Rule's treatment of pretrial motions with an appropriate general statement and responds to concerns that the deletion might have been perceived as unintentionally restricting the district courts' authority to rule on pretrial motions. The references to "double jeopardy" and "statute of limitations" were dropped from the nonexclusive list in (b)(3)(A) to permit further debate over the treatment of such claims. New paragraph (c)(2) was added to state explicitly the district court's authority to extend or reset the deadline for pretrial motions; this authority had been recognized implicitly in language being deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial. In subparagraph (c)(3)(A), the current language "good cause" was retained. In subparagraph (c)(3)(B), the reference to "double jeopardy" was omitted to mirror the omission from (b)(3)(A), and the word "only" was deleted from the phrase "prejudice only" because it was superfluous. Finally, the Committee Note was amended to reflect these post-publication changes and to state explicitly that the rule is not intended to change or supersede statutory deadlines under provisions such as the Jury Selection and Service Act.

PUBLIC COMMENTS

Assistant Attorney General Lanny Breuer (11-CR-003) supported the amendment because it requires claims of failure to state an offense to be raised before trial; provides clarity by listing specific claims and defenses that must be raised before trial; includes language stating that a motion must be made before trial only when the basis for the motion is "reasonably available"; eliminates the confusing term "waiver" and clarifies the good cause standard,

180 specifying that "cause and prejudice" must generally be shown; and provides a more lenient
181 standard for the review of objections based upon double jeopardy and failure to state a claim.
182
183 **The Federal Magistrate Judges Association (FMJA) (11-CR-004)** endorsed the
184 amendment to clarify when certain motions must be made and the consequences of failure to
185 raise the issues in a timely manner.
186
187 **The New York Council of Defense Lawyers (NYCDL) (11-CR-007)** noted that the
188 amendment would bring "valuable clarity to many facets of Rule 12," but urged significant
189 changes before adoption. NYCDL (1) objected to requiring that defendants raise before trial
190 claims alleging double jeopardy, statute of limitations, multiplicity, duplicity, and other
191 constitutional claims; and (2) argued that the "cause and prejudice" standard for claims presented
192 for the first time in the district court and on appeal "is unduly harsh and prejudicial to
193 defendants."
194
195 **The Federal Public Defenders (FPD) (11-CR-008)** opposed the amendment on the
196 ground that it would create uncertainty regarding what motions can be decided before trial and
197 "potentially alter existing settled law" in this regard; increase litigation; "[c]reate an impossibly
198 high and confusing standard for defendants"; "[u]nduly circumscribe traditional and necessary
199 judicial discretion in the handling of courtroom proceedings"; and "[p]otentially" violate their
200 clients' Fifth and Sixth Amendment rights "by allowing grand jury indictments to be broadened
201 through the use of jury instructions."
202
203 **The National Association of Criminal Defense Lawyers (NACDL) (11-CR-010)**
204 praised certain aspects of the amendment, but urged that it should not be adopted without
205 multiple significant changes: deleting the list of claims and defenses that must be raised before
206 trial; clarifying that the rule does not affect statutory time limits for filing certain motions;
207 retaining failure to state an offense as an claim that can be raised at any time; and altering the
208 showing required for untimely motions, which should vary depending on the procedural stage at
209 which the motion is first made.

THIS PAGE INTENTIONALLY BLANK

TAB 3B.3

THIS PAGE INTENTIONALLY BLANK

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. ~~if:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

NO COMMENTS OR CHANGES AFTER PUBLICATION

THIS PAGE INTENTIONALLY BLANK

TAB 3B.4

THIS PAGE INTENTIONALLY BLANK

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Rule 12**

DATE: **March 24, 2013**

The Criminal Rules Committee has been studying a proposal to amend Fed. R. Crim. P. 12 since 2006. The Committee's proposed amendment to Rule 12 and a conforming change to Rule 34 were published in August 2011, and public comments totaling 47 pages were received from five groups. The reporters prepared a 60 page memorandum analyzing each of the issues raised in the comments. The comments and the reporters' memorandum were considered at length by the Rule 12 Subcommittee, which held a half-day, face-to-face meeting in conjunction with the Advisory Committee's April meeting in San Francisco and a follow-up teleconference. After the Advisory Committee's October meeting was cancelled due to Hurricane Sandy, the Subcommittee met by teleconference in February 2013 to consider whether to recommend additional changes.

This memorandum begins with a brief history of the proposed amendment, and then presents (1) the Subcommittee's response to the public comments, (2) the Subcommittee's recommendations for changes in the published amendment, and (3) the text of the proposed amendment with the changes proposed by the Subcommittee.

This meeting will, we hope, bring to a successful conclusion eight years of work. We do not attempt to restate in this memorandum all of the analysis on each issue we discuss. Rather, this memorandum provides an overview of the issues and the Subcommittee's conclusions. For more in-depth analysis, we also provide the reporters' March 31, 2012 memorandum to the Subcommittee (updated with additional case citations), a memorandum analyzing double jeopardy claims on a circuit-by-circuit basis (accompanied by a table of cases), and the full text of the public comments. We request that members of the Advisory Committee review the supporting materials in preparation for a full discussion of the issues at the April meeting.

I. THE HISTORY OF THE PROPOSED AMENDMENT

In 2006, in the wake of the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), the Department of Justice asked the Criminal Rules Committee to consider amending Rule 12(b)(3)(B) to require defendants to raise *before trial* any objection that the indictment failed to state an offense by eliminating the provision that required review of such a claim even when raised for the first time after conviction.

The proposal evolved substantially between 2006 and publication in 2011. Two aspects of the development warrant special mention. First, the proposal expanded to address other features of Rule 12's treatment of pretrial motions in general. The proposed amendment, as published:

- states that the requirement that certain claims and defenses be raised before trial applies only if the basis for the motion is "reasonably available" before trial;

- enumerates the common types of motions that courts have found to constitute defects "in instituting the prosecution" and "in the indictment or information" that must be raised before trial; and

- clarifies the general standard for relief from the rule that late-filed claims may not be considered, resolving confusion created by the non-standard use of the term "waiver" to reach situations in which there was no intentional relinquishment of a known right.

Second, one of the most difficult issues has been what standard the courts should apply when a defendant does not raise the failure-to-state-an-offense (FTSO) claim before trial. As described below, the Committee considered a number of different standards for relief from the rule barring consideration of late-filed claims. The proposed rule adopts a two-tier standard: it requires a showing of "cause and prejudice" to consider all untimely claims except for double jeopardy and failure to state an offense, which may be reviewed upon a showing of "prejudice."

2008 – "good cause" – rejected by the Criminal Rules Committee:

In 2008 the Rule 12 Subcommittee proposed an amendment that would have subjected untimely FTSO claims to the standard already applied to all other untimely claims under Rule 12(e). The Committee rejected that draft and asked the Subcommittee to prepare an amendment that would not require a defendant to show "cause" in order to receive relief when the failure to state an offense prejudiced him.

2009 – "prejudice to the substantial rights of the defendant" – approved by the Rules Committee but remanded by the Standing Committee:

Responding to the Committee's concern, in 2009 the Subcommittee tried a different tack, bifurcating the standard for untimely claims and providing a more generous standard for FTSO claims. The proposed amendment revised 12(e) to provide relief from the waiver "when a failure

to state an offense in the indictment or information *has prejudiced a substantial right of the defendant*." The existing "good cause" standard, applied to all other untimely claims, remained unchanged. The amendment was approved by the Committee and sent on to the Standing Committee. The Standing Committee, however, remanded the proposal to the Committee in June 2009, indicating that additional consideration should be given to the concepts of "waiver" and "forfeiture" and how Rule 12 interacted with Rule 52.

2010 – January 2011 – "good cause" for claims that are "waived" and "plain error" for claims that have been "forfeited" – approved by the Rules Committee but remanded by the Standing Committee:

Responding to the Standing Committee's 2009 concerns, the Subcommittee redrafted the proposed amendment to Rule 12, this time attempting to clarify exactly which sorts of claims must be raised, and when a claim was considered "waived" under the rule. To address the confusion in the courts over whether Rule 52(b) plain error review applied and when, the proposed amendment (1) expressly designated plain error review under Rule 52(b) as the standard for obtaining relief for three specific claims (FTSO, double jeopardy, and statute of limitations) under a new subsection entitled "forfeiture," and (2) left in place the "good cause" standard already applied to all other untimely claims, changing the language to "cause and prejudice" to reflect the Supreme Court's interpretation of the "good cause" standard, and moving this into a separate subsection entitled "waiver."

At its January 2011 meeting, the Standing Committee remanded the proposal once again to allow the Advisory Committee to consider several concerns. First, some members expressed concern that the Rule continued to employ the term "waiver" to mean something other than deliberate and knowing relinquishment. Second, some members were concerned that requiring a defendant to show plain error under Rule 52 could be even more difficult than showing "cause and prejudice." If so, the proposed amendment would not create a more generous review standard for the three favored claims. Finally, the reporters were also urged to consider some reorganization.

June 2011 – eliminating terms "waiver" and "forfeiture" – specifying "cause and prejudice" for untimely claims, but "prejudice only" for failure-to-state-an-offense and double jeopardy – Rule 12 governs and Rule 52 does not apply – approved for public comment:

In response to the Standing Committee's additional suggestions and concerns, the Advisory Committee undertook a final and more fundamental revision of Rule 12. It was this proposal that was approved by the Standing Committee in June 2011 and published in August 2011. The key elements of the proposal are noted below.

<u>As published the proposed rule no longer employs the terms "waiver" or "forfeiture."</u> Because the ordinary meaning of waiver is a knowing and intentional relinquishment of a right, the non-standard use of that term in Rule 12 creates unnecessary confusion and difficulties. The Advisory Committee was urged to consider revising the rule to avoid using these terms. Although the elimination of these terms was not part of the purpose of the amendment as originally envisioned,

there was agreement that the use of the term "waiver" has been a source of considerable confusion. Rule 12's initial use of the term waiver predated the Supreme Court's clarification of the difference between waiver and forfeiture and the meaning of plain error in *United States v. Olano*, 507 U.S. 725, 731-32 (1993). Redrafting to avoid the terms "waiver" and "forfeiture" achieves clarity and avoid traps for the unwary.

As published the proposed rule (like earlier proposals in June 2009 and January 2011) bifurcates the standard applicable when a defense, claim, or objection subject to Rule 12(b)(3) is raised in an untimely fashion, depending upon the type of claim at issue.

- Omitting any reference to the term waiver, the amendment as published specifies that for all but two specific types of claims, an untimely claim may be considered only if the party who seeks to raise it shows "cause and prejudice." As explained in greater detail in the reporters' updated March 2012 memorandum to the Rule 12 Subcommittee (included infra), the Committee replaced the phrase "good cause" with "cause and prejudice" to reflect the Supreme Court's interpretation of the current rule.

- For claims of FTSO or double jeopardy, the amendment as published provided that the court may consider the claim if the party shows "prejudice only." This is a more generous test than that applicable to other claims raised late under Rule 12, because it does not require the objecting party to demonstrate "cause," i.e. the reason for failing to raise the claim earlier. It may also be a more generous test than plain error under Rule 52(b) – the standard included in the January 2011 proposal – because it does not require the objecting party to show, in addition to prejudice, that the error was "plain" or that "the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Olano*, 507 U.S. 725, 731-32 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

- Because of the continuing controversy in the appellate courts on the question whether review of untimely claims is governed by Rule 12(e) or Rule 52(b), the Advisory Committee added and the Standing Committee approved for publication an express statement that if a party files an untimely motion "Rule 52 does not apply," and set forth the criteria of "cause and prejudice" and "prejudice only" for FTSO and double jeopardy claims.

Additionally, the Committee made other changes in language and organization to improve clarity.

II. THE PUBLIC COMMENTS AND THE SUBCOMMITTEE'S RECOMMENDATIONS

Following publication, comments in support of the proposed amendment were received from the Department of Justice and the Federal Magistrate Judges Association, and letters that oppose various aspects of the proposed amendment were received from the New York Council of Defense Lawyers (NYCDL), the Federal Defenders, and National Association of Criminal Defense Lawyers (NACDL). The proposal generated neither requests to testify nor comments from the bench other than the letter in support from FMJA. The full text of the public comments appears infra.

Because Hurricane Sandy caused the cancellation of the Advisory Committee's October meeting, Judge Raggi asked Judge Jeffrey Sutton, the chair of the Standing Committee, to provide comments for consideration by the Subcommittee in preparation for the April Advisory Committee meeting. Without taking a position on the question whether the published rule should be further amended, Judge Sutton noted the complexity of the proposal and the large number of difficult (and in some cases controversial) issues that it sought to resolve. Although it is appropriate to use the amendment process to resolve conflicts over the interpretation or application of the rules, Judge Sutton noted that the published rule is unusual in seeking to resolve so many conflicts and policy issues. The inclusion of so many difficult and/or controversial issues may have an effect at the later stages of the process, at the Standing Committee, the Judicial Conference, the Supreme Court, and Congress. After discussion of Judge Sutton's comments, the Subcommittee concluded that it would be desirable to consider whether the proposed amendment could and should be simplified in order to facilitate final approval of its core elements.

As described more fully in the reporters' updated March 31, 2012 memorandum (included infra), the critical letters from the defense groups raised a variety of arguments and concerns discussed below. After considering these issues and arguments (as well as more general arguments in favor of simplification and streamlining), the Subcommittee recommends that the Advisory Committee approve and transmit the proposed amendment to the Standing Committee after making the following post-publication changes (including changes in the Committee Note accompanying changes in the text):

- restoring language that had been deleted from (b)(2) and relocating it to (b)(1);
- deleting double jeopardy from the proposed list of claims that must be raised before trial;
- amending the Committee Note to state explicitly that the rule does not change statutory deadlines under provisions such as the Jury Selection and Service Act;
- making explicit in new (c)(2) the district court's authority to extend or reset the deadline for pretrial motions (which is recognized implicitly now in Rule 12(e));
- deleting the statement that "Rule 52(b) does not apply" to late-raised claims; and
- separating the standard for consideration of late-raised claims into separate paragraphs.

In addition, the Subcommittee considered, and requests discussion by the Advisory Committee, of one of the Style Consultant's recommendations regarding the language of 12(c) (concerning the phrase "prejudice only").

This section of the memorandum sets forth the Subcommittee's conclusions and recommendations concerning each of the issues raised during the public comment period, and its proposed responses to Judge Sutton's suggestion that the published rule might be streamlined or simplified.

A. Objections to adding FTSO claims of failure to the list that must be raised before trial.

As expected, defense commentators opposed requiring FTSO claims to be raised before trial. They argued that this aspect of the proposed amendment is neither supported by the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), nor justified by the risk of sandbagging. They also expressed concern that the proposed amendment would violate the Rules Enabling Act, lead to violations of the Fifth and Sixth Amendment rights, and prejudge Supreme Court resolution of open questions.

The Rule 12 Subcommittee considered and reaffirmed the decision that FTSO claims should be subject to Rule 12's requirement that they be raised before trial. The Subcommittee agreed that *Cotton* – which did not mention or address Rule 12 – does not require the amendment. But in holding that the failure to state an offense is not a jurisdictional error, the Supreme Court opened the door to permit such an amendment. Members concluded that there is significant value to requiring that FTSO claims be raised before trial. Despite the argument that the defense has no incentive to delay raising FTSO claims, cases have arisen in which courts felt sandbagging had occurred leading to a waste of judicial resources. Indeed, one court decried such sandbagging and urged that the Rules be amended to address the problem. *See United States v. Panarella*, 277 F.3d 678, 686 (3d Cir. 2002) ("Requiring a defendant to raise this defense before pleading guilty respects the proper relationship between trial and appellate courts and prevents the waste of judicial resources caused when a defendant deliberately delays raising a defense that, if successful, requires reversal of the defendant's conviction and possibly reindictment."). Moreover, the Subcommittee perceived no Rules Enabling Act barrier to adding an additional claim to the other constitutional issues that Rule 12 now requires to be raised before trial.

The Subcommittee also concluded that the Fifth and Sixth Amendment issues raised by the Federal Defenders are separate from those addressed by Rule 12 and the proposed amendment. The Federal Defenders expressed concern that the amended rule might prohibit a defendant from raising constitutional challenges to jury instructions at trial, e.g., claims that an instruction including an element omitted from the indictment would constructively amend the indictment or deprive the defendant of notice. The Federal Defenders note that the government has at times argued that by failing to raise a Fifth Amendment problem before trial (when it could be easily addressed by a superseding indictment) a defendant waives his chance to complain later about what is essentially the same problem: lack of grand jury review of one or more essential elements. The Federal Defenders maintain that regardless of the failure of a defendant to raise an indictment's defect, an objection to the instructions alleging constructive amendment or lack of notice should remain available.

The proposed amendment, however, speaks only to the consideration of objections to the indictment or information. Neither the proposed amendment nor the Committee Note addresses a defendant's ability to object to jury instructions on the ground that those instructions constructively

amend the indictment in violation of the Fifth Amendment, or change the theory of prosecution or otherwise surprise the defense, depriving the defendant of the notice guaranteed by the Sixth Amendment. The Subcommittee concluded that whether a judge should grant a constitutional challenge to jury instructions in a case in which a defendant failed to object to a defective indictment is a matter to be resolved by the courts if and when such cases arise. The amendment does not purport to preclude such challenges, nor is it intended to limit in any way the appropriate resolution of these separate questions.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should retain FTSO claims on the list of claims and defenses that must be raised before trial.

B. Objections to the specification of other claims that must be raised before trial.

Defense commentators also focused on several other kinds of claims that the proposed amendment lists among those that must be raised before trial. They argued that double jeopardy, statute of limitations, multiplicity, and duplicity claims should not be required before trial. One comment also opposed listing specific kinds of claims in 12(b)(3)(A) and (B) and retaining the distinction between (A) and (B).

The list of claims and defenses in the published amendment was drawn from the cases interpreting two general categories in the present rule: defects "in instituting the prosecution" and "in the indictment or information." As discussed below, the Subcommittee recommends that the Advisory Committee retain the structure of the published amendment and the list of specific claims in (b)(3)(A) and (B), but make one change: deleting double jeopardy from the list of claims that must be raised before trial. The Subcommittee also recommends that language be added to the Committee Note to guard against any suggestion that the rule was intended to displace any statutory deadlines for pretrial motions.

1. Listing specific claims and keeping (3)(A) and (B) separate

The Subcommittee strongly endorses the conclusion that the listing of specific claims that must be raised before trial will assist courts and advocates. This is a central feature of the proposal, and it should be retained.

If it were writing on a clean slate, the Subcommittee agrees that there would be some merit in the suggestion that it should merge the list of claims in (3)(A) and (B) (defects in "instituting the prosecution" and in "the indictment or information"). But we are not writing on clean slate, and the Subcommittee recommends retaining the current structure. Throughout the consideration of the amendment, the Advisory Committee has tried to avoid renumbering to the extent possible to assist

future researchers. Merging these two categories would make future research on some of the most heavily litigated issues under Rule 12 more difficult. Retaining the current structure avoids those problems.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should retain the list of claims that must be raised before trial in (3)(A) and (B) (defects in "instituting the prosecution" and in "the indictment or information") and not merge (A) and (B).

2. Double jeopardy

The New York Council of Defense Lawyers correctly recognized requiring double jeopardy claims to be raised before trial would be a change in some courts. Although many courts have required double jeopardy and statute of limitation claims to be presented before trial when clear from the face of the indictment, not all courts do so.[1] The courts that require these particular motions be filed before trial generally reason that they are "defects in the indictment." But some other courts rely on the 1944 Committee Note as support for distinguishing double jeopardy and statute of limitations from the claims that must be raised before trial.[2]

Although there are strong arguments in favor of using this amendment to resolve the disagreement and provide a basis for uniform national treatment of double jeopardy claims, the Subcommittee was concerned that questions about – and objections to – the treatment of double jeopardy might be sufficient to derail the proposal as a whole. Accordingly, after reviewing the options the Subcommittee concluded that it would be prudent to delete double jeopardy from the enumerated list of claims that must be raised before trial. Because the list of claims that must be raised is not exhaustive, most circuits courts will continue to require double jeopardy claims to be raised before trial whether or not such claims are listed in Rule 12(b)(3)(B). But deleting double jeopardy from this list does not foreclose arguments that the original design of Rule 12 distinguished double jeopardy from the claims that must be raised before trial. Deleting double jeopardy from the list of claims thus avoids taking a position on this issue and alienating supporters of the minority view.

---

[1]We provide extensive citations for these points in footnotes 15-22 of our March 31, 2012 memorandum to the Rule 12 Subcommittee (updated with new cases August 16, 2012), which is included infra. Also included infra is a memorandum providing a circuit-by-circuit analysis of the double jeopardy cases.

[2]The courts that have allowed these claims to be raised during trial often point to the Advisory Committee Note from 1944, which states that motions that "may" but need not be brought before trial include "such matters as former jeopardy, former conviction, former acquittal, statute of limitations . . . ."

Omitting double jeopardy from the list of claims that must be raised before trial also removes another possible obstacle to final approval of the rule: debates about the proper standard of review if double jeopardy claims are subject to the timing requirements of Rule 12(b)(3). As noted in the reporters' supplemental memorandum on double jeopardy (included infra), the standard for review of late-raised double jeopardy claims in most courts is plain error. However, there is considerable variation in the appellate cases. Many circuits have at least a few decisions that also refer to "waiver" in this context. The published rule, however, applied the "prejudice" standard to double jeopardy (as well as failure to state a claim). Although the Committee has taken the view that there would be no difference in the effect of the "prejudice" and plain error standards in double jeopardy cases, this point was not obvious and it required extended explanation and defense. Moreover, authorizing relief upon a showing of prejudice would be a change from the various panel opinions that used waiver or waiver as well as plain error. Removing double jeopardy from the list of enumerated claims obviates the need to address this issue in the proposal.

The Subcommittee concluded that simplifying the proposed rule by omitting the references to double jeopardy would remove what might have been a significant obstacle to adoption of the proposal. The double jeopardy case law has varied considerably from circuit to circuit, perhaps because double jeopardy issues can arise in so many different contexts. Although there would be real advantages to a rule change that would settle all of these disputes about double jeopardy, the Subcommittee concluded, with some reluctance, that retaining the double jeopardy provisions might simply be taking on too much for a single proposal.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should delete double jeopardy from the list of claims that must be raised before trial. If this recommendation is accepted, the Advisory Committee should also delete the standard for review of late-raised double jeopardy claims.

3. Multiplicity, duplicity, and statutes of limitations

The Subcommittee agreed with the commentators that under some circumstances it is not possible to raise multiplicity and duplicity claims before trial. However, the proposed amendment applies only when the basis of a claim is "reasonably available" before trial. That limitation should take care of the concerns in the public comments about claims that become apparent only after trial begins.

Similarly, the Subcommittee concluded that it should generally be possible to raise statute of limitations before trial, subject to the limitation that such claims are "reasonably available" at that time. As a matter of policy, the Subcommittee reaffirmed the judgment that statute of limitation claims should be raised before trial when reasonably available.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should retain multiplicity, duplicity, and statute of limitations in the list of claims that must be raised before trial.

4. Distinguishing statutory deadlines from claims that must be raised before trial

The National Association of Criminal Defense Lawyers raised a concern that one or more of the claims that must be raised before trial under the proposed rule might be interpreted to supersede statutory deadlines. It explained:

> Listing only the constitutional right to a speedy trial might be interpreted to suggest that statutory motions need not be filed prior to trial. The Rule, or at least Note, should make clear that the amended Rule "will supersede that statute [the Speedy Trial Act] or any other that purports to set a specific pretrial motion deadline, such as 18 U.S.C. § 3237(b) (certain venue motions) or 28 U.S.C. § 1867(b) (jury selection challenges), by virtue of the Rules Enabling Act . . . ." (NACDL Public Comment at 6).

The amendment was not intended to have any effect on statutorily prescribed deadlines for pretrial motions. To make that point crystal clear, the Subcommittee proposes an addition to the Committee Note.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should add the following language to the Committee Note:

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

C. Objection to deleting language in (b)(2).

The Federal Defenders expressed concern that the deletion of certain language in (b)(2) could be interpreted as removing the authority of courts to consider particular motions before trial that do not require a trial on the merits. The Subcommittee proposes that the language in question be restored and relocated in (b)(1) with slight stylistic revisions.

As published, the amendment deleted the following language now found in Rule 12(b)(2): "A party *may* raise by pretrial motion any defense, objection, or request that the court can determine without trial of the general issue." (Emphasis added). This language was deleted because of a concern that the permissive word "may" could be misleading. It implies that a party may *or may not*

raise such a motion. But Rule 12 does not permit the parties to wait to raise certain motions that can be resolved without a trial on the merits. Indeed, it requires many motions to be made before trial. The Committee concluded that this potentially confusing language could be deleted because it was no longer necessary. When Rule 12 was adopted in 1944, it abolished pleas in abatement, demurrers, and other forms of pleading. The language in question stated that motions to dismiss were the new vehicle for raising these claims and defenses. Nearly 60 year later, motions to dismiss are well established, and thus the language was no longer considered necessary.

In their public comment and during the Subcommittee deliberations, the Federal Defenders expressed concern that courts might interpret the change as stripping the courts of authority to consider certain motions before trial, especially in the case of pretrial motions to dismiss for insufficient evidence on stipulated facts when the government did not object.

Although Rule 12 does not contain any analogue to the Civil Rule's motion for summary judgment and at least one circuit has categorically prohibited summary judgment dismissals,[3] several appellate courts have recognized that in narrow circumstances the court can rule on the legal sufficiency of the government's case before trial. A recent Fourth Circuit decision summarized the cases:

> Although there is no provision for summary judgment in the Federal Rules of Criminal Procedure, the district court's pretrial dismissal of the § 922(h) charges was procedurally appropriate under Rule 12(b)(2). That rule provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." Fed.R.Crim.P. 12(b)(2). *As circuit courts have almost uniformly concluded, a district court may consider a pretrial motion to dismiss an indictment where the government does not dispute the ability of the court to reach the motion and proffers, stipulates, or otherwise does not dispute the pertinent facts.* See United States v. Flores, 404 F.3d 320, 325 (5th Cir.2005); United States v. Yakou, 428 F.3d 241, 247 (D.C.Cir.2005) (citing United States v. Phillips, 367 F.3d 846, 855 & n. 25 (9th Cir.2004); United States v. DeLaurentis, 230 F.3d 659, 660–61 (3d Cir.2000); United States v. Alfonso, 143 F.3d 772, 776–77 (2d Cir.1998); United States v. Nabors, 45 F.3d 238, 240 (8th Cir.1995); United States v. Hall, 20 F.3d 1084, 1087–88 (10th Cir.1994); United States v. Levin, 973 F.2d 463, 470 (6th Cir.1992); United States v. Risk, 843 F.2d 1059, 1061 (7th Cir.1988)).

United States v. Weaver, 659 F.3d 353, 355 n.* (4th Cir. 2011) (emphasis added).

---

[3]*United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992). See also *United States v. Nabors*, 45 F.3d 238 (8th Cir. 1995) (reversing dismissal of indictment for failure of proof, noting, "[t]here being no equivalent in criminal procedure to the motion for summary judgment that may be made in a civil case, see Fed.R.Civ.P. 56(c), the government has no duty to reveal all of its proof before trial.").

After discussion, the Subcommittee concluded that it would be desirable to restore the language in question to the text of the rule and to relocate it in (b)(1). This improves the rule by placing a general statement about the availability of pretrial motions in its proper place, and it addresses the Federal Defender's concern that deletion of this language might have unintended effects. This language has also been cited as authority for pretrial rulings on motions in limine, which make the trial process more efficient by narrowing the evidentiary issues and avoiding trial interruptions. *See, e.g.*, *United States v. Bulger*, 2013 WL 781925, at * 4 & n. 6 (D. Mass. Mar. 4, 2013) (noting conflicting authority on whether Rule 12 "expressly authorizes" motions in limine).

Subsection (b)(1) (captioned "*In general*") was unchanged in the published rule and now begins abruptly with the statement "Rule 47 applies to a pretrial motion." In the Subcommittee's view, it would be an improvement to begin the Rule's treatment of pretrial motions with the more general statement "A party may by pretrial motion raise any defense, objection, or request that the court can determine without a trial on the merits." Although the language would still be permissive, it would be followed by subsections (b)(2) and (3), which clearly indicate that some motions may be made at any time and others must be raised before trial. The more modern phrase "trial on the merits," used later in the rule, is substituted for "trial of the general issue." No change in meaning is intended.

As revised, Rule 12(b)(1) would provide:

1 **(1) In General.** A party may, by pretrial motion, raise any defense, objection, or request that
2 the court can determine without a trial on the merits. Rule 47 applies to all pretrial motions.
3

The Subcommittee's proposal does involve relocating the provision in question from (b)(2) to (b)(1). In general, the Committee has attempted, when possible, to avoid renumbering in order to facilitate research, especially when the provision in question has been the subject of extensive litigation. In this case, however, the change in placement seems warranted, particularly in comparison to the alternatives (deletion of the language, or merely a reference in the Committee Note).

The Subcommittee also proposes the following addition to the Committee Note:

1 **Subdivision (b)(1).** The language formerly in (b)(2), which provided that "any
2 defense, objection, or request that the court can determine without trial of the general issue"
3 may be raised by motion before trial, has been relocated here. The more modern phrase "trial
4 on the merits" is substituted for the more archaic phrase "trial of the general issue." No
5 change in meaning is intended.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should add the following language to the proposed amendment to Rule 12(b)(1):

> ***A party may, by pretrial motion, raise any defense, objection, or request that the court can determine without a trial on the merits.***

If the proposed language is added to the rule, the Committee Note should be amended as well.

D. Objection to language defining issues that can be determined without "trial on the merits."

NACDL expressed concern that the amended rule would be interpreted so broadly that counsel would file unnecessary motions before trial and courts would later hold that other motions were untimely. ("[I]t is likely if not inevitable that litigations and courts will understand references to motions that 'can be determined without a trial on the merits' to mean motions that *might* be able to be determined without a trial . . . .") The language to which this comment refers, however, is little changed by the proposed amendment. The current rule refers to motions "that *the court can determine without trial* of the general issue," and the proposed amendment refers to motions that "*can be determined without*" a trial on the merits. There is no reason to think that this change would lead to a different interpretation.

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should make no change in the phrase "can be determined without a trial."

E. Concerns about the Court's authority to extend or reset the deadline for pretrial motions.

The Subcommittee also recommends new language that would explicitly state the district court's authority to extend or reset the deadline for pretrial motions at any time before trial. In the Subcommittee's view, it is critical that the changes in Rule 12 not have the unintended effect of restricting the ability of district courts to deal efficiently with claims and defenses before trial. The present rule implicitly recognizes that the district court may extend the time to consider claims not raised by the deadline for pretrial motions. Rule 12(e) now states that "[a] party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) *or by any extension the court provides*." (Emphasis added.) The Subcommittee concluded that it would be beneficial to explicitly state the court's authority to extend or reset the deadline, and to make it clear that a motion made before the new deadline would be timely.

The Subcommittee proposes that a new subparagraph (c)(2) be added:

1 (c) ~~Motion Deadline.~~ **Deadline for a Pretrial Motion; Consequences of Not Making a**
2 **Timely Motion.**
3 **(1) *Setting the Deadline.*** The court may, at the arraignment or as soon afterward as
4 practicable, set the deadline for the parties to make pretrial motions and may also schedule
5 a motion hearing. If the court does not set a deadline, the deadline is the start of trial.
6 **(2) *Extending or Resetting the Deadline.*** At any time before trial, the court may extend
7 or reset the deadline for pretrial motions.
8 **(3) *Consequences of an Untimely Motion Under Rule 12(b)(3).***[4] If a party does not meet
9 the deadline [set under (c)(1) or (2)] ~~– or any extension the court provides –~~ for making a
10 Rule 12(b)(3) motion, the motion is untimely. In such a case, Rule 52[(b)] does not apply,
11 but a court may consider the defense, objection, or request if:
12 (A) the party shows cause and prejudice; or
13 (B) the defense or objection is failure to state an offense or double jeopardy, and
14 the party shows prejudice [only].

As published, (c)(2) – which the Subcommittee proposes to renumber (c)(3) – drew from present Rule 12(e) and referred in the phrase set off by dashes only to a date that had been extended, but not one that the court had reset. The Subcommittee's current proposal recognizes that the district court may extend or reset the deadline (which might, for example, shorten the deadline). Courts and litigants might be confused if the dashed phrase in (c)(3) referred only to deadlines that had been extended, and not those that had been reset. Accordingly, the Subcommittee proposes striking the phrase currently set off by dashes.

To make it completely clear that all references in (b)(1), (2), and (3) refer to the same deadline, the references to "a" deadline were changed to "the" deadline. Thus in (1) the court sets "the deadline," in (2) the court may extend or reset "the deadline," and (3) states that a motion is untimely if not made before "the deadline [set under (c)(1) or (2)]." The Subcommittee bracketed "set under (c)(1) or (2)" to highlight the question whether the language is sufficiently clear without the cross reference. Professor Kimble thinks the cross reference is unnecessary, and recommends its deletion.

The Subcommittee also proposes that the Committee Note be revised to reflect the addition of the new paragraph in the text:

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

[4]As noted below, the Subcommittee also recommends additional changes to (c)(3).

anticipates that a district court has the discretion to extend the deadline for pretrial motions. The new paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's statement of it to a more logical place: after the provision concerning setting the deadline and before the provision concerning the consequences of not meeting the deadline. New paragraph (c)~~(2)~~(3) governs review of untimely claims, which were previously addressed in Rule 12(e).

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should add new subparagraph (c)(2) expressly stating the court's authority to extend or reset the deadline for pretrial motions, and make the conforming changes in the text of the rule and the Committee Note.

G. Objections to the standards for relief.

Defense commentators also raised a host of arguments concerning the standards for relief from the consequences of failing to raise an issue before trial. Most fundamentally, they challenged the requirement of "cause and prejudice" on several grounds. Some of the comments focused on the application of cause and prejudice in the trial court before conviction. They argued this standard is not supported by precedent and is unworkable and inappropriate for challenges prior to conviction. Two comments argued in favor of different standards when a claim is first raised at different procedural stages (in the district court, on appeal, and on collateral attack). Another comment argued that the meaning of "prejudice" was not clear, and using the term in Rule 12 would lead to substantial uncertainty and litigation. This comment also argued that requiring a showing of prejudice would lead to wasteful substitution of defense counsel. Finally, at various stages concern has been expressed with the phrase "Rule 52 does not apply."

1. Cause and prejudice

The Subcommittee recommends that no change be made in the standard of "cause and prejudice." As described more fully on pages 42-48 of the reporters' updated March 3, 2012 memorandum (infra), the Supreme Court's opinions stating that the standard under Rule 12 is cause and prejudice give no indication that this requirement is applicable only to claims raised for the first time after conviction. Moreover, we identified cases from six circuits supporting an assessment of prejudice as well as cause in considering relief for untimely claims raised before conviction. After reconsidering this question, the Subcommittee concluded that discarding the good cause review standard as it has been defined by the Supreme Court – as cause and prejudice – would be a dramatic break from precedent. The standard has been applied for decades to untimely claims under Rule 12, and courts assessing cause and prejudice under Rule 12 have encountered no difficulty doing so. Before publication, the Subcommittee, the Committee, and the Standing Committee had all recognized that not all courts interpreted good cause to require both cause and prejudice, but were persuaded that an amendment was the appropriate way to resolve the inconsistency, and did not choose to propose a dramatic break with current practice. Given the long history of applying the Rule 12 standards, the Subcommittee was unpersuaded that it would generate uncertainty and

litigation to make explicit the requirement that "prejudice" must be shown by a party who failed to raise a claim or defense before trial as required by Rule 12(b)(3). For the same reason, there is no reason to believe that the proposal will lead to new and wasteful substitution of counsel.

The Subcommittee also discussed the concern that district court discretion would be unduly limited if trial judges were required to find prejudice as well as cause before a late claim could be considered. The Subcommittee recognized that district judges should have substantial leeway in determining how best to manage claims raised before trial. It concluded that the "cause and prejudice" standard was consistent with that principle, particularly in light of the two new provisions in the rule: the proposed new (c)(2) spelling out the discretion of a judge to respond to a late claim filed any time before trial by simply extending the filing deadline, discussed above, and the proposed new language, to which there has been no objection, providing that the Rule does not bar consideration of any claim filed after the deadline, if the basis for the claim was not reasonably available before the deadline.

Finally, the Subcommittee was not persuaded by the suggestion in one comment that all late-raised constitutional claims should be subject to review upon a showing of "prejudice only." This, again, would be a dramatic break with present practice.

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should retain "cause and prejudice" as the standard for review of late-raised claims other than failure to state an offense.

The Subcommittee found other concerns relating to the standards for relief more persuasive. It recommends that the provision stating the consequences for untimely motions be amended to delete the statement that "Rule 52 does not apply" and that the standards for relief be separated and restated as described below. These recommendations, like the deletion of double jeopardy, are intended to eliminate controversial aspects of the proposal in order to pave the way for approval of the core elements. Additionally, as noted below, the Subcommittee considered and requests discussion of a stylistic change recommended by Professor Joe Kimble.

2. Deletion of "Rule 52 does not apply"

As modified, the proposal still sets forth the "consequences of an untimely motion" and states the standard for when "a court may consider the [untimely] defense, motion, or request." Because some appellate courts have applied "plain error" to late-raised claims, the statement that "Rule 52(b) does not apply," though not strictly necessary, was included to guard against the possibility that some courts might continue to require a showing of plain error as well as (or instead of) "cause and prejudice" for all late claims other than failure to state an offense (for which only a showing of "prejudice" is required). The reference to Rule 52, however, has proven to be a lightening rod at various stages. The Subcommittee weighed the benefits of including this language, and explicitly

mandating a uniform approach in the appellate courts, against the possibility that objections to this one aspect of the rule might be sufficient to prevent adoption of the proposal. The Subcommittee concluded that it would be prudent to delete this language, though members expressed the view that this was an important issue that should be considered and discussed by the Advisory Committee at the April meeting.

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should delete "Rule 52 does not apply" from proposed Rule 12(c)(3).

3. Separation of standards of review

The Subcommittee also concluded that it would also be beneficial to revise the provision governing late raised claims to make it clearer that there is one general rule for considering untimely motions, and that general rule has just one exception for motions for failure to state an offense. As published, the proposal provided:

1 **(2)** ***Consequences of an Untimely Motion Under Rule 12(b)(3).*** If a party does not meet
2 the deadline – or any extension the court provides – for making a Rule 12(b)(3) motion, the
3 motion is untimely. In such a case, Rule 52[5] does not apply, but a court may consider the
4 defense, objection, or request if:
5 (A) the party shows cause and prejudice; or
6 (B) the defense or objection is failure to state an offense or double jeopardy, and the
7 party shows prejudice [only].

As noted above, the Subcommittee has proposed relocating the reference to the court's authority to extend the time for making a motion into a new paragraph (c)(2), which requires renumbering the remaining portion of subsection (c). The Subcommittee proposes revising what would become paragraph (c)(3) and adding a new paragraph (c)(4):

---

[5]Professor Kimble noted that as published the amendment referred to Rule 52 as a whole; he asked whether the Committee intended to make all of the Rule 52 in applicable, or only Rule 52(b) (which provides that a "plain error" must be shown if an error was not brought to the district court's attention). In general, the cases addressing the question whether Rule 12 or Rule 52 govern when claims are raised belatedly have focused on Rule 52(b), and Subcommittee members did not identify any problems that would be posed by restricting the reference to Rule 52(b). Accordingly, the Subcommittee and the reporters provisionally agreed that the reference should be limited to Rule 52(b) if the provision is retained. If the provision is retained, however, Subcommittee members and reporters would appreciate hearing the full Committee's views on this issue.

1 **(3)** ***Consequences of an Untimely Motion Under Rule 12(b)(3).*** Except as provided in
2 paragraph (c)(4), if a party does not meet the deadline [set under (c)(1) or (2)] for making a
3 Rule 12(b)(3) motion, the motion is untimely. In such a case, a court may consider the
4 defense, objection, or request if the party shows cause and prejudice.
5 **(4)** ***Consequences of an Untimely Motion for Failure to State an Offense.***
6 Notwithstanding paragraph (c)(3), a court may consider an untimely motion for failure to
7 state an offense if the defendant shows prejudice [only].

In the Subcommittee's view, this separation and restatement of the standards makes it clearer that the general standard for untimely motions is cause and prejudice, and draws attention to the one exception: "prejudice only" for late raised claims that the charging document failed to state an offense.

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should revise proposed paragraph (b)(3) and add new paragraph (c)(4) for clarity.

4. Reference to "prejudice only"

Professor Kimble has objected to the world "only" in proposed subparagraph (c)(3)(B) of the proposal as published (shown in brackets on line 7 in the first version quoted above). The Subcommittee's revision places the same phrase in (c)(4) (shown on line 7 of the Subcommittee's proposed revision quoted above).

The Advisory Commission added "only" to counter the likelihood that courts might add requirements other than prejudice to the showing required for untimely double jeopardy and failure-to-state-an-offense claims. There has been some confusion and disagreement among the appellate courts on the question what showing is required. For example, some decisions have required a showing of both good cause and plain error for late-raised double jeopardy claims. The Advisory Committee felt that there was a danger that if the amendment were adopted, some courts would continue such practices absent the clearest possible signal in the text: "prejudice only."

However, the Subcommittee acknowledges Professor Kimble's point that as a literal matter the standards under (A) and (B) ("cause and prejudice" versus "prejudice") are clear: in contrast to (A), (B) requires only prejudice even without the word "only." Moreover, Professor Kimble argued that adding "only" here sets a dangerous precedent: it might suggest that if other provisions in the rules setting standards or requirements do not add "only," the courts may add additional requirements. Professor Kimble suggested that this would be such a serious problem he would likely seek the views of the Style Subcommittee of the Standing Committee if the Advisory Committee does not agree to delete "only."

THE SUBCOMMITTEE'S RECOMMENDATION: The Subcommittee requests discussion on the question whether to delete the word "only."

III. THE NEED FOR REPUBLICATION

Although the determination whether republication is necessary will be made by the Standing Committee, it will wish to know the Advisory Committee's views. Accordingly, it would be useful for the Advisory Committee to turn to this issue once it has determined what changes (if any) it approves in the text and Committee Note as published.

Subcommittee members doubted that republication would be necessary or beneficial if the Advisory Committee approves the post-publication changes described above. Although the published rule certainly generated controversy and critical commentary from several defense groups, each of the changes after publication would seek to clarify the proposal without changing it in any significant way, or to delete provisions that had generated controversy and opposition.

Restoring the omitted language from (b)(2) would simply make clear that the amendment worked no unintended change. This is consistent with the intention stated in the published Committee Note describing the deletion of the language. Moreover, the change responds to a concern raised during the public comment period.

Subcommittee members view the addition of new (c)(2) as a significant improvement, but nonetheless doubt that it warrants republication. Subcommittee members expressed the view that it was extremely important for district judges to have sufficient flexibility to deal with untimely pretrial motion before trial. Given the importance of the subject, republication would be advisable if the addition to the text of new (c)(2) were deemed to constitute a major change in the proposed amendment. However, subdivision (e) of the present rule contains the language "or by any extension the court provides," and it thus anticipates that a district court has the discretion to extend the deadline for pretrial motions. Accordingly, in the Subcommittee's view the proposed amendment merely makes explicit the authority that the district courts now possess, and integrates this authority with the overall revision of Rule 12.

Similarly, the Subcommittee's proposed addition to the Committee note and the changes recommended by the Style Consultant respond to concerns about perceived ambiguities in the rule as published. In the Subcommittee's view, they are all intended to state more clearly the intent of the original proposal, and they are responsive to concerns raised in the public comment period.

Two changes – the deletion of double jeopardy from the list of claims that must be raised before trial, and the deletion of the statement that Rule 52(b) does not apply – remove provisions that generated controversy and opposition. The Advisory Committee's goal in requiring double jeopardy to be raised before trial and stating that Rule 52(b) does not apply to late-raised claims governed by Rule 12 was to settle circuit conflicts and avoid future litigation about the standard of review for late-raised claims. Although eliminating those provisions reduces in some respects the

benefits of the proposed amendment, leaving the law on these points unchanged should help defuse opposition to the amendment. In the Subcommittee's view, it is doubtful that such a scaling back of the proposal would warrant republication.

TAB 3B.5

THIS PAGE INTENTIONALLY BLANK

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE***

Rule 12. Pleadings and Pretrial Motions

1 * * * * *

2 **(b) Pretrial Motions.**

3 **(1)** ***In General.*** Rule 47 applies to a pretrial motion.

4 **(2)** ~~***Motions That May Be Made Before Trial.*** A party~~
5 ~~may raise by pretrial motion any defense,~~
6 ~~objection, or request that the court can determine~~
7 ~~without a trial of the general issue.~~ ***Motions That***
8 ***May Be Made at Any Time.*** A motion that the
9 court lacks jurisdiction may be made at any time
10 while the case is pending.

11 **(3)** ***Motions That Must Be Made Before Trial.*** The
12 following defenses, objections, and requests must
13 be raised by motion before trial if the basis for the

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

14 motion is then reasonably available and the motion
15 can be determined without a trial on the merits:
16 (A) a motion alleging a defect in instituting the
17 prosecution, including:
18 (i) improper venue;
19 (ii) preindictment delay;
20 (iii) a violation of the constitutional right to
21 a speedy trial;
22 (iv) double jeopardy;
23 (v) the statute of limitations;
24 (vi) selective or vindictive prosecution;
25 and
26 (vii) an error in the grand-jury proceeding or
27 preliminary hearing;
28 (B) ~~a motion alleging~~ a defect in the indictment
29 or information, including:
30 (i) joining two or more offenses in the
31 same count (duplicity);

32 (ii) charging the same offense in more than
33 one count (multiplicity);
34 (iii) lack of specificity;
35 (iv) improper joinder; and
36 (v) failure to state an offense.
37 ~~— but at any time while the case is pending, the~~
38 ~~court may hear a claim that the indictment or~~
39 ~~information fails to invoke the court's jurisdiction~~
40 ~~or to state an offense~~;
41 (C) ~~a motion to~~ suppression of evidence;
42 (D) ~~a Rule 14 motion to sever~~severance of
43 charges or defendants under Rule 14; and
44 (E) ~~a Rule 16 motion for~~ discovery under Rule
45 16.
46 **(4)** ***Notice of the Government's Intent to Use***
47 ***Evidence.***
48 (A) *At the Government's Discretion*. At the
49 arraignment or as soon afterward as

50 practicable, the government may notify the
51 defendant of its intent to use specified
52 evidence at trial in order to afford the
53 defendant an opportunity to object before
54 trial under Rule 12(b)(3)(C).
55 (B) *At the Defendant's Request*. At the
56 arraignment or as soon afterward as
57 practicable, the defendant may, in order to
58 have an opportunity to move to suppress
59 evidence under Rule 12(b)(3)(C), request
60 notice of the government's intent to use (in
61 its evidence-in-chief at trial) any evidence
62 that the defendant may be entitled to discover
63 under Rule 16.
64 **(c)** ~~**Motion Deadline.**~~ **Deadline for a Pretrial Motion;**
65 **Consequences of Not Making a Timely Motion.**
66 **(1)** ***Setting a Deadline.*** The court may, at the
67 arraignment or as soon afterward as practicable,

68 set a deadline for the parties to make pretrial
69 motions and may also schedule a motion hearing.
70 If the court does not set a deadline, the deadline is
71 the start of trial.

72 **(2)** ***Consequences of an Untimely Motion under Rule***
73 ***12(b)(3).*** If a party does not meet the deadline —
74 or any extension the court provides — for making
75 a Rule 12(b)(3) motion, the motion is untimely. In
76 such a case, Rule 52 does not apply, but a court
77 may consider the defense, objection, or request if:

78 (A) the party shows cause and prejudice; or
79 (B) the defense or objection is failure to state an
80 offense or double jeopardy, and the party
81 shows prejudice only.

82 **(d) Ruling on a Motion.** The court must decide every
83 pretrial motion before trial unless it finds good cause to
84 defer a ruling. The court must not defer ruling on a
85 pretrial motion if the deferral will adversely affect a

86 party's right to appeal. When factual issues are involved

87 in deciding a motion, the court must state its essential

88 findings on the record.

89 **(e) [Reserved]** ~~**Waiver of a Defense, Objection, or**~~

90 ~~**Request.**~~ ~~A party waives any Rule 12(b)(3) defense,~~

91 ~~objection, or request not raised by the deadline the court~~

92 ~~sets under Rule 12(c) or by any extension the court~~

93 ~~provides. For good cause, the court may grant relief~~

94 ~~from the waiver.~~

95 * * * * *

Committee Note

Subdivision (b)(2). The amendment deletes the provision providing that "any defense, objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

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

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

The introductory language includes two important limitations. The basis for the motion must be one that is "available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can — and should — be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(2). *Cf.* 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue" that appeared in existing (now deleted) (b)(2). No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked.

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

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

As amended, subdivision (c) contains two paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. New paragraph (c)(2) governs review of untimely claims, which were previously addressed in Rule 12(e).

Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(2).

The standard for review of untimely claims under new subdivision 12(c)(2) depends on the nature of the defense, objection, or request. The general standard for claims that must be raised before trial under Rule 12(b)(3) is stated in (c)(2)(A), which requires that the party seeking relief show "cause and prejudice" for failure to raise a claim by the deadline. Although former Rule 12(e) referred to "good cause," no change in meaning is intended. The Supreme Court and lower federal courts interpreted the "good cause" standard under Rule 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States*, 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). Each concept — "cause" and "prejudice" — is well-developed in case law applying Rule 12. The amended rule reflects the judicial construction of Rule 12(e).

Subdivision (c)(2)(B) provides a different standard for two specific claims: failure of the charging document to state an offense and violations of double jeopardy. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power of the state to bring a defendant to trial or to impose punishment, should be available without a showing of "cause." Accordingly, paragraph (c)(2)(B) provides that the court can consider these claims if the party "shows prejudice only." Unlike plain error review under Rule 52(b), the new standard under Rule 12(c)(2)(B) does not require a showing that the error was "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Nevertheless, it will not always be possible for a defendant to make the required showing. For example, in some cases in which the charging document omitted an element of the offense the defendant may have admitted the element as part of a guilty plea after having been afforded timely notice by other means.

Subdivision (e). The effect of failure to raise issues by a pretrial motion have been relocated from (e) to (c)(2).

Rule 34. Arresting Judgment

1 **(a) In General.** Upon the defendant's motion or on its
2 own, the court must arrest judgment if the court does not
3 have jurisdiction of the charged offense. if:
4 (1) the indictment or information does not charge an
5 offense; or
7 (2) the court does not have jurisdiction of the charged
8 offense.
9 * * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

TAB 3C

THIS PAGE INTENTIONALLY BLANK

TAB 3C.1

THIS PAGE INTENTIONALLY BLANK

RULES 5 WITH PROPOSED MODIFICATIONS
WITH PROPOSED NOTES

Rule 5. Initial Appearance

* * * * *

1

2 **(d) Procedure in a Felony Case.**

3 **(1)** ***Advice.*** If the defendant is charged with a

4 felony, the judge must inform the defendant of

5 the following:

6 * * * *

7 (D) any right to a preliminary hearing; and

8 (E) the defendant's right not to make a

9 statement, and that any statement made

10 may be used against the defendant; and

11 (F) that a defendant who is not a United States

12 citizen may request that an attorney for the

13 government or a federal law enforcement

14 official notify a consular officer from the

15 defendant's country of nationality that the

16 defendant has been arrested — but that

17 even without the defendant's request, a

18 treaty or other international agreement may

19 require consular notification.

20

* * * * *

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.

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. 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.

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.

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES MADE AFTER PUBLICATION

In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at their initial appearance. The new phrasing also makes it clear that the advice should be provided to every defendant, without any attempt to determine the defendant's citizenship. A conforming change was made to the Committee Note.

PUBLIC COMMENTS CONCERNING RULE 5 AS PUBLISHED IN 2012

12-CR-001. George C. Lobb. Mr. Loeb criticizes the proposed amendment because it does not provide for the enforcement of individual rights in judicial proceedings and does not set a precise time at which law enforcement must give advice concerning consular notification.

12-CR-002. Federal Magistrate Judges Association. FMJA "endorses the purpose behind the proposed amendments but suggests rewording" to (1) require that the advice be given to all defendants, not just those "in custody," and (2) make it clear that judges should give warnings to all defendants, not seek to determine whether individual defendants are citizens. It also "remains concerned that incorporating any statement into the Rules regarding consular notification carries some risk that it will be interpreted as a substantive right."

12-CR-003. Peter Goldberger on behalf of the National

Association of Criminal Defense Lawyers. NACDL generally supports the proposed amendment, but reiterates its 2010 concerns, noting particularly that it is unclear "whether the phrase 'is held' refers to the defendant's status at the commencement of, or at the conclusion of, the hearing."

PUBLIC COMMENTS CONCERNING RULE 5 AS PUBLISHED IN 2010

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed Rule 5(c)(4) be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

1 **Rule 58. Petty Offenses and Other Misdemeanors**

2 * * * * *

3 **"(b) Pretrial Procedure.**

4 * * * * *

5 **(2) Initial Appearance.** At the defendant's initial appearance on
6 a petty offense or other misdemeanor charge, the magistrate judge must
7 inform the defendant of the following:

8 * * * * *

9 (F) the right to a jury trial before either a magistrate
10 judge or a district judge – unless the charge is a petty
11 offense;~~ and~~

12 (G) any right to a preliminary hearing under Rule 5.1,
13 and the general circumstances, if any, under which the
14 defendant may secure pretrial release; and

15 (H) that a defendant who is not a United States citizen
16 may request that an attorney for the government or a
17 federal law enforcement official notify a consular officer
18 from the defendant's country of nationality that the
19 defendant has been arrested — but that even without the
20 defendant's request, a treaty or other international
21 agreement may require consular notification.

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.

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. 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.

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.

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES MADE AFTER PUBLICATION

In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at the initial appearance. The new phrasing also makes it clear that the advice should be provided to every defendant, without any attempt to determine the defendant's citizenship. A conforming change was made to the Committee Note.

PUBLIC COMMENTS CONCERNING RULE 58 AS PUBLISHED IN 2012

12-CR-001. George C. Lobb. Mr. Loeb criticizes the proposed amendment because it does not provide for the enforcement of individual rights that may be invoked in a judicial proceeding and does not define a precise time at which law enforcement must give advice concerning consular notification.

12-CR-002. Federal Magistrate Judges Association. FMJA "endorses the purpose behind the proposed amendments but suggests rewording" to (1) require that the advice be given to all defendants, not just those "in custody," and (2) make it clear that judges should give warnings to all defendants, not seek to determine whether individual defendants are citizens. It also "remains concerned that incorporating any statement into the Rules regarding consular notification carries some risk that it will be interpreted as a substantive right."

12-CR-003. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL generally supports the proposed amendments, but reiterates its 2010 concerns, noting particularly that it is unclear "whether the phrase 'is held' refers to the defendant's status at the commencement of, or at the conclusion of, the hearing."

PUBLIC COMMENTS CONCERNING RULE 58 AS PUBLISHED IN 2010

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed rule be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

THIS PAGE INTENTIONALLY BLANK

TAB 3C.2

THIS PAGE INTENTIONALLY BLANK

RULES 5 WITH PROPOSED MODIFICATIONS
WITH PROPOSED NOTES*

Rule 5. Initial Appearance

* * * * *

1

2 **(d) Procedure in a Felony Case.**

3 **(1)** ***Advice.*** If the defendant is charged with a

4 felony, the judge must inform the defendant of

5 the following:

6 * * * *

7 (D) any right to a preliminary hearing; ~~and~~

8 (E) the defendant's right not to make a

9 statement, and that any statement made

10 may be used against the defendant; and

11 (F) that a defendant who is not a United States

12 citizen may request that an attorney for the

13 government or a federal law enforcement

14 official notify a consular officer from the

15 defendant's country of nationality that the

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

16 defendant has been arrested — but that

17 even without the defendant's request, a

18 treaty or other international agreement may

19 require consular notification.

20

* * * * *

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.

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. 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.

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

---

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

create any such rights or remedies.

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES MADE AFTER PUBLICATION

In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at their initial appearance. The new phrasing also makes it clear that the advice should be provided to every defendant, without any attempt to determine the defendant's citizenship. A conforming change was made to the Committee Note.

PUBLIC COMMENTS CONCERNING RULE 5 AS PUBLISHED IN 2012

12-CR-001. George C. Lobb. Mr. Loeb criticizes the proposed amendment because it does not provide for the enforcement of individual rights in judicial proceedings and does not set a precise time at which law enforcement must give advice concerning consular notification.

12-CR-002. Federal Magistrate Judges Association. FMJA "endorses the purpose behind the proposed amendments but suggests rewording" to (1) require that the advice be given to all defendants, not just those "in custody," and (2) make it clear that judges should give warnings to all defendants, not seek to determine whether individual defendants are citizens. It also "remains concerned that

---

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

incorporating any statement into the Rules regarding consular notification carries some risk that it will be interpreted as a substantive right."

12-CR-003. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL generally supports the proposed amendment, but reiterates its 2010 concerns, noting particularly that it is unclear "whether the phrase 'is held' refers to the defendant's status at the commencement of, or at the conclusion of, the hearing."

PUBLIC COMMENTS CONCERNING RULE 5 AS PUBLISHED IN 2010

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed Rule 5(c)(4) be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

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

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) that a defendant who is not a United States citizen 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 — but that even without the defendant's request, a treaty or other international agreement may require consular notification.

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.

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. <u>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.</u>

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.

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES MADE AFTER PUBLICATION

In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at the initial appearance. The new phrasing also makes it clear that the advice should be provided to every defendant, without any attempt to determine the defendant's citizenship. A conforming change was made to the Committee Note.

PUBLIC COMMENTS CONCERNING RULE 58 AS PUBLISHED IN 2012

12-CR-001. George C. Lobb. Mr. Loeb criticizes the proposed amendment because it does not provide for the enforcement of individual rights that may be invoked in a judicial proceeding and does not define a precise time at which law enforcement must give advice concerning consular notification.

12-CR-002. Federal Magistrate Judges Association. FMJA "endorses the purpose behind the proposed amendments but suggests rewording" to (1) require that the advice be given to all defendants, not just those "in custody," and (2) make it clear that judges should give warnings to all defendants, not seek to determine whether individual defendants are citizens. It also "remains concerned that incorporating any statement into the Rules regarding consular notification carries some risk that it will be interpreted as a substantive right."

12-CR-003. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL generally supports the proposed amendments, but reiterates its 2010 concerns, noting particularly that it is unclear "whether the phrase 'is held' refers to the defendant's status at the commencement of, or at the conclusion of, the hearing."

PUBLIC COMMENTS CONCERNING RULE 58 AS PUBLISHED IN 2010

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed rule be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

THIS PAGE INTENTIONALLY BLANK

TAB 3C.3

THIS PAGE INTENTIONALLY BLANK

RULES 5 AND 58 – AS PUBLISHED 2012*

Rule 5. Initial Appearance

* * * * *

1 **(d) Procedure in a Felony Case.**

2 **(1)** ***Advice.*** If the defendant is charged with a
3 felony, the judge must inform the defendant of
4 the following:

5 * * * *

6 (D) any right to a preliminary hearing; ~~and~~

7 (E) the defendant's right not to make a
8 statement, and that any statement made
9 may be used against the defendant; and

10 (F) if the defendant is held in custody and is
11 not a United States citizen:

12 (i) that the defendant may request that an
13 attorney for the government or a
14 federal law enforcement official notify
15 a consular officer from the defendant's

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

16 country of nationality that the
17 defendant has been arrested; and
18 (ii) that even without the defendant's
19 request, consular notification may be
20 required by a treaty or other
21 international agreement.
22

* * * * *

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

---

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

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.

1 **Rule 58. Petty Offenses and Other Misdemeanors**

2 * * * * *

3 **"(b) Pretrial Procedure.**

4 * * * * *

5 **(2) Initial Appearance.** At the defendant's initial
6 appearance on a petty offense or other misdemeanor
7 charge, the magistrate judge must inform the defendant
8 of the following:

9 * * * * *

10 (F) the right to a jury trial before either
11 a magistrate judge or a district judge –
12 unless the charge is a petty offense; ~~and~~

13 (G) any right to a preliminary hearing
14 under Rule 5.1, and the general
15 circumstances, if any, under which the
16 defendant may secure pretrial release~~.~~ ; and

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

17 (H) if the defendant is held in custody

18 and is not a United States citizen:

19 (i) that the defendant may request that an

20 attorney for the government or a federal law

21 enforcement officer notify a consular officer

22 from the defendant's country of nationality that

23 the defendant has been arrested; and

24 (ii) that even without the defendant's request,

25 consular notification may be required by a

26 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

---

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

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.

---

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

THIS PAGE INTENTIONALLY BLANK

TAB 3C.4

THIS PAGE INTENTIONALLY BLANK

RULES 5 AND 58 AS SUBMITTED TO SUPREME COURT – INCLUDING PORTIONS RETURNED FOR RECONSIDERATION*

Rule 5. Initial Appearance

* * * * *

1 **(d) Procedure in a Felony Case.**

2 **(1)** ***Advice.*** If the defendant is charged with a
3 felony, the judge must inform the defendant of
4 the following:

5 * * * * *

6 (D) any right to a preliminary hearing; ~~and~~

7 (E) the defendant's right not to make a
8 statement, and that any statement made
9 may be used against the defendant; and

10 (F) if the defendant is held in custody and is
11 not a United States citizen, that an attorney
12 for the government or a federal law
13 enforcement officer will:

14 (i) notify a consular officer from the

---

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

15 defendant's country of nationality that

16 the defendant has been arrested if the

17 defendant so requests; or

18 (ii) make any other consular notification

19 required by treaty or other

20 international agreement.

* * * * *

Committee Note

Subdivision (d)(1)(F). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

1 **Rule 58. Petty Offenses and Other Misdemeanors**

2 * * * * *

3 **(b) Pretrial Procedure.**

4 * * * * *

5 **(2) Initial Appearance.** At the defendant's initial
6 appearance on a petty offense or other misdemeanor
7 charge, the magistrate judge must inform the defendant
8 of the following:

9 * * * * *

10 (F) the right to a jury trial before either a
11 magistrate judge or a district judge – unless
12 the charge is a petty offense; ~~and~~

13 (G) any right to a preliminary hearing under
14 Rule 5.1, and the general circumstances, if
15 any, under which the defendant may secure
16 pretrial release~~.~~ ; and

17 (H) if the defendant is held in custody and is
18 not a United States citizen, that an attorney
19 for the government or a federal law
20 enforcement officer will:

21 (i) notify a consular officer from the

22 defendant's country of nationality that
23 the defendant has been arrested if the
24 defendant so requests; or
25 (ii) make any other consular notification
26 required by treaty or other
27 international agreement.

COMMITTEE NOTE

Section (b)(2)(H). This amendment is part of the government's effort to ensure that the United States fulfills its international obligations under Article 36 of The Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of these amendments, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). These amendments do not address those questions.

TAB 3D

THIS PAGE INTENTIONALLY BLANK

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 25, 2013, Durham, North Carolina

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in at Duke Law School in Durham, North Carolina on April 25, 2013. The following persons were in attendance:

Judge Reena Raggi, Chair
Carol A. Brook, Esq.
Judge Morrison C. England, Jr.
Kathleen Felton, Esq.
Mark Filip, Esq. (by telephone)
Chief Justice David E. Gilbertson
James N. Hatten, Esq.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Judge Donald W. Molloy
Judge Timothy R. Rice
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Reporter

Judge Jeffrey Sutton, Standing Committee Chair
Professor Daniel Coquillette, Standing Committee Reporter
Judge Marilyn L. Huff, Standing Committee Liaison
Judge Richard C. Tallman, Former Advisory Committee Chair

The following persons were present to support the Committee:

Laural L. Hooper, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi introduced new members Mark Filip (who participated by telephone) and John S. Siffert. She also thanked Judge Richard Tallman, the former chair of the Committee, for attending. Judge Tallman played a critical role in the development of the proposed amendment

to Rule 12.

Judge Raggi noted that the Department of Justice recently conferred significant honors on Jonathan Wroblewski and Kathleen Felton. Mr. Wroblewski received the John C. Keeney award for Exceptional Integrity and Professionalism. Ms. Felton received the most prestigious award given by the Criminal Division, the Henry E. Peterson Memorial Award, in recognition of her "lasting contribution to the Division." Judge Raggi congratulated Mr. Wroblewski and Ms. Felton, and thanked them for their exceptional contributions to the Committee's work. Judge Raggi also noted with regret Ms. Felton's plan to retire before the next meeting of the Committee.

B. Review and Approval of Minutes of April 2012 Meeting

A motion to approve the minutes of the April 2012 Committee meeting in San Francisco, California, having been moved and seconded:

The Committee unanimously approved the April 2012 meeting minutes by voice vote.

C. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Judge Raggi reported that the following proposed amendments, approved by the Supreme Court and transmitted to Congress, will take effect on December 1, 2013, unless Congress acts to the contrary:

Rule 11. Advice re Immigration Consequences of Guilty Plea.

Rule 16. Government Disclosure: Proposed technical and conforming amendment.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendments to Rules 12 and 34

Judge Raggi noted that the main work before the Committee was consideration of Rules 12 and 34. Because the proposed amendments have such a lengthy history and the materials in the agenda book were voluminous, Judge Raggi asked the Reporters to begin with a summary of the history of the proposal.

Professors Beale and King stated that following the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), in 2006 the Department of Justice asked the Criminal

Rules Committee to consider amending Rule 12(b)(3)(B) to require defendants to raise *before trial* any objection that the indictment failed to state an offense by eliminating the provision that required review of such a claim even when raised for the first time after conviction. (In the remainder of these minutes, failure to state an offense will be referred to as FTSO.) At the urging of members of the Advisory Committee and at the Standing Committee, the proposal evolved and expanded over the course of eight years to address other features of Rule 12's treatment of pretrial motions in general.

As published, the proposed amendment:

- stated that the requirement that certain claims and defenses be raised before trial applies only if the basis for the motion is "reasonably available" before trial;

- enumerated the common types of motions that courts have found to constitute defects "in instituting the prosecution" and "in the indictment or information" that must be raised before trial;

- included FTSO among the defects "in the indictment or information" that must be raised before trial; and

- clarified the general standard for relief from the rule that late-filed claims may not be considered, resolving confusion created by the non-standard use of the term "waiver" to reach situations in which there was no intentional relinquishment of a known right.

Judge Raggi noted that she had encouraged the defense bar to review the published amendment, and that the Committee had received thoughtful extended comments that were extremely helpful. The Reporters then drew the Committee's attention to the various issues raised in the public comments, particularly the concerns raised by the defense bar.

To consider the issues raised in the public comments the Rule 12 Subcommittee met in person in San Francisco and held numerous additional meetings by telephone. Judge Raggi thanked the Subcommittee for its extraordinary efforts, and asked Judge England, the Subcommittee chair, to give an overview of the Subcommittee's proposal for amendment as revised following publication.

Judge England prefaced his presentation by noting that, in contrast to earlier proposals for amendment of Rule 12, which had passed the Subcommittee by divided votes, the proposal he would now present had been approved by the Subcommittee unanimously. The proposed amendment would increase the clarity of guidance provided by Rule 12 to both courts and practitioners by listing the common motions that must be raised before trial and delineating the standard of review for late-raised claims. For claims other than FTSO, the proposed standard

was cause and prejudice. For FTSO, the recommended standard was prejudice alone. The Subcommittee also concluded that the district courts needed to have significant discretion to handle claims in the period before trial, and it added language to make that clearer. Finally, at the urging of Judge Raggi, the Subcommittee reconsidered features of the proposed rule that applied the standards for late-raised claims to appellate courts. The Subcommittee ultimately agreed it was best not to try to tie the hands of the appellate courts. Accordingly, it agreed to delete from the proposed rule the statement that Rule 52 does not apply. This would allow the appellate courts to determine whether to apply the standards specified in Rule 12(c) or the plain error standard specified in Rule 52 when untimely claims are raised for the first time on appeal.

When Judge England completed his presentation of the Subcommittee proposal, Judge Raggi agreed that the proposed rule provides greater clarity in identifying motions that must be filed before trial. She also noted that proposed 12(c)(2) gives district judges the needed flexibility to consider untimely motions and claims raised before jeopardy attaches, which could have the practical advantage of minimizing later claims of ineffective assistance of counsel. The proposed amendments also clarify that if the circumstances giving rise to a claim or defense identified in Rule 12(b)(3) are not known before trial, no pretrial motion is required. At that point, Judge Raggi invited Subcommittee members to add their views.

Speaking individually, Subcommittee members agreed that the proposed amendment reflected compromise. Nevertheless, the proposed rule was a considerable improvement over the current one. A defense representative noted that some features of the proposed rule might not benefit defendants in particular cases, but she voiced strong support for retaining the prejudice-only standard for late-raised FTSO claims and the abundant discretion afforded to trial judges. A judge characterized the Subcommittee proposal as a "delicate but exquisite compromise," and he noted that like Civil Rule 12 it "clears the decks before trial" and affords the trial judge abundant discretion to do substantial justice. Representatives of the Department of Justice noted that they began with a narrow policy-based proposal to require FTSO claims to be raised before trial, so that errors would be raised promptly and rectified. However, if the charging document did not give the defendant notice, and he could show prejudice, the Department has always agreed that relief should be afforded. The current proposal also clarifies what claims must be raised before trial, provides substantial discretion to the district judge before the jury is sworn, eliminates the term "waiver," and bifurcates the standard for late-raised claims, providing for cause and prejudice (a clarification of what the law currently is) for all claims except FTSO, for which prejudice alone is sufficient. In resolving conflicts that had developed in the lower courts, the proposal used terms that had been litigated and defined in the case law.

Judge Raggi noted that the proposal raises two different standard of review questions, because it:

(1) changes "good cause" to "cause and prejudice" in order to reflect the interpretation given by most courts, and

(2) provides a different standard, "prejudice," for late raised FTSO claims.

Following *Cotton*, many appellate courts are now applying plain error to FTSO claims raised for the first time on appeal, and Judge Raggi said she had urged the Subcommittee to consider whether it was desirable to mandate the prejudice standard for late-raised FTSO claims on appeal.

Judge Raggi then opened the floor for general discussion by all committee members. A member asked the purpose of limiting the motions that must be raised before trial to those where the basis is "*reasonably* available." The Reporters and Subcommittee members explained that "available" appears to be a binary factual concept: information was or was not available. In contrast, "reasonably available" includes both this factual component and a qualitative judgment. For example, if the information necessary to raise the motion was included on one page of a massive data dump only one day before the date for filing pretrial motions, it might be deemed available in a factual sense, but not reasonably available. The requirement that a motion "must" be raised before trial applies only if the basis for the motion was "then reasonably available." This allows the defense to argue that, given the circumstances, it was not reasonable to expect a claim or defense to be raised. If the court determines that the basis for the motion was not reasonably available, then proposed Rule 12(b)(3) does not require the motion to be raised before trial. Therefore a later motion would not be untimely under Rule 12(c), and there would be no need to show good cause.

A defense member expressed a variety of concerns with the proposed amendment. First, he argued, the proposal shifts the burden of proof/burden of production by requiring the defense to raise certain "defenses" before trial. But the law generally permits the defense to remain silent and not to assert defenses before trial. For example, in the Third Circuit a statute of limitations defense is timely whether raised before trial, during trial, or at the time of jury instructions. The defendant can wait until the government rests, and then raise its claim that the government has not proven conduct that occurred within the limitations period. In the member's view, requiring this issue to be raised before trial would be a radical change. It would alert the prosecution to the problem. The proposal may also work a change for other claims or defenses. For example, even if some circuits require venue to be raised before trial, the matter may be open in other circuits. In some cases, it may also be to the advantage of the defense not to raise selective or vindictive prosecution before trial, because the government might change its presentation of the case. The member noted that requiring such defenses to be raised before trial may be efficient, but efficiency is not the concern of the defense. In some cases it might also be problematic for the defense to raise multiplicity before trial. These are not merely procedural issues. They are defenses. A defendant has a constitutional right to remain silent, and the government has the

burden of proof. Finally, he expressed concern about the uncertainty created by the new standard "reasonably available." There will be substantial litigation about what the defendant should have known. What if the defendant gets a gigabyte of data one year before trial? The member proposed as an alternative that claims must be raised before trial only when the defense has "actual knowledge." And even that would not solve the problem with shifting the burden of proof, especially for venue and statute of limitations.

Judge Raggi asked the member who first raised the issue of "reasonably available" if he was satisfied with the explanations. He responded that he now understood the rationale for including the word and the issues it would generate.

Judge Raggi then asked for any other concerns about the rule, so that the Subcommittee could respond to all of the issues. One member asked what kind of error could occur in a preliminary hearing, and given grand jury secrecy, how would a defendant know before trial that an error had occurred. Another participant asked why the Subcommittee proposed to substitute "cause and prejudice" for the traditional "good cause." Judge Raggi noted that Judge Sutton had also raised that issue, and asked him for his comments on the proposed amendment.

Judge Sutton noted that he was relatively new to Rule 12. He thanked the Committee for its extensive work on the proposal and expressed his sense that after eight years it was very important to complete the project. He identified a number of strengths of the proposal. First, it is valuable to clarify what issues must be raised before trial. Second, it is imperative to get rid of the term "waiver" in Rule 12(e). The current language was drafted before the Supreme Court clarified the distinction between waiver and forfeiture, and it makes no sense now. Giving district judges more flexibility before trial is very important. It's becoming clearer that this is a rule addressed to the district courts, which he characterized as positive.

Judge Sutton also provided perspective on the Supreme Court's role in the rulemaking process. Although the Court has the authority to approve rules over the dissent of a justice, under Chief Justice Roberts unanimity has been required. So rules must, in effect, be approved by all nine justices. With that in mind, Judge Sutton agreed that it was appropriate to omit double jeopardy from the non-exhaustive list of claims that must be raised before trial. But given the agreement that the word "waiver" should be eliminated, why not substitute "forfeiture"? Finally, he predicted that there would be a lot of push back on the proposed change from "good cause" to "cause and prejudice." "Good cause" is a well established concept, and it gives the court wide discretion. Prejudice is part of that traditional enquiry. But when you codify a standard, it ordinarily carries with it the meaning it has developed. Because "cause and prejudice" is now the standard in habeas litigation, its meaning in that context (including the exception for actual innocence) could carry over to Rule 12.

Judge Tallman explained that you could say the original rule was drafted, at least in part,

on the erroneous assumption that failure to state an offense was a jurisdictional error. *Cotton* then made it clear that failure to state an offense is not jurisdictional. In response to the concerns raised by the defense member, Judge Tallman noted that the proposal does reflect a policy judgment that the rules should discourage sandbagging. It does attempt to flush out issues that could be dispositive, which from the court's perspective should be raised early for effective case management. It may require the defense to play a card earlier than it wishes, but it does not require the defense to come forward with evidence. As an appellate judge, he shared some of the concerns that using "cause and prejudice" in Rule 12 could import some of the habeas case law. But trial judges understand "good cause." Finally, he noted that all of the issues raised at the meeting had been thoroughly vetted on multiple occasions. He commended the latest proposal as a very good rule and one that was a significant improvement over current Rule 12. The Supreme Court has now clarified the distinction between jurisdictional issues and merits claims, and there's no reason to allow sandbagging on non-jurisdictional issues.

Judge Raggi noted that the speakers had raised concerns about four main aspects of the Subcommittee's proposed rule:

(1) "then reasonably available";
(2) items on the enumerated list of claims (particularly statute of limitations);
(3) substituting "forfeiture" for "waiver"; and
(4) substituting "cause and prejudice" for "good cause."

She declared a break in the meeting and asked the Subcommittee to use the time to consider its response to these concerns and report back to the full Committee.

Following the break, Judge England announced the Subcommittee's views on the issues identified by Judge Raggi. In all cases, the Subcommittee was unanimous.

(1) The Subcommittee reaffirmed its strong support for "then reasonably available."
(2) The Subcommittee agreed that it would be acceptable to remove statute of limitations from the list of claims that must be raised before trial.
(3) The Subcommittee rejected the proposal to substitute "forfeiture" for "waiver" in subdivision (e).
(4) The Subcommittee agreed to retain "good cause" rather than "cause and prejudice."

He noted if the Committee as a whole endorsed this approach, it would be necessary to rework the language to incorporate "good cause." Members then explained the Subcommittee's views.

(1) <u>"then reasonably available"</u>

The Subcommittee was unanimous in the view that the qualifier "then *reasonably*

available" should be retained. The mandate of the rule (and the potential sanction) should be restricted to cases in which the court finds the basis of the defense was "reasonably" available. This is very important from the defense perspective, and it gives appropriate flexibility to the court.

A question arose as to whether the Committee Note could be used to clarify the meaning of "reasonably" in this context. Professor Coquillette reminded everyone that Committee Notes cannot be used to change the meaning of the rule. Professor Beale noted that as published the proposed Committee Note included the following:

> The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3) and (4). Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence").

She stated that the Cf. citation had been added only to provide an illustration of the kind of analysis that courts might undertake. Although the note could not properly be used to narrow or restrict the rule itself, there was general agreement that it would be beneficial to delete the Cf. citation.

Discussion focused on the effect of including the word "reasonably." A member stated that even if the word reasonably were omitted courts might nonetheless read in the same concept. Another member responded that it was nonetheless desirable to include the word in the text. Judge England observed that on the facts of any given case courts might disagree about what is reasonable, but that's inevitable. A member commented that judges already disagree about when a witness is "available." On his court, for example, the judges disagree about whether soldiers serving in Afghanistan are "available," depending on their view of the efficacy of video technology. The Reporters noted that inclusion of the "reasonably available" criteria is important because it short circuits the analysis: unless the basis for a late-filed motion was reasonably available, there is no need to show either cause or prejudice. Professor King also pointed out that inclusion of the word "reasonably" had been praised by defense commentators, and its deletion might be understood to make the rule significantly harsher. On this view, deletion might require republication.

A member sought clarification of who bore the burden of establishing that the basis for a motion was reasonably available. Several members expressed the view that the government would have this burden because it would be seeking to bar the claim or defense as untimely. In contrast, if the basis for the motion was reasonably available and the motion was thus untimely, the defense would have the burden of showing good cause. The chair and members discussed the possibility of adding a discussion of this issue to the Committee Note, but no action was taken

on this point.

(2) <u>changes to the list of enumerated claims</u>

Professor King explained the Subcommittee's willingness to delete statute of limitations from the list of claims which must be raised before trial. The Subcommittee had previously agreed to remove double jeopardy from the list, and it agreed to treat statute of limitations in the same way. Professor King noted that the 1944 Committee Note had described both double jeopardy and statute of limitations as defenses that need not be raised before trial. The Subcommittee's preference was to add both to the list of defenses that must be raised before trial with the understanding that other aspects of the rule – the limitation to motions for which the basis was "then reasonably available" which "can be determined without a trial on the merits" – would respond to the relevant concerns. However, the Subcommittee was amenable to deleting statute of limitations from the list of claims. The list is illustrative, not exhaustive. Many but not all courts now treat both double jeopardy and statute of limitations as defects in the indictment or institution of the prosecution that must be raised before trial, and deleting these claims from the rule simply allows the case law to continue to develop. Although the Subcommittee would prefer to clarify the law and bring about uniformity, the members agreed to delete both double jeopardy and statute of limitations in the interest of achieving the broadest support for the proposed amendment.

The member who had previously enquired about the inclusion of errors in the grand jury and preliminary hearing indicated that he was satisfied that there were rare instances in which such claims could be raised and determined before trial.

(3) <u>substitution of "forfeiture" for "waiver"</u>

The Subcommittee unanimously rejected the suggestion to substitute "forfeiture" for "waiver" in subdivision (e). Judge Raggi noted that she had discouraged the use of the term "forfeiture" because it was the language of appellate courts, and the rule was principally directed at the district courts. Looking ahead to the question how this might be viewed by the Supreme Court, she observed that the portion of the rule that included the "waiver" language when the Court decided *Cotton* was being eliminated. The new provisions on relief were part of a comprehensive revision of Rule 12. Judge Sutton stated he was satisfied with the explanation that "forfeiture" was principally an appellate standard, and it was not desirable to import that into the rule. Judge Tallman indicated that the disagreement in the application of forfeiture in the appellate cases was another reason not to import that phrase into the rule. Finally, Judge Raggi noted that forfeiture is generally associated with the plain error standard, not the good cause/cause and prejudice standards.

(4) <u>retention of "good cause"</u>

The Subcommittee also agreed to retain "good cause" (the term in the present rule) rather than "cause and prejudice" (the phrase substituted in the amendment published for public comment). The Subcommittee concluded that retaining the familiar "good cause" standard would assuage concerns that habeas case law would be imported into Rule 12, garner support in the Standing Committee, and avoid problems when the proposal is transmitted to the Supreme Court. Again, in a cost benefit calculus, the benefit of clarification was outweighed by the problems that might be caused. The Subcommittee noted, however, this change would require some additional revisions to the text. Judge Raggi deferred discussion of any changes in the language to accommodate "good cause." If the Committee approved the proposed rule in concept, she suggested, then the Subcommittee could use the lunch hour to draft the necessary language.

In light of the Subcommittee's resolution of the issues that had been raised for discussion, and with no member seeking further discussion, Judge Raggi then called for a vote on the proposed amendment to Rule 12 as modified in the following respects:

(1) eliminating statute of limitations defenses from (b)(3)(A),
(2) specifying that a court may consider an untimely claim if the party shows "good cause," and
(3) deleting the Cf. reference in the Committee Note accompanying (b)(3).

With the understanding that specific language to incorporate "good cause" into (c)(3) would be submitted for review, the Committee voted unanimously to transmit Rule 12, as amended following publication, to the Standing Committee.

By voice vote, the Committee also unanimously approved transmitting the conforming amendment to Rule 34.

Following the lunch break, the Subcommittee presented the following revised language for proposed Rule 12(c)(3):

> **(3)** ***Consequences of Not Making a Timely Motion Under Rule 12(b).*** If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. In such a case, a court may consider the defense, objection, or request if:
> (A) the party shows good cause; or
> (B) for a claim of failure to state an offense, the defendant shows prejudice.

Judge Raggi called for discussion. A member asked why (A) referred to the "party" and (B) to the "defendant." Professor Beale explained that only a defendant can raise a claim of failure to state an offense, but the prosecution as well as the defense may raise other pretrial motions governed by Rule 12.

After time for review of the proposed language, Judge Raggi asked whether there were any further concerns. Hearing none, she declared that the morning vote approving Rule 12 for transmission to the Standing Committee would stand with the inclusion of the new language for Rule 12(c)(3). The Reporters would make the necessary changes to the Committee Note to incorporate the other changes made by the Committee. The revised rule would also be subject to restyling. Judge Raggi assured members that any restyling changes that might be significant would be referred to the Rule 12 Subcommittee and, if necessary, to the Committee.

Judge Sutton asked for the Committee's view on the need for republication. Judge Raggi stated that in her view none of the post-publication changes warranted republication, as they did not change the balance among the parties. Professor Beale observed that certain controversial features supported by the Department of Justice had been deleted, but the Department had agreed to those changes as part of an overall agreement to move the rule forward. No member of the Committee supported republication.

B. Proposed Amendments to Rules 5 and 58

This is the Committee's second effort to amend Rules 5 and 58 to provide for advice concerning consular notification. The first proposed amendments were published for public comment and subsequently approved by the Advisory Committee, the Standing Committee, and the Judicial Conference. However, in April 2012 the Supreme Court returned the Rule 5(d) and Rule 58 amendments to the Advisory Committee for further consideration. In response, the Committee revised the language of the proposed amendments, which were approved for publication by the Standing Committee in August 2012.

Rules 5 and 58 govern the procedure for initial appearances in felony and misdemeanor cases. Both provide, inter alia, that the judge must inform the defendant of various procedural rights (including the right to retain counsel or request that counsel be appointed for him, any right to a preliminary hearing, and the right not to make incriminating statements). Parallel amendments to Rules 5 and 58 were proposed by the Department of Justice to facilitate the United States' compliance with Article 36 of the Vienna Convention on Consular Relations ("the Vienna Convention"), which provides for detained foreign nationals to be advised of the opportunity to contact the consulates of their home country. Various bilateral agreements also contain consular notification provisions.

As published in 2012, 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 rules do 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, as the Committee note emphasizes, the proposed rules do not themselves create any such rights or remedies.

Opening the discussion, Judge Raggi noted that, in twice proposing amendments to Rules 5 and 58, the Committee had carefully considered the policy question of whether the judiciary should be involved in the executive's efforts to satisfy its consular notification requirements under various treaties. The Committee had answered that question in the affirmative, albeit not unanimously. Further, the Committee's 2012 redrafting of the amendment in response to the Supreme Court's remand had been approved for publication by the Standing Committee. Thus, the immediate issue before the Committee was the comments received in response to publication.

Professor Beale described the public comments, which urged changes in the introductory clause of the proposed rules providing that the advice must be given "if the defendant is held in custody and is not a United States citizen." The Federal Magistrate Judges Association (FMJA) recommended that the quoted language be deleted and that the advice requirement apply to all defendants. Two reasons informed the recommendation. First, the FMJA expressed concern that the amendment could be interpreted to require that the arraigning judge determine whether a defendant is a U.S. citizen before providing the advice regarding consular notification. An inquiry of this nature would be undesirable, because defendants might make incriminating statements. Professor Beale endorsed the FMJA's suggestion that it would be better to rephrase the new provisions to parallel proposed Rule 11(b)(1)(O), which is being transmitted from the Supreme Court to Congress. Proposed Rule 11(b)(1)(O) requires the court to give warnings to all defendants about the possible collateral immigration consequences of a guilty plea. The Committee Note explains:

> 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.

Second, the FMJA submitted that the proposed advice requirement should not be limited to defendants "in custody" at the time of their initial appearance.[1] After consultation with the

[1] There was some disagreement between the Department of State and the FMJA concerning the scope of the obligation under Article 36, but it was not necessary for the Committee to resolve this disagreement. The FMJA noted that Article 36 of the Vienna Convention covers any national who is "arrested or committed to prison or to custody pending trial or is detained in any other manner." Because all defendants who are brought to the court for an initial appearance are arrestees, the FMJA concludes that the proposed amendment should provide for all

Department of State, the Department of Justice had no objection to removing the "in custody" language in the proposed rule if the Committee considers that appropriate. The National Association of Criminal Defense Attorneys also expressed concern with the "in custody" language, though for other reasons.

Professor Beale noted that the revised language now proposed had been agreed to by the Department of Justice after consultation with the Department of State, and vetted by the Style Consultant.

Judge Raggi stated that the key post-publication change was expanding the notification to all defendants, not only those in custody. Although there is always a concern about adding to the long list of information judges are already required to provide, she explained that in this instance there was a practical reason to provide the required advice to all defendants at their initial appearance. Specifically, a defendant who was not in custody at the time of his first appearance might later be remanded for various reasons, such as violation of the conditions of bail. It would be more efficient to provide the warning to all defendants at the first appearance, rather than try to ensure that advice is given later under the varying circumstances that might occur in individual cases.

Professor Coquillette questioned the inclusion in the Committee Note of a reference to the Code of Federal Regulations governing consular advice by arresting officers. He noted that if the regulations were altered it would not be possible to change the Note to update the citation. The Committee agreed to delete the citation and explanatory parenthetical.

A member asked what the consequence would be if a judge does not provide the advice. The proposed rule does not provide for a right or a remedy. Judge Raggi noted that the

---

defendants to receive advice concerning consular notification irrespective of their custodial status at arraignment.

Although the Department of Justice had no objection to removing the "in custody" language in the proposed rule if the Committee considers that appropriate, as noted in the March 25, 2013 letter from Ms. Felton and Mr. Wroblewski, the Department of State does not agree with the FMJA's reading of the Vienna Convention. As reflected in U.S. DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS at 17 (3rd ed. 2010) http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf , the Department construes the Vienna Convention to cover only situations in which a foreign national's ability to communicate with or visit consular officers is impeded as a result of actions by government officials limiting the foreign national's freedom. (For example, the Department of State would not consider a "detention" to include a brief traffic stop or similar event in which a foreign national is questioned and then allowed to resume his or her activities.) In light of the magistrates' concern, however, the Department saw no harm in offering this advice to every arrestee at the first appearance if the Committee considers that appropriate.

Departments of State and Justice see value in incorporating this advice into the rules as part of the effort to satisfy our treaty obligations, even absent a remedial provision. Speaking on behalf of the Justice Department, Ms. Felton noted that there is often no record of advice given by arresting officers; providing the warning at the initial appearance would create a record of compliance with treaty obligations. Additionally, the federal rule may provide a model for similar state rules and thus indirectly bring about more widespread compliance with Article 36.

By voice vote, the Committee unanimously agreed that Rule 5, as modified after publication, be transmitted to the Standing Committee.

By voice vote, the Committee unanimously agreed that Rule 58, as modified after publication, be transmitted to the Standing Committee.

IV. NEW PROPOSAL FOR DISCUSSION

Judge Raggi asked Mr. Wroblewski to provide an introduction to the Department of Justice proposal to amend Rule 4.

Mr. Wroblewski explained that Rule 4 has become an obstacle to the prosecution of foreign corporations that commit offenses in the United States but cannot be served because they have no known last address or principal place of business in the U.S. Some courts have held that efforts to serve by other means were insufficient even if they would provide notice. He stated that this issue is now coming up with some frequency.

Judge Raggi noted that the next step would be the appointment of a subcommittee, but that some initial discussion might be helpful. She asked how the provision sought by the Department would work in practice. What if the foreign corporation were served, but it entered no appearance. Did the Department contemplate that it would be able to prosecute without an appearance, and, if not, what would be the benefit of the change?

Mr. Wroblewski said he was not prepared to answer all facets of the question, but he drew attention to several points. First, to date foreign corporations have not generally ignored service. They have appeared but contested the adequacy of service. Additionally, even if a corporation has not entered an appearance, effective service would have other beneficial consequences, such as asset forfeiture, regardless of whether the government could proceed with the prosecution.

Judge Raggi noted that these were among the issues to be considered by a Subcommittee. She announced that Judge David Lawson had agreed to chair the Rule 4 Subcommittee, and that Judge Rice, Mr. Siffert, and representatives of the Department of Justice would serve as

members. She asked the Subcommittee to report at the October meeting.

V. STATUS REPORT ON CRIMINAL RULES

Mr. Robinson stated that in response to the trial of Senator Ted Stevens, hearings were held in Congress to consider disclosure obligations of Federal Prosecutors. The Administrative Office worked with Judge Raggi to prepare a voluminous submission that contained all of the Committee’s work on Rule 16. Informally we heard that staff found our materials very helpful.

Ms. Brook stated that she had testified at the hearing as a Federal Defender, not as a member of the Committee. She provided written testimony, was questioned extensively, and then provided written comments.

VI. INFORMATION ITEMS

Judge Raggi reported to the Committee that the FJC's Benchbook Committee had acted on the Criminal Rules Committee's suggestion that a discussion of Brady/Giglio obligations be included in the next edition of the Benchbook. A copy of the new Benchbook's detailed and comprehensive section on Brady/Giglio was included in the Committee's agenda book. Judge Raggi expressed her gratitude to the Benchbook Committee for allowing her to participate in its discussions leading to the preparation of this new section.

Judge Lawson, who served as a liaison to the Synonym Subcommittee, was asked to comment on the Subcommittee, whose report was included in the Agenda Book. He noted that the Subcommittee report includes a chart detailing a very large number of words and phrases that appear in more than one set of rules. At this point, no action to standardize these many terms is contemplated.

Judge Raggi announced that the Committee’s next meeting would be held October 17-18, 2013, in Salt Lake City, where the Committee will be hosted by the University of Utah School of Law.

THIS PAGE INTENTIONALLY BLANK

TAB 4

THIS PAGE INTENTIONALLY BLANK

TAB 4A

THIS PAGE INTENTIONALLY BLANK

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

From: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Federal Rules of Bankruptcy Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 2 and 3, 2013, in New York, New York, at the United States Bankruptcy Court. The draft minutes of that meeting accompany this report as Appendix C. The Committee's actions fall into three categories.

First, the Advisory Committee took action on the proposed rule and form amendments that were published for comment in August 2012. Forty-six comments were submitted in response to the publication, some of which addressed multiple rules and forms. The comments were considered in a series of subcommittee conference calls, at a meeting of the Forms Modernization Project, and in Committee discussions at the New York meeting. (The comments are summarized below, along with a discussion of the changes that the Committee made in response.) The Advisory Committee now seeks the Standing Committee's final approval and transmission to the Judicial Conference of most of the published items: the revision of the Part VIII rules and amendments to ten other rules and five official forms. Because the Committee made significant changes after publication to one set of published forms—the means test forms—it requests that those forms be republished.

Second, the Advisory Committee took action on new proposed rule and form amendments that are the result of two major projects: the continuing work of the Forms Modernization Project and the development of a chapter 13 plan form. The Committee requests publication for public comment of (1) the remaining group of modernized forms for use in individual-debtor bankruptcy cases and (2) a chapter 13 plan form and implementing rule amendments.

Finally, as discussed below, the Committee also approved and seeks publication for comment of proposed amendments to two other rules and three forms.

Part II of this report discusses the action items, grouped as follows:

(A1) matters published in August 2012 for which the Advisory Committee seeks approval for transmission to the Judicial Conference—amendments to Rules 1014, 7004, 7008, 7012, 7016, 7054, 8001-8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, and 6J;

(A2) a conforming amendment to Official Form 23, for which the Committee requests transmission to the Judicial Conference without publication;

(B1) amendments to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, for which the Committee seeks approval for republication in August 2013, along with the initial publication of Official Form 22A-1Supp; and

(B2) matters for which the Advisory Committee seeks approval for publication in August 2013—amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5005, 5009, 7001, 9006, and 9009, and Official Forms 101, 101A, 101B, 104, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 113, 119, 121, 318, 423, 427, 17A, 17B, and 17C.

II. Action Items

A. Items for Final Approval

A1. Amendments Published for Comment in August 2012. **The Advisory Committee recommends that the proposed rule and form amendments that are discussed below be approved and forwarded to the Judicial Conference. It recommends that the amended forms take effect on December 1, 2013.** The text of the amended rules and forms is set out in Appendix A.

Action Item 1. Rules 7008, 7012, 7016, 9027, and 9033 would be amended in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011). 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*, which held that a bankruptcy judge did not have authority under Article III of the Constitution to enter final judgment in a proceeding deemed core under the Judicial Code, has introduced the possibility that such a proceeding may nevertheless lie beyond the power of a bankruptcy judge to adjudicate finally. In other words, a proceeding could be "core" as a statutory matter but "non-core" as a constitutional matter.

The Advisory Committee proposed to amend the Bankruptcy Rules in three respects. First, the terms core and non-core would 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) would need 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, would be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

The Advisory Committee received eight comments on all or part of these proposed amendments. In the main, the comments expressed support for the amendments but raised five issues:

(1) whether to retain the terms "core" and "non-core";

(2) whether references to the "bankruptcy court" in the published amendments should revert to the "bankruptcy judge," the term that is currently used;

(3) whether to provide procedures for treating as proposed findings and conclusions a bankruptcy judge's decision entered as a final order or judgment when that decision is later determined to be beyond the bankruptcy judge's final adjudicatory power;

(4) whether to require a statement as to consent when a litigant proceeds by motion before filing a formal pleading; and

(5) whether to provide that a litigant may consent to final adjudication by a bankruptcy judge with respect to part, but not the whole, of a proceeding.

After reviewing the comments, the Advisory Committee voted unanimously to recommend final approval of the published amendments. With respect to the first three issues raised by the comments, these points were thoroughly considered before publication of the amendments. The Advisory Committee did not find the comments to raise new concerns that would justify revisiting those issues. Issues (4) and (5), on the other hand, had not been considered previously. The Advisory Committee nevertheless concluded that the comments raising those issues, although presenting possible suggestions for future rulemaking, did not

require alteration of the published amendments. Similarly, the Advisory Committee concluded that a comment by the Bankruptcy Clerks Advisory Group regarding the requirement of service of notice by mail under current Rules 9027 and 9033 might be considered for future rulemaking but was beyond the scope of the *Stern*-related amendments. The comments are set out in more detail in Appendix A.

Action Item 2. Rules 8001-8028 (Part VIII of the Bankruptcy Rules) are the products of a comprehensive revision of the rules governing bankruptcy appeals to district courts, bankruptcy appellate panels, and, with respect to some procedures, courts of appeals. 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. Existing rules were reorganized and renumbered, some rules were combined, and provisions of other rules were moved to new locations. Much of the language of the existing rules was restyled.

Fourteen sets of comments were submitted in response to the publication of these rules. Many of the comments were lengthy and detailed. They demonstrated the commenters' careful review of the published rules and provided suggestions on issues of style, organization, and substance. In considering the comments, the Advisory Committee was guided by the goal of maintaining close adherence to the Federal Rules of Appellate Procedure ("FRAP"), except where those rules are incompatible with bankruptcy appeals. It also recommended postponing for future consideration a number of suggestions that would change existing practice or raise policy issues requiring careful consideration. In general, the comments displayed a positive response to the proposed revision of the Part VIII rules, and the Advisory Committee unanimously voted to recommend them for final approval with the post-publication changes that are indicated.

Not all of the proposed rules were commented upon. The following discussion describes the most significant comments that were submitted and the Advisory Committee's responses. Appendix A sets out after each rule a more complete listing of both the comments—including some on rules not discussed below—and the changes made after publication.

General Comments. Two bankruptcy judges and the National Conference of Bankruptcy Judges praised the revision of the Part VIII rules, stating that it would lead to improved quality of bankruptcy appellate practice, reduce confusion, and yield a more efficient and effective bankruptcy appellate practice.

Rule 8002. Two comments expressed concern about the inclusion of an inmate mailbox rule, which deems a notice of appeal by an inmate timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. The commenters stated that this rule could delay for several days the determination that a bankruptcy court order or judgment has become final. The Committee continued to support the inclusion of this provision

in order to mirror FRAP 4(c). It believed that, given the rarity of inmate appeals in bankruptcy cases, the impact of the provision on finality will be limited.

Rule 8003. Several comments pointed out that the provision in subdivision (d) directing the clerk of the appellate court to docket an appeal "under the title of the bankruptcy court action" is unclear since "action" might refer to the overall bankruptcy case or to an adversary proceeding within the case. The Committee agreed that this was an instance in which the FRAP language needs to be modified for the bankruptcy context. It voted to change the wording in Rule 8003(d)(2) and the parallel provision in Rule 8004(c)(2) to "under the title of the bankruptcy case and the title of any adversary proceeding."

Rule 8004. The clerk of a bankruptcy appellate panel ("BAP") commented on the provision of subdivision (c)(3) that directed the dismissal of an appeal if leave to appeal is denied. She stated that appellants sometimes file a motion for leave to appeal when leave is not required and in that situation, although the motion is denied, dismissal is not appropriate. The Committee voted to delete the sentence in question, which is not contained in either the current bankruptcy rule or FRAP rule from which the proposed rule is derived.

One comment pointed out an inconsistency between proposed Rule 8003 and Rule 8004. Rule 8003(c) requires the bankruptcy clerk to serve the notice of appeal, whereas Rule 8004(a) places that duty on the appellant (along with the motion for leave to appeal). This difference is a carryover from existing practice. The Committee decided to consider in the future whether the service requirement should be the same in both rules.

Rule 8005. Several comments questioned whether an election to have an appeal heard by the district court, rather than the BAP, must still be made by a statement in a separate document. Subdivision (a) of the proposed rule refers to an official form that did not exist at the time the rule was published, and some comments also expressed confusion about that reference. At the spring meeting, the Committee approved for publication an amendment to the notice of appeal form, Official Form 17A, that will include a section for making an election under this rule. That form, which if approved will take effect on the same date as the rule, will clarify that the separate-document rule no longer applies.

Two comments addressed the procedure that should apply when an appellee elects to have the district court hear an appeal that was initially sent to the BAP. The Committee agreed with one of the comments that the BAP clerk should notify the bankruptcy clerk if an appeal is transferred to the district court, and it voted to add a sentence to that effect in subdivision (b).

Rule 8006. Two comments stated that the proposed rule does not give the bankruptcy court sufficient time to certify a direct appeal to the court of appeals. Under subdivision (b), a matter is deemed to remain pending in the bankruptcy court for purposes of this rule for 30 days after the effective date of the first notice of appeal. The Advisory Committee decided that this time limit strikes an appropriate balance between giving the bankruptcy court time to decide

whether to certify a direct appeal and letting the district court or BAP know at a reasonably early time that a certification for direct appeal will not be coming from the bankruptcy court. Under 28 U.S.C. § 158(d)(2), district courts and BAPs also have certification authority.

Rule 8007. Two comments questioned the provision of the published rule that appeared to permit a party to seek a stay pending appeal in an appellate court before a notice of appeal has been filed. The comments took the position that, until a notice of appeal is filed, the appellate court lacks jurisdiction to rule on a stay motion. The Committee agreed that the rule should be clarified to eliminate the possibility of filing a motion for a stay in the appellate court prior to the filing of a notice of appeal.

Rule 8009. Two bankruptcy judges and the Bankruptcy Clerks Advisory Group submitted comments stating that the practice of having the parties designate the record on appeal is now outdated and that the 8th Circuit BAP's rule regarding the record should be adopted. Under that rule the record before the bankruptcy court is the record on appeal, and parties refer by number to the appropriate bankruptcy court docket entries in their appellate briefs. BAP judges are able to review the entire bankruptcy court record electronically. The Advisory Committee decided that the rule should remain as published but that this issue should be taken up for consideration in the future.

Several comments objected to two FRAP provisions that were included in this rule: subdivision (c) that permits a statement of the evidence when a transcript is unavailable, and subdivision (d) that permits an agreed statement as the record on appeal. As to both, the Committee favored remaining consistent with the parallel FRAP provisions.

Rule 8010. Three comments noted that, while subdivision (b)(1) directs the bankruptcy clerk to transmit the record to the appellate clerk when it is complete, it does not specify what the clerk should do if the record is never completed. The Advisory Committee voted to add this issue to the list of matters for future consideration.

Rule 8013. One comment suggested that district courts be allowed to require a notice of motion in bankruptcy appeals if they otherwise follow that practice in their court. Another comment made a similar suggestion concerning proposed orders. The Advisory Committee agreed with these comments and added "Unless the court orders otherwise" to subdivision (a)(2)(D)(ii).

Another comment questioned why a rule allowing intervention on appeal is necessary and whether a party moving to intervene would have standing. The Advisory Committee noted that it is not always clear who is a party to a contested matter, so someone affected by an order being appealed may want to intervene to participate in the appeal. A United States trustee is also sometimes in the position of needing to intervene on appeal.

Rule 8016. Two comments raised questions about subdivision (f), which addressed the consequences of failing to file a brief on time. It was unclear why the provision was located in the rule governing cross-appeals, and it seemed to be inconsistent with a provision in Rule 8018. The Advisory Committee thought that the comments were well taken, and it voted to delete the subdivision.

Rule 8017. The States' Association of Bankruptcy Attorneys commented that all governmental units, not just the United States and states, should be permitted to file an amicus brief without consent or leave of court. The Advisory Committee adhered to the decision to make the bankruptcy rule consistent with FRAP 29.

Rule 8018. A bankruptcy judge commented that the authorization in subdivision (f) for dismissal of an appeal or cross-appeal should require notice and an opportunity to show cause why the appeal should not be dismissed. The Advisory Committee voted to reword the provision to clarify that dismissal can occur only upon motion of a party or on the court's own motion, after which the appellant would have an opportunity to respond.

Rule 8019. One comment stated that there should not be a presumption in favor of oral argument and that the grounds for not allowing it should not be limited. The Advisory Committee made no change to the proposed rule, which is consistent with current Rule 8012 and FRAP 34(a)(2).

Another comment asserted that there is an inconsistency between subdivision (b), which requires a unanimous vote of a BAP panel to dispense with oral argument, and subdivision (g), which allows a BAP panel by majority vote to require oral argument when the parties agree to submit the case on the briefs. The Advisory Committee concluded that these provisions are consistent with FRAP 34(a)(2) and (f) and with the presumption in favor of oral argument.

Rule 8021. The States' Association of Bankruptcy Attorneys commented that subdivision (b), which permits the assessment of costs for or against the United States, its agencies, and officers only if authorized by law, should apply to all governmental units. The Advisory Committee made no change to this provision, which is consistent with FRAP 39(b).

Rule 8023. In its comments, the National Conference of Bankruptcy Judges suggested two issues for future consideration by the Advisory Committee relating to this rule, which governs voluntary dismissals of appeals. (1) In the bankruptcy court Rule 7041 requires a plaintiff seeking to dismiss an adversary proceeding objecting to the debtor's discharge to provide notice to certain parties and obtain a court order containing appropriate terms and conditions. The NCBJ suggests the need for similar safeguards when that type of proceeding is voluntarily dismissed on appeal. (2) Under Rule 9019 a trustee is required to obtain court approval of any compromise or settlement. The NCBJ stated that it is not clear how Rule 9019 relates to this rule. The Advisory Committee added these issues to its list of matters for future consideration.

Rule 8024. The National Conference of Bankruptcy Judges commented that the rule carries forward a problem in current Rule 8016: It does not provide for the issuance of a mandate by the appellate court and thus does not make clear when jurisdiction revests in the bankruptcy court after the conclusion of an appeal. While the existing rule does not appear to be disrupting bankruptcy administration unduly, the comment suggested that the Advisory Committee consider this issue in the future. The Advisory Committee agreed to do so.

Action Item 3. **Rule 1014(b)** governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The rule currently provides that, upon 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. Except as otherwise ordered by that court, proceedings in the cases in the other districts "shall be stayed by the courts in which they have been filed" until the first court makes its determination.

The Advisory Committee proposed amending Rule 1014(b) to provide that proceedings in subsequently filed cases are stayed only upon order of the court in which the first-filed petition is pending and to expand the list of persons entitled to receive notice of a motion in the first court for a determination of where the related cases should proceed. The amendment would state more clearly what event triggers the stay of proceedings in the court in which a subsequent petition is filed. The current rule has led to uncertainty about whether the stay goes into effect immediately upon the filing of the second petition or only upon the filing of a motion to determine where the cases should proceed. Rather than selecting either of these options, the Committee decided that an order by the first court should be required. That requirement would eliminate any uncertainty about whether a stay was in effect. It would also permit a judicial determination—not just a party's assertion—that the rule applies and that a stay of other proceedings is needed.

Four sets of comments were submitted in response to the publication of the proposed amendments. Two of the commenters—Bankruptcy Judge Robert J. Kressel and the National Conference of Bankruptcy Judges—questioned the jurisdiction of the first court to enjoin parties to other cases. The States' Association of Bankruptcy Attorneys raised four issues. Its comment stated that (1) the rule does not clearly state that the first court has exclusive authority to determine the venue of the related cases; (2) it is not clear who can seek a determination of where the cases can proceed; (3) the Committee Note says that the clerk can order the moving party to provide notice, but that party will not always have the information needed to provide notice to parties in other cases; and (4) a time limit should be imposed for seeking a determination in the first court. Finally, Bankruptcy Judge Christopher Klein commented that the current rule generally works well and engenders cooperation among the affected courts, something he fears will not happen under the amended rule.

Regarding the jurisdictional issue that was raised, the Advisory Committee noted that the rule—in its current form as well as in the proposed amended version—allows a court to order a change of venue of cases pending in other courts. The accompanying stay provision is intended to prevent the entry of inconsistent orders while the venue situation is resolved by the first court.

The proposed amendment both clarifies and narrows the scope of the stay provision. The current rule applies a blanket rule that all the later-filed cases are stayed while the first court makes the venue determination. The amended rule would limit the stay to situations in which the first court finds that the rule in fact applies and that a stay is needed. Bankruptcy courts have long been held to have jurisdiction to issue stays to protect the estate being administered, including stays to protect the individuals managing the estate. *Ex parte Christy*, 44 U.S. 292, 318 (1845) (recognizing the power of a court presiding over a bankruptcy case to issue stays of other proceedings); *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (enforcing a bankruptcy court's injunction preventing judgment creditors from proceeding against sureties). Consistent with this authority, the legitimacy of the existing rule's stay authority has not been questioned. The Committee concluded that an amendment that reduces the scope of that authority would be equally valid.

In considering the comments of the States' Association of Bankruptcy Attorneys, the Committee concluded that the amended rule would give the first court exclusive authority to determine where the related cases will proceed if a motion for that purpose is filed in that court. The Committee did not support imposing a time limit for filing the motion because of the varying circumstances in which this rule might be invoked. The Committee also concluded that the rule did not need to be more specific about the provision of notice. It did, however, vote to make a wording change regarding notice that was suggested by the National Conference of Bankruptcy Judges.

Despite Judge Klein's positive experience with current Rule 1014(b), the Committee remained concerned that it imposes a stay of other cases at a time that is uncertain and under circumstances of which affected courts and parties may be unaware.

The Committee therefore unanimously voted to approve the amendments to Rule 1014(b) with one wording change.

Action Item 4. Rule 7004(e) governs the time during which a summons is valid after its issuance in an adversary proceeding. The current rule provides that a summons is valid so long as it is served within 14 days of its issuance. The Advisory Committee sought publication of an amendment to reduce that period from 14 days to 7 days. The concern prompting the amendment is that a 14-day delay before service of a summons may unduly limit the defendant's time to answer, which is calculated under Rule 7012 of the Bankruptcy Rules from the date the summons is issued and not (as is the case under the Civil Rules) the date it is served. Because summonses are routinely issued electronically and served by mail (as permitted under Rule

7004(b)), the Advisory Committee believed that a seven-day service window would be sufficient.

Upon publication of the amendment, the Advisory Committee received four comments. Each of the comments raised essentially the same issue—that a seven-day window to serve a summons may be too short in some circumstances. Two comments noted that service by mail is not permitted under Rule 7004(b) when the recipient's postal address is not a "dwelling house or usual place of abode or . . . the place where the individual regularly conducts a business or profession." If, for example, the recipient has only a post office box, the Bankruptcy Rules do not provide for service by mail. Effecting service within seven days may be impracticable under those circumstances. One comment observed that with an unrepresented plaintiff or one whose lawyer is not a registered electronic filer, the summons will not be issued electronically. If the party receives the summons by mail from the clerk, some or all of the seven-day period will expire, making timely service unlikely. A similar concern was raised with respect to judges who require the inclusion of a scheduling order with the summons. The scheduling order might not be prepared for several days, which could impede the ability to make timely service.

For three reasons, the Advisory Committee concluded that the concerns raised by the comments did not justify altering or abandoning the amendment to Rule 7004(e). First, the principal concern expressed by the comments—that a seven-day service window might be insufficient in particular circumstances—had been contemplated by the Advisory Committee. Those circumstances were considered to be infrequent and, if they did arise, were thought to be best handled through a request for an enlargement of the time to serve the summons under Rule 9006(b). The comments do not suggest that the Advisory Committee was mistaken in its consideration of the issue. In response to the comments, the Advisory Committee has added language to the Committee Note accompanying the amendment in order to highlight the availability of an enlargement of time under Rule 9006(b).

Second, the alternative approaches to service of summonses offered by the comments would require significant changes to the Bankruptcy Rules. The Advisory Committee, however, sought to make the least disruptive change that would ensure sufficient time to serve, and respond to, a summons. The Advisory Committee rejected an alternative amendment to Rule 7012 that would lengthen the defendant's time to answer, because that approach would not serve the need to expedite proceedings in bankruptcy. The Advisory Committee also declined to make more extensive changes to Rule 7004, such as adopting the Civil Rules' method of calculating the defendant's time to respond.

Third, the published amendment's 7-day time to serve a summons, although less than the 14-day period under the current rule, is close to the ten-day period that prevailed before it was lengthened by the Time-Computation Project. The comments suggest that further study may be warranted with respect to harmonizing the Bankruptcy and Civil Rules on issuance and service of a summons and complaint. But that project is well beyond the scope of the published amendment.

Accordingly, the Advisory Committee voted unanimously to recommend final approval of the text of the amended rule as published, together with a revised Committee Note.

<u>Action Item 5</u>. Rules 7008(b) and 7054 would be amended to change the procedure for seeking attorney's fees in bankruptcy proceedings. The Advisory Committee proposed the amendments in order to clarify and to promote uniformity in the procedures for seeking an award of attorney's fees. Rule 7054 would be amended to include much of the substance of Civil Rule 54(d)(2). Rule 7008(b), which currently addresses attorney's fees, would be deleted. By bringing the Bankruptcy Rules into closer alignment with the Civil Rules, the amendments would eliminate a potential trap for an attorney, particularly one familiar with the Civil Rules, who might overlook the requirement in Rule 7008(b) to plead a request for attorney's fees as a claim in the complaint, answer, or other pleading. As under the Civil Rules, the procedure for seeking an award of attorney's fees would be governed exclusively by Rule 7054, unless the governing substantive law requires the fees to be proved at trial as an element of damages.

Two comments were submitted on these amendments. The States' Association of Bankruptcy Attorneys addressed the sentence in Rule 7054(b)(1), which is not proposed for amendment, that permits the award of costs against the United States, its officers, and agencies only to the extent permitted by law. The Association suggested that the provision be broadened to apply to all governmental units. The other comment was submitted by attorney Louis M. Bubala III. Mr. Bubala stated that he was "pleased especially with the proposed elimination of Rule 7008(b) and addition of Rule 7054(b)(2) regarding claims for attorney's fees. The current rules have caused problems over the years, and the adoption of the procedure from the civil rules is a good one."

The Advisory Committee voted unanimously to approve the amendments as published.

<u>Action Item 6</u>. Rule 9023, which governs New Trials; Amendment of Judgments, and **Rule 9024**, which governs Relief from Judgment or Order, would be amended to include a cross-reference to proposed Rule 8008, which governs Indicative Rulings. The Advisory Committee proposed these amendments in order to call attention at an appropriate place in the rules to that new bankruptcy appellate rule. Rule 8008 prescribes procedures for both the bankruptcy court and the appellate court when an indicative ruling is sought. It therefore incorporates provisions of both Civil Rule 62.1 and FRAP 12.1. Because a litigant filing a post-judgment motion that implicates the indicative-ruling procedure will not encounter a rule similar to Civil Rule 62.1 in either the Part VII or Part IX rules, the Committee decided that it would be useful to include a cross-reference to Rule 8008 in the rules governing post-judgment motions.

The only comment submitted in response to the publication of these amendments was from the National Conference of Bankruptcy Judges. It commented that a cross-reference to another rule is more appropriately placed in a Committee Note than in the rule itself.

The Advisory Committee voted unanimously to approve the amendments to these rules as published because a Committee Note may not be amended without an amendment of the rule. Furthermore, several comments on the Part VIII rules suggested that it is helpful to have a cross-reference to another rule included in the rule, rather than in the Committee Note, because Committee Notes are not always published in rule compilations and are often overlooked.

Action Item 7. **Official Forms 3A, 3B, 6I, and 6J** are restyled forms for use in individual-debtor cases that were published for comment last August. The Advisory Committee unanimously voted to recommend them for final approval with the post-publication changes that are indicated.

The forms were developed as part of the Advisory Committee's ongoing Forms Modernization Project ("FMP"), which is a multi-year endeavor of the Advisory Committee, working in conjunction with the Federal Judicial Center and the Administrative Office of the U.S. Courts. 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 ("Next Gen"), and the modernized forms are being designed to use enhanced technology that will become available through Next Gen. From a forms perspective, the major change in Next Gen 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 group made a preliminary decision, endorsed by the Advisory Committee, that the forms for individual debtors should be separated from those for entities other than individuals. 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 clearer instructions and examples within the forms and more extensive separate instruction sheets.

Official Forms 3A (Application for Individuals to Pay the Filing Fee in Installments), 3B (Application to Have the Chapter 7 Filing Fee Waived), 6I (Schedule I: Your Income), and 6J (Schedule J: Your Expenses) were selected for the initial-implementation stage of the FMP because they make no significant change in substantive content and simply replace existing forms that apply only in individual-debtor cases. The restyled forms 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. The publication of these forms has already provided valuable feedback on the FMP approach to form design, and, if adopted, their use will provide a helpful gauge of the effectiveness of the FMP approach.

In response to the publication of these forms, 29 sets of comments were submitted, and one letter was informally submitted to the working group. Set out below is a discussion of the most significant comments and the changes made by the Advisory Committee in response.

General Comments. Comments on the overall project and the published forms in general fell primarily into the following categories:

- support for the new forms;
- dislike of the new forms and a preference for maintaining the current forms;
- concern that the forms contain too much shading, too much white space, and too many pages, all of which will increase printing, mailing, and electronic transmission costs;
- concern that the forms will encourage pro se filings, to the detriment of the debtors and the courts; and
- expressions of a need for a clear statement about the extent to which software-generated forms can deviate from the graphic and formatting styles of the proposed forms, such as by omitting instructions and omitting or collapsing inapplicable sections.

The Advisory Committee discussed these comments during its spring meeting. Members first discussed the most fundamental question—whether the project should proceed notwithstanding the negative commentary. After reviewing the reasons for the project and the guiding principles behind the redesign, the Committee unanimously concluded that the project should proceed.

In response to the numerous comments about shading, the Committee accepted the FMP's recommendation that shading should largely be eliminated. The Committee agreed with the FMP's redesign of the forms, which retains the black banner for the "part" designation but uses a different format for the title of each part. Shading was largely eliminated from the balance of each of the forms. The Committee believes that these changes will reduce toner usage and increase the ease with which forms are printed and reproduced.

The Advisory Committee also agreed with the FMP's assessment regarding page length. The increase in the page length is a function of several factors. First, in an effort to increase accuracy and ease of use, and to create a form whose answers can populate a usable database of answers, more specific questions are posed, and the debtor is often prompted to provide an answer. Second, rather than providing a dense set of instructions at the beginning of a form and then blank spaces for the answers, these forms provide instructions where the debtor is likely to need them. Third, more space is provided to answer some of the questions. Finally, examples are often included to help the debtor understand what information is being requested. The Committee agreed with the FMP that this approach is likely to provide more accurate, usable information.

The extent to which software-generated forms may deviate from the official forms is an issue that is relevant to other forms, not just to the modernized forms. Proposed revised Rule 9009, which is part of the chapter 13 plan form and rules package presented at this meeting for publication, provides additional guidance regarding the extent to which software-generated forms may deviate from the official forms.

Whether the use of plain English and a more user-friendly design will encourage more filings without the assistance of counsel has been the subject of discussion since the beginning of this project. The preparation of comprehensive instructions that explain the impact and complexity of a bankruptcy case and provide ample warnings about the significance of the forms should discourage, not encourage, pro se filings. In addition, the Committee believes that it is important that forms be understandable by all debtors, including those who are represented, because debtors are required to sign the forms under penalty of perjury. The comments did not cause the Committee to change its views.

Comments on Official Form 3A (installment payment of filing fees). Two sets of comments addressed this form specifically. Both suggested the need to add to the form the option of paying a chapter 13 filing fee through the debtor's plan. Districts differ on whether to permit this practice, and the current form does not expressly provide this option. In view of the fact that the practice is far from universal and the bankruptcy system has been able to accommodate the practice when it is allowed, the Advisory Committee decided that the form should remain silent regarding that option.

Line 2 of the published form stated that a debtor may ask the court to extend the deadline for payment of the final fee installment and that the debtor must explain why an extension is needed. One comment noted that no space was provided on the form for the explanation. Because the FMP group contemplated that such an extension would require a separate application at a later time, and in order to avoid any confusion, reference to the possibility of an extension was moved from the form to the instructions. This change is consistent with the form currently in effect, which merely informs the debtor of the possibility of obtaining an extension "for cause shown" and does not ask the debtor to provide reasons for the extension as part of the application.

A comment proposed deletion of the instruction in the signature box not to pay "anyone else in connection with your bankruptcy case" until the entire filing fee is paid. The comment noted that this statement would prohibit a debtor from making payments to a chapter 13 trustee before all of the installment payments are made. The published form changed the wording of the current form slightly, but in a way that gave rise to this comment. Current Form 3A includes the statement, "Until the filing fee is paid in full, I will not make any additional payment or transfer any additional property to an attorney or any other person *for services* in connection with this case" (emphasis added). The Committee agreed with the FMP that the comment should be addressed by reinserting "for services" in the statement.

Comments on Official Form 3B (waiver of filing fees). Five comments were submitted regarding this form. Several of them stated that certain information asked for on the proposed form should be omitted because of its irrelevance to the waiver decision. The following information was suggested for deletion:

- line 3, non-cash government assistance;
- lines 12-16, various assets that the debtor owns;
- line 19, payment for bankruptcy services by someone else; and
- line 20, prior bankruptcy filings by the debtor or the debtor's spouse.

The current form asks for the second and third items of information listed above, and the Advisory Committee decided to continue requesting that information. The current form also asks for prior bankruptcy filings by the debtor, but not by the debtor's spouse unless the spouse is also filing. On recommendation of the FMP, the Committee decided that the request for information about prior filings should be limited to filings by the debtor(s), and not by a non-filing spouse.

The decision about how to respond to the first item, non-cash government assistance, was more complicated. The amount of non-cash government assistance may be relevant to determining whether a debtor is able to make payments of the filing fee, since it may reduce the debtor's other expenses, but it is not specifically asked for on current Form 3B. The current form asks for the total combined monthly income as computed on Schedule I. Restyled Schedule I as published asked debtors to include the value of "[o]ther government assistance." Immediately preceding that question, it asked for "unemployment compensation" and "Social Security," which might have suggested to some debtors that "other government assistance" referred only to other forms of cash assistance. At the same time, non-cash governmental assistance should not be counted in determining whether the debtor meets an income threshold for waiver eligibility. The interim procedures of the Judicial Conference regarding chapter 7 fee waivers direct that "Non-cash governmental assistance (such as food stamps or housing subsidies) is not included [in income]."

The comments caused the FMP group to rephrase the request for information about governmental assistance on both Form 3B and Schedule I and to harmonize the two forms. In completing Form 3B, the debtor is permitted to use the income calculated on Schedule I. Because Schedule I has been revised to direct the debtor to include non-cash governmental assistance in income to the extent that the debtor knows the value of such assistance, on Form 3B it is necessary to have the debtor first report the amount of income including the value of non-cash assistance and then deduct the value of such assistance to determine the amount of income for purposes of the fee waiver application. In response to comments that the debtor does not always know the value of non-cash governmental assistance, both Form 3B and Schedule I have been revised to clarify that the debtor only needs to include the value of such assistance to the extent known. The Advisory Committee approved these changes recommended by the FMP.

Comments on Official Form 6I (income). Fourteen comments specifically addressed this form. Several of them raised questions about when income information must be provided about non-filing spouses. In order to clarify the requirement, the following instruction was added at the beginning of the form: "If you are married and not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse." The form specifically asks for information about both spouses when they file jointly.

As discussed above, in response to comments about non-cash governmental assistance, the Advisory Committee approved changes to Schedule I. As revised, the form asks the debtor to report income from unemployment compensation, Social Security, and "Other governmental assistance that you regularly receive." For the last category, the form directs the debtor to include the value of cash assistance and "the value (if known) of any non-cash assistance."

The FMP group recommended and the Advisory Committee approved two changes to the form's list of payroll deductions. The proposed form now asks separately about mandatory and voluntary contributions to retirement plans. And a new specific payroll deduction for "domestic support obligations" was added in response to a comment that these deductions are sufficiently common to justify a specific listing.

Comments on Official Form 6J (expenses). Fifteen comments specifically addressed Schedule J. The part of the proposed form drawing the most comment was the inclusion in part 2 of column B ("For Chapter 13 Only – What your expenses will be if your current plan is confirmed"). The comments displayed uncertainty about the purpose served by that column and doubt about the accuracy of the responses that it would elicit. The FMP group recommended two changes, which the Advisory Committee approved, in response to those comments. First, column B in was eliminated. Second, in order to permit districts that currently allow debtors to use Schedules I and J to update their income and expense information, a new checkbox was added to both forms in which a debtor can indicate that the information on the form is a "supplement . . . as of the following date:______."

One commenter questioned the reason for the question, "Does anyone else live in your household?" Agreeing with the FMP that the question was too broad, the Advisory Committee approved the following changes to Part 1 of Schedule J. First, questions 1 and 2 on the published form were combined into a single question asking about all of the debtor(s)'s dependents, regardless of whether the dependents live with the debtor. Second, question 3 was revised to make its financial purpose clear. In the published version of the form, question 3 asked, "Does anyone else live in your household?" Now question 3 asks, "Do your expenses include expenses of people other than yourself and your dependents?" The question has been converted to a simple "yes/no" format. If the debtor's Schedule J reveals that it includes expenses for people other than the debtor and the debtor's dependents, interested parties may investigate further if warranted.

Several comments questioned the inclusion of student loan payments as an expense deduction in Schedule J. They argued that allowing this deduction represented a policy decision that student loans can continue to be paid during a chapter 13 case without constituting unfair discrimination against other unsecured claims that are not being paid in full. Another comment contrasted the treatment of student loans with other nondischargeable debts that are not treated as deductions. In response, the category of student loans as a distinct line item was eliminated. Now debtors who are paying student loans as an expense may list those payments as an "other" installment payment on line 21 of the form.

Just as with Schedule I, some comments questioned the treatment of non-filing spouses on this form. To eliminate the confusion, the following wording was added to the instructions for the form: "If you are married and are filing individually, include your non-filing spouse's expenses unless you are separated. If you are filing jointly and Debtor 1 and Debtor 2 keep separate households, fill out a separate *Schedule J* for each debtor. Check the box at the top of page 1 of the form for Debtor 2 to show that a separate form is being filed." New question 1 affirmatively asks if debtor 2 lives in a separate household. If so, that debtor is directed to file a separate Schedule J.

A2. Amendment for Which Final Approval Is Sought Without Publication. **The Advisory Committee recommends that an amendment to Official Form 23 be approved and forwarded to the Judicial Conference. It recommends that the amended form become effective on December 1, 2013.** Because the proposed amendment is conforming in nature, the Committee concluded that publication for comment is not required. The text of the amended form is set out in Appendix A.

Action Item 8. Official Form 23 is the form an individual debtor files in a chapter 7 or chapter 13 case to certify that he or she has completed a postpetition instructional course concerning personal financial management—a requirement for receiving a discharge. The Supreme Court has approved an amendment to Rule 1007(b)(7), due to go into effect on December 1, 2013, that will relieve individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course. The preface and instructions to Form 23 would be amended to reflect that change by stating that a debtor should file the form only if the course provider has not already notified the court of the debtor's completion of the course.

B. Items for Publication in August 2013

The Advisory Committee recommends that the proposed rule and form amendments and new proposed forms that are discussed below be published for public comment. The texts of the amended rules and official forms are set out in Appendix B.

B1. Form Amendments for Which Republication Is Sought.

<u>Action Item 9</u>. **Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2**, the restyled means-test forms for individual debtors under chapter 7, 11, and 13, were published for comment in August 2012. Eighteen sets of comments on these forms were officially submitted, and one person informally provided the Advisory Committee with a detailed review of the forms. The comments ranged from suggestions and critiques regarding wording, style, and formatting of the forms to ones raising questions about interpretations of the Bankruptcy Code and case law. The FMP, the Subcommittee on Forms, and the Advisory Committee carefully considered all of the comments. The Committee determined that several of the comments were well taken, and it approved changes to the forms in response. Because it determined that the changes made were of sufficient significance to require republication, it requests that the newly revised means-test forms be published for public comment in August. Along with the republication of Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, the Committee requests publication of **Official Form 22A-1Supp**, which was created in response to the comments.

The following discussion describes the most significant changes that the Committee made to the means-test forms at the spring meeting. In addition to the changes that are discussed, a number of stylistic changes were made.

(1) <u>Creation of a separate form for chapter 7 means-test exemption</u>. Section 707(b)(2)(D) exempts—either permanently or for a specified period—a limited number of chapter 7 debtors from being subject to the means test. In the current chapter 7 means-test form (Official Form 22A) and the revised form that was published last summer (proposed Official Form 22A-1), information about eligibility for an exemption is asked for at the beginning of the form. Because of the complexity of the qualifying requirements, this portion of the form occupies the entire first page.

Several comments were submitted regarding this part of the published form. One comment suggested moving to a separate form the questions that pertain to exemptions based on certain types of military service. The Advisory Committee agreed and decided that all of the exemption questions should be removed from Form 22A-1 and placed in a new supplement to that form, Official Form 22A-1Supp. That change serves two purposes. It unclutters Form 22A-1 by removing questions that are only occasionally applicable. It also results in uniform line numbering in the three means-test forms about income (22A-1, 22B, and 22C-1). Previously, the initial questions that were only in the chapter 7 form caused a misalignment with the parallel forms.

(2) <u>New instruction about a domestic support obligation paid by one joint debtor or non-filing spouse to the other debtor</u>. A comment suggested and the Advisory Committee agreed that the question in line 3 of Forms 22A-1, 22B, and 22C-1 about income from alimony and maintenance payments should be accompanied by an instruction not to include such payments from a spouse if column B (for reporting the income of a joint debtor or non-filing spouse) is filled in. The instruction is intended to prevent double reporting of the same income.

(3) Changes to implement the *Hamilton v. Lanning* decision. In *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), the Supreme Court held that the calculation of a chapter 13 debtor's projected disposable income under § 1325(b) requires consideration of changes to income or expenses reported elsewhere on Official Form 22C that, at the time of plan confirmation, had occurred or were virtually certain to occur. Proposed Form 22C-2, as published last summer, included a section in which a debtor was asked to report any income or expense reported on the form that "has changed or is virtually certain to change during the 12 months after the date you filed your bankruptcy petition." Two comments stated that the 12-month limitation should be deleted. The Advisory Committee voted to accept this suggestion as better reflecting the *Lanning* decision. As revised, line 46 of Form 22C-2 directs a debtor to indicate if reported income or expenses "have changed or are virtually certain to change after the date that you filed your bankruptcy petition and during the time your case will be open."

The Advisory Committee also approved a change at the spring meeting to Official Form 22C-1 to reflect the possibility that a bankruptcy judge might calculate current monthly income under § 101(10A)(A)(ii), rather than the ordinary method required by § 101(10A)(A)(I). The Advisory Committee agreed to provide for this possibility by adding the language "Unless otherwise ordered by the court," to the options in line 21 of proposed Form 22C-1 for stating the applicable commitment period.

B2. Rules and Forms for Which Publication Is Sought.

Action Item 10. Rules to implement the chapter 13 plan form. For the past two years, the Advisory Committee has studied the creation of a national plan form for chapter 13 cases. The twin goals of the project have been to bring more uniformity to chapter 13 practice and to simplify the review of chapter 13 plans by debtors, courts, trustees, and creditors. These goals are consistent with the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), which held that an order confirming a procedurally improper chapter 13 plan was nevertheless entitled to preclusive effect and that bankruptcy judges must independently review chapter 13 plans for conformity with applicable law.

The Advisory Committee formed a Chapter 13 Plan Form Working Group to steer the project. The Working Group produced a draft plan form, together with a number of draft amendments to the Bankruptcy Rules that would be necessary to give effect to the plan and would clarify and increase the efficiency of chapter 13 practice. At its September 2012 meeting in Portland, Oregon, the Advisory Committee discussed drafts of the plan form and rule amendments prepared by the Working Group. The Advisory Committee also approved the Working Group's recommendation to hold a mini-conference on the draft plan and rules. That mini-conference, held in Chicago in January 2013, brought together participants from a broad cross-section of groups interested in the chapter 13 process. The participants included chapter 13 trustees, bankruptcy judges, a court clerk, consumer debtor attorneys, and representatives of secured and unsecured creditors. Based on the input received during the mini-conference, the Working Group prepared a revised draft plan and accompanying rule amendments for

consideration by the Advisory Committee at its April 2013 meeting in New York. The Advisory Committee voted unanimously to seek publication of the form and rule amendments.

The following discussion summarizes the amendments to the Bankruptcy Rules that the Advisory Committee seeks permission to publish with the chapter 13 plan form.

Rule 2002. The Bankruptcy Rules describe categories of events that trigger the obligation to provide notice. Rule 2002 currently requires 28 days' notice of the time to file objections to confirmation of a chapter 13 plan as well as of the confirmation hearing itself. Because the Bankruptcy Rules do not currently require that an objection to confirmation be filed in advance of the confirmation hearing, notice of the confirmation hearing and notice of the time to file an objection to confirmation can be made at the same time. An amendment to Rule 3015(f), however, would require that objections to confirmation of a chapter 13 plan be filed at least seven days before the confirmation hearing.

The Advisory Committee had two concerns about the interplay between current Rule 2002 and amended Rule 3015(f). First, parties would need to cross-reference the two rules in order to calculate the proper time for serving notice of the deadline to file an objection to confirmation in a chapter 13 case, and this might pose a trap for the unwary. Second, the combination of the 7-day pre-hearing deadline for objections to confirmation under Rule 3015(f) and the 28-day notice period for the time to file objections to confirmation under Rule 2002 would effectively create a 35-day notice period for a confirmation hearing, which is unnecessarily long. In particular, when a pre-confirmation modification of a plan is required, a 35-day period would be excessive.

The Advisory Committee proposes to retain the 28-day period for notice of a chapter 13 confirmation hearing, but to amend Rule 2002 in light of the new time period for objections to confirmation in Rule 3015(f). Thus, Rule 2002 would require 21 days' notice of the time to file objections to confirmation.

Rule 3002. When the Advisory Committee surveyed bankruptcy judges and trustees regarding chapter 13 practice, they frequently expressed dissatisfaction with the requirements for filing a proof of claim. The current rule requires only unsecured creditors to file proofs of claim, which has caused confusion about whether and when secured creditors must file proofs of claim in chapter 13 cases. Adding to that confusion, the lengthy deadline for filing a proof of claim under the current rule means that a timely claim could be filed even after the Bankruptcy Code requires a court to hold a confirmation hearing in a chapter 13 case.

Amended Rule 3002 responds to both of these concerns. First, Rule 3002(a) would be amended to require a secured creditor, as well as an unsecured creditor, to file a proof of claim in order to have an allowed claim. In keeping with Code § 506(d), however, the amendment also makes clear that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. Second, Rule 3002(c) would be amended to change the calculation of the

claims bar date. Rather than 90 days from the meeting of creditors under Code § 341, the bar date would be 60 days after the petition is filed in a chapter 13 case. The amended rule includes a provision for an extension of the bar date when the debtor has failed to provide in a timely manner a list of creditors' names and addresses for notice purposes. In response to concerns raised during the Chicago mini-conference, the amended rule would also include a longer bar date for certain supporting documents required for mortgage claims on a debtor's principal residence. With those claims, the mortgagee would be required to file a proof of claim within the 60-day period but would have an additional 60 days to file a supplement with the supporting documents.

Rule 3007. Objections to claims are governed by Rule 3007. Because the plan form permits some determinations regarding claims to be made through the plan, the Advisory Committee proposes an amendment to Rule 3007. The amended rule would provide an exception to the need to file a claim objection if a determination with respect to that claim is made in connection with plan confirmation under proposed Rule 3012.

Rule 3012. In order to implement the provisions of the plan form that would allow determinations of the amount of a claim in certain circumstances, the Advisory Committee proposes to amend and reorganize Rule 3012. The amendment would provide that the amount of a secured claim under Code § 506(a) may be determined in a proposed plan, subject to objection and resolution at the confirmation hearing. Current Rule 3012 provides for the valuation of a secured claim by motion only. The amended rule would also make clear that a chapter 13 plan would not control the amount of a claim entitled to priority treatment or the amount of a secured claim of a governmental unit.

Rule 3015. Rule 3015 governs the filing of a chapter 13 plan as well as plan modifications and objections to confirmation. The Advisory Committee proposes extensive amendments to the rule. They include an amended subdivision (c) requiring use of the official form for chapter 13 plans, a new seven-day deadline in Rule 3015(f) for filing objections to confirmation, and an amended subdivision (g) providing when the plan terms control over contrary proofs of claim. These amendments dovetail with amendments to Rules 2002, 3007, and 3012.

Rule 4003. Code § 522(f) permits a debtor to avoid certain liens encumbering property that is exempt from the debtor's estate. Current Rule 4003(d) provides that lien avoidance under this section of the Code requires a motion. The plan form, however, would include a provision for a debtor to request lien avoidance as permitted by § 522(f). The Advisory Committee proposes an amendment to Rule 4003(d) to give effect to that part of the plan form.

Rule 5009. The Advisory Committee has included a procedure in amended Rule 5009(d) for the debtor to obtain an order confirming that a secured claim has been satisfied. This is particularly important to debtors who need, for title purposes, documentation showing that an unsecured second mortgage or other lien has been satisfied in a chapter 12 or chapter 13 case.

Because the Advisory Committee does not wish to take a position on the requirements for lien satisfaction, the language of the amended rule permits the debtor to request entry of the order but does not specify those requirements.

Rule 7001. Rule 7001 lists disputes that are required to be conducted by adversary proceeding. Current Rule 7001(2) includes among the list of adversary proceedings a proceeding "to determine the validity, priority, or extent of a lien or other interest in property." The Advisory Committee proposes to amend Rule 7001(2) so that determinations of the amount of a secured claim (under amended Rule 3012) and lien avoidance (under amended Rule 4003(d)) through a chapter 12 or chapter 13 plan would not require an adversary proceeding.

Rule 9009. In order to ensure use of the chapter 13 plan form without significant alterations, the Advisory Committee has proposed an amendment to Rule 9009. That rule currently provides that official forms may be "used with alterations as may be appropriate" and with "their contents rearranged." The language of the current rule raised the concern that debtors (or courts) might rearrange the chapter 13 plan form or include terms that deviate from it without properly identifying those terms. Because greater uniformity is a principal goal of the plan form, amended Rule 9009 would limit the range of permissible changes to forms. The amended rule—which would be reorganized with separate subdivisions for official forms, director's forms, and a rule of construction for forms—prohibits alterations to official forms, unless alterations are permitted by the Bankruptcy Rules or by an official form itself. The amended rule would also permit modification of forms in limited circumstances to take account of the use of similar typefaces and the need to expand or delete space for responses on a form. These provisions would permit a filer to expand or delete space, as appropriate, when responding to an item on a form or to skip a category of information by indicating that no response is reported for that category. The amended rule also includes a provision for the alteration of form court orders in a particular case.

Action Item 11. **Rule 5005** governs the Filing and Transmittal of Papers. As reported at last two meetings, the Advisory Committee has been considering the advisability of proposing a national bankruptcy rule that would permit the use of electronic signatures of debtors and other individuals who are not registered users of CM/ECF, without requiring the retention of the original document bearing a handwritten signature. The Committee now seeks publication for public comment of a proposed amendment of Rule 5005 that would create such a rule.

Currently the use of electronic signatures in bankruptcy courts is governed by local rules. Bankruptcy Rule 5005(b)(2) provides in part that a "court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes."

Many of the local rules that deal with electronic signatures are based on Model Rules for Electronic Case Filing that were approved by the Judicial Conference of the United States ("JCUS") in 2001 and modified in 2003. The model rules were recommended by the Committee

on Court Administration and Case Management ("CACM"), which developed them with participation by the Committee on Information Technology and the Standing Committee. The introduction to the model rules explains that courts are "free to adapt the provisions of these model rules as they choose."

Two of the model rules relate to signatures on electronically filed documents. Model Rule 8 (Signatures) provides that the "user log-in and password required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court. . . . for any . . . purpose for which a signature is required in connection with proceedings before the court." Regarding the signature of an individual without a CM/ECF user log-in and password (a "non-Filing User"), Model Rule 8 states that an electronically filed document should represent the signature by "a 's/' and the name typed in the space where a signature would otherwise appear, or as a scanned image."

Model Rule 7 (Retention Requirements) imposes a duty on a Filing User to maintain in paper form any electronically filed document that required the original signature of someone other than the Filing User. The Commentary to the rule states without further elaboration that, "because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future." The rule does not specify the retention period, but instead leaves that decision up to each district.

Many bankruptcy courts today have local rules that require the attorney (Filing User) to preserve original documents bearing the debtor's (non-Filing User's) signature for a specified period of time. The retention periods vary. A few bankruptcy courts do not require retention of the original document so long as the attorney submits a declaration manually signed by the debtor attesting to the truth of the information electronically filed or, in other courts, files a scanned image of the signature page with the debtor's original signature.

The issue of the retention of documents that are filed electronically with the debtor's signature was initially brought to the Advisory Committee by the Forms Modernization Project. It raised the issue in response to concerns expressed by debtors' attorneys about their need to retain petitions, schedules, and other individual-debtor filing documents that will be lengthier in the proposed restyled format. Representatives of the Department of Justice also expressed concerns about the retention of original documents by debtors' attorneys and the lack of uniformity regarding the retention period. The Department made a recommendation to the Next Gen's Additional Stakeholders Functional Requirements Group that documents bearing handwritten signatures, signed under penalty of perjury, be retained by the clerk of court for five years—the statute of limitations for fraud and perjury proceedings—unless a national rule were adopted declaring that electronic copies of such documents in the court's CM/ECF system constitute legally sufficient best evidence in the absence of an original signed document.

After its fall 2012 meeting, the Advisory Committee received a copy of a memorandum from the chair of CACM to the chair of the Standing Committee that requested the Standing Committee to "explore creating a federal rule regarding electronic signatures and the retention of paper documents containing original signatures." CACM suggested three possible approaches to the issue:

- Its preference is the promulgation of a national rule specifying that an electronic signature in the CM/ECF system is *prima facie* evidence of a valid signature. Under this proposal, the burden would be placed on persons opposing the validity of the signature to prove with appropriate evidence that an electronic signature was not valid.

- The second approach would be to require courts to retain copies of all originally-signed, paper documents that are electronically filed. According to CACM, this method would address problems with law firms retaining such records, but would impose a substantial cost on the courts.

- According to CACM, a third alternative would be a policy option. CACM could ask JCUS to specify the retention period for original documents containing the signature of a non-Filing User. CACM noted, however, that such a policy would not address the problems for external users because of lack of uniformity in local rules, and it would not encourage the reliance on electronic signatures.

At the request of the Advisory Committee, Dr. Molly Johnson of the Federal Judicial Center collected and reviewed local bankruptcy rules regarding signatures of debtors on documents that are filed electronically and requirements for the retention of original documents bearing a non-Filing User's signature. For a point of comparison, she also reviewed local district court rules regarding signatures by non-Filing Users and related retention requirements. In connection with her report, Dr. Johnson reviewed a recent Office of Management and Budget document on the use of electronic signatures in federal transactions and solicited the views of interested parties about possible rule changes that would eliminate retention requirements.

Informal feedback from U.S. trustees, chapter 7 case trustees, and the Executive Office of U.S. Attorneys indicated a preference for handwritten signatures affixed to original documents, rather than purely electronic signatures and an accompanying declaration, but recognized that scanned images of signatures may also be workable. They expressed concern about whether a debtor's declaration would be persuasive evidence that the debtor saw all of the relevant documents or knew which documents were covered by the declaration.

The Advisory Committee's Subcommittee on Technology and Cross Border Insolvency considered several options for a rule that would allow the use of electronic signatures of non-Filing Users without requiring either an attorney or the court to retain the original document. At the spring meeting, it recommended to the Committee a proposed amendment of Rule 5005 that

would allow scanned signatures of debtors and other non-Filing Users to be treated the same as handwritten signatures without requiring the retention of hard copies of documents. The Subcommittee stressed the importance of requiring the scanned signature page and the related document to be filed as a single docket entry in order provide clarity about the document that was being attested to by the non-Filing User. The amended rule would also provide that the user name and password of a registered user of the CM/ECF system would be treated as that individual's signature on electronically filed documents. The Subcommittee noted that the validity of a signature submitted under the amended rule would still be subject to challenge, just as is true for a handwritten signature.

After full discussion, the Advisory Committee unanimously approved the Subcommittee's recommendation, and it requests that the proposed revision of Rule 5005(a) be published for comment.

Action Item 12. Rule 9006(f), which is modeled on Civil Rule 6(d), provides three additional days for a party to act "after service" if service is made by mail or under Civil Rule 5(b)(2)(D), (E), or (F). At the January 2013 meeting, the Standing Committee approved for publication a proposed amendment of Civil Rule 6(d) that would clarify that only the party that is served by mail or under the specified provisions of Civil Rule 5—and not the party making service—is permitted to add three days to any prescribed period for taking action after service is made. Because Rule 9006(f) contains the same potential ambiguity as current Rule 6(d), the Advisory Committee voted to propose a parallel amendment of the bankruptcy rule. The Committee requests that the proposed amendment of Rule 9006(f) be published for public comment at the same time as the amendment of Civil Rule 6(d).

Action Item 13. Official Form 113 (chapter 13 plan form). The Advisory Committee seeks permission to publish for public comment a national plan form for chapter 13 cases. As described in Action Item 10, the plan form is the product of more than two years of study and consultation by a Working Group of the Advisory Committee.

The plan form includes ten parts. Beginning with a notice to interested parties (Part 1), the plan form covers: the amount, source, and length of the debtor's plan payments (Part 2); the treatment of secured claims (Part 3); the treatment of the trustee's fees, administrative claims, and other priority claims (Part 4); the treatment of unsecured claims not entitled to priority (Part 5); the treatment of executory contracts and unexpired leases (Part 6); the order of distribution of payments by the trustee (Part 7); the revesting of property of the estate with the debtor (Part 8); and nonstandard plan terms (Part 9). Part 10 is the signature box.

The plan form contains a number of significant features. First, it permits a debtor to propose to limit the amount of a secured claim (Part 3, § 3.2), to avoid certain liens as provided by the Bankruptcy Code (Part 3, § 3.4), and to include nonstandard terms that are not part of—or that deviate from—the official form (Part 9). In order to make any of these particular terms effective, however, the debtor must clearly indicate in Part 1 that the plan includes one or more

of them by marking the appropriate checkbox. Thus, the face of the document will put the court, the trustee, and creditors on notice that the plan contains terms that may require additional scrutiny. Second, the plan form makes clear when it will control over a creditor's contrary proof of claim. For example, a debtor may propose to limit the amount of a nongovernmental secured claim under Code § 506(a) because the collateral securing it is worth less than the claim. The proposed amount of the secured claim would be binding, subject to a creditor's objection to the plan and a final determination of the issue in connection with plan confirmation. Otherwise, a creditor's proof of claim will control the amount and treatment of the claim, subject to a claim objection.

The treatment of nonstandard plan provisions has been a concern during the process of drafting the plan. As described earlier, Part 1 requires the debtor to indicate whether the plan form includes nonstandard terms. In order to give further assurance that the debtor has filed a plan form that otherwise adheres to the official form, the Working Group proposed that the plan's signature box include a certification to that effect. Thus, the plan form requires that the debtor's attorney (or the debtor, if pro se) must certify by signing the plan that all of its provisions are identical to the official form, except for nonstandard provisions located in Part 9.

The Advisory Committee anticipates that the plan form would go into effect at the same time as the amendments to the Bankruptcy Rules intended to implement it. Accordingly, a request for final approval of the plan form after publication for public comment would be timed to match the progress of those rule amendments.

Action Item 14. Remaining revised forms for individual debtors. As discussed above under Action Item 7, the Advisory Committee has been engaged in a multi-year undertaking—through its FMP—to restyle the official bankruptcy forms and to improve the interface between the forms and available technology. The Advisory Committee approved the FMP's decision to create a separate set of forms for use in cases involving individual debtors. The first group of the individual-debtor forms was published for comment last August, and, as set out in Action Items 7 and 8, the Committee is seeking either final approval or republication of those forms at this meeting. The Committee also requests publication of the remaining restyled individual-debtor forms in August of this year. These forms are included in Appendix B. Although the normal effective date for official bankruptcy forms published this summer would be December 1, 2014, the Advisory Committee recommends that the effective date be delayed until at least December 1, 2015, for reasons that are discussed below.

Drafts of the proposed Official Forms for which publication is sought were presented to the Standing Committee for its preliminary review at the January 2013 meeting. Members of the Standing Committee offered comments, both of a stylistic and substantive nature, and the Advisory Committee subsequently approved some changes to the proposed forms in response to that feedback. The Advisory Committee approved other changes to the forms at its spring meeting in response to comments that were submitted on the forms published in 2012 and suggestions by Committee members.

As explained at the January 2013 Standing Committee meeting, the need for different versions of case opening forms for individuals and non-individuals required the FMP to develop a new numbering scheme for all the bankruptcy forms that both organizes the bankruptcy forms in a logical way and has some relationship to current form numbers. The basic numbering protocol for the new forms is:

1XX – Forms for Individuals Filing for Bankruptcy

2XX – Forms for Non-individual Filing for Bankruptcy

3XX – Orders and Court Notices

4XX – Additional Official Forms

XXXX - Director's Forms

A forms number conversion chart to accompany the forms for publication is included in Appendix B.

The proposed Official Forms for which the Advisory Committee requests publication are the following:

101	**Voluntary Petition for Individuals Filing for Bankruptcy**
101A	**Initial Statement About an Eviction Judgment Against You**
101B	**Statement About Payment of an Eviction Judgment Against You**
104	**List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders**
105	**Involuntary Petition Against an Individual**
106Sum	**Summary of Your Assets and Liabilities and Certain Statistical Information**
106A/B	**Schedule A/B: Property**
106C	**Schedule C: The Property You Claim as Exempt**
106D	**Schedule D: Creditors Who Hold Claims Secured by Property**
106E/F	**Schedule E/F: Creditors Who Have Unsecured Claims**
106G	**Schedule G: Executory Contracts and Unexpired Leases**

106H Schedule H: Your Codebtors

106Dec Declaration About an Individual Debtor's Schedules

107 Statement of Financial Affairs for Individuals Filing for Bankruptcy

112 Statement of Intention for Individuals Filing Under Chapter 7

119 Bankruptcy Petition Preparer's Notice, Declaration, and Signature

121 Statement About Your Social Security Numbers

318 Order of Discharge

423 Certification About a Financial Management Course

427 Cover Sheet for Reaffirmation Agreement

An instruction booklet for individuals is also included for comment.

Changes Made after the January Meeting. (1) The exemption schedule's *Schwab v. Reilly* option. As presented at the January meeting of the Standing Committee, the draft of the schedule that a debtor uses for claiming property as exempt (at that time designated as Schedule D and now as Schedule C) included four columns for providing information. They were labeled: **I.** Brief description of the property and line on *Schedule A* that lists this property; **ii.** Current value of the portion you own; **iii.** Amount of the exemption you claim; and **iv.** Specific laws that allow exemption. The third column—Amount of the exemption you claim—included only a blank line on which a debtor could insert either a specific dollar amount or use the option offered by *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), of claiming as exempt "100% of fair market value."[1]

The instructions at the beginning of the form explained, "For each item of property you claim as exempt, you must specify the amount of the exemption you claim. Usually, a specific dollar amount is claimed as exempt, but in some circumstances the amount of the exemption claimed might be indicated as 100% of fair market value. For example, a debtor might claim 100% of fair market value for an exemption that is unlimited in amount, such as some exemptions for health aids."

This design of the form represented a compromise between the existing exemption schedule and an earlier published amendment to the schedule, which was eventually withdrawn

[1] The *Schwab* Court stated, "Where, as here, it is important to the debtor to exempt the full market value of the asset or the asset itself, our decision will encourage the debtor to declare the value of her claimed exemption in a manner that makes the scope of the exemption clear, for example, by listing the exempt value as "full fair market value (FMV)" or "100% of FMV." 130 S. Ct. at 2668.

by the Advisory Committee. The existing exemption schedule requires a debtor to specify "the value of the claimed exemption." The proposed amendment that was published in August 2011 added two checkboxes to the form to allow debtors to state the value of a claimed exemption as either (1) the "Full fair market value of the exempted property" or (2) "Exemption limited to $________."

The Advisory Committee decided not to pursue the August 2011 proposal after reviewing comments submitted in response to publication. A number of them, mostly by bankruptcy trustees, stated that because the new option could be easily invoked by checking a box, it would encourage debtors to claim the full fair market value of an asset as exempt, even when using an exemption capped at an amount less than the asset's value. They argued that the increase in such exemption claims would then lead to a "plethora of objections."

In January when the draft exemption form was discussed by the Standing Committee, several concerns were raised about the form's proposed wording and format. One concern was that the option of claiming 100% of fair market value was presented too subtly for pro se debtors to understand it. One member suggested that additional examples be provided of when that option could properly be invoked, and another suggested highlighting the relevant instructions. It was also suggested that perhaps the Advisory Committee had given too much deference to the views of trustees and that the Committee should consider revising the form to present the "100% FMV" option more clearly. At the conclusion of the meeting, one member of the Standing Committee suggested that the column for "Amount of the exemption you claim" provide two options: (1) a checkbox followed by a line with a dollar sign, and (2) a checkbox followed by "100% of fair market value, not greater than any applicable statutory limit."

A revised draft of the proposed exemption form was prepared to incorporate the suggestions offered by the Standing Committee. As approved by the Advisory Committee, the form now provides two options under "Amount of the exemption you claim": (1) a checkbox followed by a line with a dollar sign, and (2) a checkbox followed by "100% of fair market value, up to any applicable statutory limit." The instruction at the top of the form relating to the exemption amount appears in a separate paragraph, written in bold. It reads as follows:

> For each item of property you claim as exempt, you must specify the amount of the exemption you claim. One way of doing so is to state a specific dollar amount as exempt. Alternatively, you may claim the full fair market value of the property being exempted up to the amount of any applicable statutory limit. Some exemptions—such as those for health aids, rights to receive certain benefits, and tax-exempt retirement funds—may be unlimited in dollar amount. However, if you claim an exemption of 100% of fair market value under a law that limits the exemption to a particular dollar amount and the value of the property is determined to exceed that amount, your exemption would be limited to the applicable statutory amount.

The Advisory Committee concluded that this version of the form provides the debtor a means of claiming an exemption of 100% of fair market value when doing so is permissible under applicable law.

(2) Changed designations of the debtor's schedules. Official Form 6 (to be redesignated as Official Form 106) consists of a series of schedules that a debtor must file at the outset of a bankruptcy case. The schedules are referred to by letter—currently A–J. As proposed by the FMP group, some schedules would be combined (current A and B, and E and F), and the order of some schedules would be changed. As a result, the existing letter designations of all of the schedules would be altered.

At the spring meeting, two members of the Advisory Committee suggested an alternative designation scheme for the schedules that would result in only a minimal change from the existing designations. Under their proposal, the two combined forms would be designated by two letters—A/B and E/F—and the schedules would remain in the same order as they currently appear. As a result, all but the combined forms would retain their current letter designations. The proponents of this alternative argued that publishing new schedules with a lettering scheme that more closely aligns with the status quo would minimize confusion during the period of implementation and transition to the new forms and would likely make it easier to build support for the new forms among the constituencies that use them on a daily basis.

After discussion, the Committee adopted the alternative designation proposal by a vote of 7 to 5.

(3) Other changes after the January meeting. In response to comments made about the restyled individual-debtor forms that were published in August 2012, the Advisory Committee approved formatting and appearance changes to those forms, and it made the same changes to the forms that are now proposed for publication. Most shading was removed from the forms, and the black banners separating the parts of the forms were reduced. The Committee's review and editing of the proposed forms also resulted in some stylistic changes and, in a few forms, substantive changes to ensure conformity with the Bankruptcy Code and rules.

Proposed Effective Date. Although the normal effective date for official bankruptcy forms published in 2013 would be December 1, 2014, the Advisory Committee recommends that the effective date for the restyled individual-debtor forms that will be initially published this summer be delayed at least until December 1, 2015, in order to permit them to go into effect at the same time as the restyled forms for non-individual cases. The non-individual forms are about a year behind the individual forms in development. There are two reasons for the need for synchronization. First, many of the individual-debtor forms being published this summer are revisions of forms that currently apply in all bankruptcy cases, individual and non-individual. To avoid overlap and confusion, the non-individual forms should not go into effect until the current forms have been replaced for all cases. Second, the forms that will be published this summer implement the new forms-numbering scheme. Waiting for the effective date of the non-

individual forms will allow there to be a uniform numbering scheme for all of the bankruptcy forms. A year or more delay in the effective date will also have the benefit of allowing the next generation of CM/ECF to first become operational. Next Gen will provide the ability to store information on the forms as data so that authorized users can produce customized reports suitable for their needs. One of the goals of the FMP has been to take advantage of these new technological developments.

Action Item 15. **Official Forms 17A, 17B, and 17C** are proposed for publication in connection with the revision of the bankruptcy appellate rules. Form 17A would be an amended and renumbered notice-of-appeal form, and Forms 17B and 17C would be new.

Proposed Form 17A would include in the Notice of Appeal a section for the appellant's optional statement of election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. It would only be applicable in districts for which appeals to a bankruptcy appellate panel have been authorized. Inclusion of the statement in the notice of appeal would ensure compliance with the statutory requirement that an appellant make its election to have the district court hear its appeal "at the time of filing the appeal." 28 U.S.C. § 158(c)(1)(A).

New Form 17B—the Optional Appellee Statement of Election to Proceed in the District Court—would be the form that an appellee would file if it wanted the appeal to be heard by the district court and the appellant or another appellee did not make that election. To comply with § 158(c)(1)(B), the appellee would have to file the form within 30 days after service of the notice of appeal.

New Form 17C—Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)—would provide a means for a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text (the "type-volume limitation"). It is based on Appellate Form 6, which implements the parallel provisions of FRAP 32(a)(7)(B).

The Advisory Committee requests that the proposed forms be published this August so that they would be on schedule to take effect on December 1, 2014, the same effective date as is anticipated for the revised Part VIII rules.

THIS PAGE INTENTIONALLY BLANK

APPENDIX A

THIS PAGE INTENTIONALLY BLANK

APPENDIX A.1

THIS PAGE INTENTIONALLY BLANK

Appendix A.1

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

For Final Approval and Transmittal to the Judicial Conference

Rule 1014. Dismissal and Change of Venue

1 * * * * *

2 (b) PROCEDURE WHEN PETITIONS INVOLVING

3 THE SAME OR RELATED DEBTORS ARE FILED IN

4 DIFFERENT COURTS. If petitions commencing cases under the

5 Code or seeking recognition under chapter 15 are filed in different

6 districts by, regarding, or against (1) the same debtor, (2) a

7 partnership and one or more of its general partners, (3) two or

8 more general partners, or (4) a debtor and an affiliate, ~~on motion~~

9 ~~filed~~ the court in the district in which the first-filed petition ~~filed~~

10 ~~first~~ is pending ~~and after hearing on notice to the petitioners, the~~

11 ~~United States trustee, and other entities as directed by the court,~~

12 ~~the court~~ may determine, in the interest of justice or for the

13 convenience of the parties, the district or districts in which ~~the case~~

14 ~~or~~ any of the cases should proceed. The court may so determine

15 on motion and after a hearing, with notice to the following entities

16 in the affected cases: the United States trustee, entities entitled to

---

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

17 notice under Rule 2002(a), and other entities as the court directs.

18 ~~Except as otherwise ordered by t~~ The court ~~in the district in which~~

19 ~~the petition filed first is pending,~~ may order the parties to the later-

20 filed cases not to proceed further ~~the proceedings on the other~~

21 ~~petitions shall be stayed by the courts in which they have been~~

22 ~~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.

Changes Made After Publication

The only change made after publication was stylistic.

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). I do not understand how a judge has jurisdiction to enter orders affecting parties in a case pending in another district in front of a different judge.

12-BK-008. National Conference of Bankruptcy Judges (NCBJ). The NCBJ is concerned that the court hearing the first-filed case would lack jurisdiction to order parties in the other cases, some of whom may not be parties to the first-filed case, not to proceed further. In addition, a wording suggestion is offered to make clearer who is to receive notice of the motion in the first-filed case.

12-BK-010. States' Association of Bankruptcy Attorneys. The rule does not expressly state that the court where the first petition is filed shall be the only one to determine the issue of where the cases should proceed. It is also not clear who can initiate such a determination or whether the court may or should do so sua sponte. While the Committee Note says that the court can order the moving party to provide notice to parties in the other cases, the rule does not say so. Finally, a time limit should be set for filing a motion for a determination in the first court since the stay is no longer automatic.

12-BK-033. Chief Judge Christopher M. Klein (Bankr. E.D. Cal.). The current rule-mandated stay has generally worked well. Under the proposed amendment, the later-filed cases can proceed unabated until the first court orders the later-filed cases to stop. Stays are less likely to occur (judges do not like telling other judges what to do), resulting in a greater chance of multiple, inconsistent orders being issued in the respective cases involving the same or related debtors.

Rule 7004. Process; Service of Summons, Complaint

1 * * * * *

2 (e) SUMMONS: TIME LIMIT FOR SERVICE WITHIN

3 THE UNITED STATES. Service made under Rule 4(e), (g),

4 (h)(1), (I), or (j)(2) F.R. Civ. P. shall be by delivery of the

5 summons and complaint within ~~14~~ 7 days after the summons is

6 issued. If service is by any authorized form of mail, the summons

7 and complaint shall be deposited in the mail within ~~14~~ 7 days after

8 the summons is issued. If a summons is not timely delivered or

9 mailed, another summons shall be issued and served. This

10 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. If service of the summons within any seven-day period is impracticable, a court retains the discretion to enlarge that period of time under Rule 9006(b).

Changes Made After Publication

A new sentence referring to the availability of an enlargement of time under Rule 9006(b) was added to the Committee Note.

Summary of Public Comment

12-BK-001. Bradley R. Tamm (Attorney, Honolulu, Hawaii). The shortened time is sufficient in circumstances when service can be effected by mail. Sometimes, however, service cannot be effected by mail under Rule 7004(b), such as when an individual's only address is a post office box. Seven days will often be insufficient and will lead to situations where the summons must be reissued multiple times. Instead of shortening the summons service window in Rule 7004(e), the defendant's time to respond in Rule 7012(a) should be lengthened. That period could be increased from 30 days to 45 days, or the government's 35-day period to answer could be applied to all parties.

12-BK-031. Insolvency Law Committee of the Business Law Section of the State Bar of California. Service within 7 days may be onerous under certain circumstances. Some judges require service of a scheduling order, which may not issue until days after the case is filed and the summons is issued. We recommend keeping the 14-day window and revising Rule 7012(a) to provide the defendant with 28 days to respond after service of the summons and complaint.

12-BK-033. Chief Judge Christopher M. Klein (Bankr. E.D. Cal.). Rule 7004(e) is dysfunctional, and reducing the service window from 14 to 7 days will only make the existing problems worse. The published amendment will increase the likelihood of stale summonses, which will increase delay. Because the "limited life" summons under the Bankruptcy Rules is out of step with practice in federal district court and state court, where a summons typically does not expire, general practice lawyers and pro se parties fall into a trap for the unwary.

These bankruptcy-specific service provisions date back to the era of the Bankruptcy Act, when the Civil Rules lacked a time limit for service. The Civil Rules now contain a time limit for service under Rule 4(m), and the Bankruptcy Rules should reflect that change. The Rules Committee should (1) delete the time limit on the validity of the summons under Rule 7004(e); (2) amend Rule 7012(a) to mirror the times in Civil Rule 12(a); and (3) alter the Civil Rule 4(m) time limit (incorporated by Bankruptcy Rule 7004(a)) to less than the 120 days in the Civil Rule.

12-BK-041. Daniel Press (Attorney, McLean, Virginia). In most cases, counsel should be able to serve the summons and complaint by mail within 7 days. If, however, an unrepresented plaintiff, or one whose lawyer is not a registered electronic filer, receives the summons by mail from the clerk, some or all of the 7-day window will expire, making it impossible to make timely service on the defendant. In addition, not all domestic summonses can be served by mail. Service within 7 days may be impossible in such situations.

The rule should be amended to allow service by mail to post office boxes, or there should be a different time period specified for service that is not made by mail. Also, although Rule 7004(e) does not include service under Civil Rule 4(j)(1) (service on foreign governments or agencies), an express exception should be included.

Rule 7008. General Rules of Pleading

1 ~~(a) APPLICABILITY OF RULE 8 F.R.CIV.P.~~ Rule 8
2 F.R.Civ.P. applies in adversary proceedings. The allegation of
3 jurisdiction required by Rule 8(a) shall also contain a reference to
4 the name, number, and chapter of the case under the Code to which
5 the adversary proceeding relates and to the district and division
6 where the case under the Code is pending. In an adversary
7 proceeding before a bankruptcy ~~judge~~ court, the complaint,
8 counterclaim, cross-claim, or third-party complaint shall contain a
9 statement ~~that the proceeding is core or noncore and, if non-core~~
10 that the pleader does or does not consent to entry of final orders or
11 judgment by the bankruptcy ~~judge~~ court.

12 ~~(b) ATTORNEY'S FEES. A request for an award of~~
13 ~~attorney's fees shall be pleaded as a claim in a complaint, cross-~~
14 ~~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, 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-003. Douglas N. Candeub (Attorney, Wilmington, Delaware). The Advisory Committee should not abandon references to "core" and "non-core" proceedings in the rules. Those terms could be retained while adding a statement regarding consent in all proceedings.

12-BK-008. National Conference of Bankruptcy Judges (NCBJ). The NCBJ approves of the published rule amendments to the extent that they require a statement regarding consent in all adversary proceedings. But the terms "core" and "non-core" should not be deleted from the rule. In the NCBJ's view, the court and parties benefit from knowing early in the proceeding whether the parties view the proceeding as core or non-core.

12-BK-010. States'Association of Bankruptcy Attorneys (SABA). We approve of the basic approach of the amendments. The amended rules should make clear that a party may consent to some aspects of a bankruptcy court's determination and not others. For example, a state may consent to final adjudication by a bankruptcy court on the question whether the automatic stay applies to a police or regulatory action but not consent to a final adjudication by the bankruptcy court of the underlying substantive claim.

12-BK-033. Chief Judge Christopher M. Klein (Bankr. E.D. Cal.). The term "bankruptcy court," which was substituted in place of "bankruptcy judge," should be defined. The Bankruptcy Rules apply in cases and proceedings under title 11, whether before district judges or bankruptcy judges. Accordingly, reference to the "bankruptcy court" could be read to include a district judge that is sitting in bankruptcy (such as upon withdrawal of the reference). In those circumstances, there is no need for a statement regarding consent, because an Article III judge is presiding.

12-BK-037. National Bankruptcy Conference (NBC). Rule 7008 should be revised to permit a party to consent to the bankruptcy court's final adjudication of specific issues or claims in the proceeding.

12-BK-044. Louis M. Bubala (Attorney, Reno, Nevada). I am pleased with the proposed elimination of Rule 7008(b) and addition of Rule 7054(b)(2) regarding claims for attorney's fees. The current rules have caused problems over the years, and the adoption of the procedure from the civil rules is a good one.

Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

1 * * * * *

2 (b) APPLICABILITY OF RULE 12(b)-(I) F.R. CIV. P.

3 Rule 12(b)-(I) F.R. Civ. P. applies in adversary proceedings. A

4 responsive pleading ~~shall admit or deny an allegation that the~~

5 ~~proceeding is core or non-core. If the response is that the~~

6 ~~proceeding is non-core it~~ shall include a statement that the party

7 does or does not consent to entry of final orders or judgment by the

8 bankruptcy ~~judge~~ court. ~~In non-core proceedings, final orders and~~

9 ~~judgments shall not be entered on the bankruptcy judge's order~~

10 ~~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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-003. Douglas N. Candeub (Attorney, Wilmington, Delaware). The Advisory Committee should not abandon references to "core" and "non-core" proceedings in the rules. Those terms could be retained while adding a statement regarding consent in all proceedings.

12-BK-008. National Conference of Bankruptcy Judges (NCBJ). The NCBJ approves of the published rule amendments to the extent that they require a statement regarding consent in all adversary proceedings. But the

terms "core" and "non-core" should not be deleted from the rule. In the NCBJ's view, the court and parties benefit from knowing early in the proceeding whether the parties view the proceeding as core or non-core.

12-BK-033. Chief Judge Christopher M. Klein (Bankr. E.D. Cal.). The term "bankruptcy court," which was substituted in place of "bankruptcy judge," should be defined. The Bankruptcy Rules apply in cases and proceedings under title 11, whether before district judges or bankruptcy judges. Accordingly, reference to the "bankruptcy court" could be read to include a district judge that is sitting in bankruptcy (such as upon withdrawal of the reference). In those circumstances, there is no need for a statement regarding consent, because an Article III judge is presiding.

12-BK-037. National Bankruptcy Conference (NBC). Rule 7012(b) should be revised to permit a party to consent to the bankruptcy court's final adjudication of specific issues or claims in the proceeding.

Rule 7016. Pre-~~T~~trial Procedures~~; Formulating Issues~~

1 (a) PRETRIAL CONFERENCES; SCHEDULING;
2 MANAGEMENT. Rule 16 F.R.Civ.P. applies in adversary
3 proceedings.

4 (b) DETERMINING PROCEDURE. The bankruptcy
5 court shall decide, on its own motion or a party's timely motion,
6 whether:

7 (1) to hear and determine the proceeding;

8 (2) to hear the proceeding and issue proposed
9 findings of fact and conclusions of law; or

10 (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 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-001. National Conference of Bankruptcy Judges (NCBJ). The addition of subpart (b) to Rule 7016 is unnecessary and confusing. It suggests that the bankruptcy court must choose one of three possible dispositions at an early stage of an adversary proceeding. This is an intrusion on the court's inherent case management authority. The proposed amendment does not fill the gap created by removing the required allegation as to whether a proceeding is core or non-core. Even if the Advisory Committee does not retain the requirement that parties declare whether a proceeding is core or non-core, Rule 7016 should be kept in its current form.

12-BK-009. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). The proposed changes to the rules do not address the treatment of a bankruptcy judge's decision, entered as a final order or judgment, if it is later determined that the bankruptcy judge lacked constitutional authority to enter a final order or judgment. If Rule 9033 is not amended to address this issue, then the Committee Note in Rule 7016 should be changed to add language expressly providing for the treatment of the bankruptcy court's decision as proposed findings of fact and conclusions of law.

12-BK-037. National Bankruptcy Conference (NBC). Rather than permit the bankruptcy court to decide *Stern* issues on its own motion, proposed Rule 7016 should require notice and a hearing. In the alternative,

the Court should make a formal decision not to hold a hearing rather than simply deciding *Stern* issues on its own.

The proposed rule, which deals with pre-trial procedures, does not address the treatment of *Stern* issues that arise in the resolution of motions to dismiss or other preliminary rulings. The proposed rules should provide a mechanism for a party to raise *Stern* issues if the party has not yet filed an answer or other pleading.

Rule 7054. Judgments; Costs

1 (a) JUDGMENTS. Rule 54(a)-(c) F.R. Civ. P. applies in
2 adversary proceedings.

3 (b) COSTS; ATTORNEY'S FEES

4 (1) *Costs Other Than Attorney's Fees*. The court
5 may allow costs to the prevailing party except when a statute of the
6 United States or these rules otherwise provides. Costs against the
7 United States, its officers and agencies shall be imposed only to
8 the extent permitted by law. Costs may be taxed by the clerk on 14
9 days' notice; on motion served within seven days thereafter, the
10 action of the clerk may be reviewed by the court.

11 (2) *Attorney's Fees.*

12 (A) Rule 54(d)(2)(A)-(C) and (E) F.R. Civ.
13 P. applies in adversary proceedings except for the reference in
14 Rule 54(d)(2)(C) to Rule 78.

15 (B) By local rule, the court may establish

16 special procedures to resolve fee-related issues without extensive

17 evidentiary hearings.

COMMITTEE NOTE

Subdivision (b) is amended to prescribe the procedure for seeking an award of attorney's fees and related nontaxable expenses in adversary proceedings. It does so by adding new paragraph (2) that incorporates most of the provisions of Rule 54(d)(2) F.R. Civ. P. The title of subdivision (b) is amended to reflect the new content, and the previously existing provision governing costs is renumbered as paragraph (1) and re-titled.

As provided in Rule 54(d)(2)(A), new subsection (b)(2) does not apply to fees recoverable as an element of damages, as when sought under the terms of a contract providing for the recovery of fees incurred prior to the instant adversary proceeding. Such fees typically are required to be claimed in a pleading.

Rule 54(d)(2)(D) F.R. Civ. P. does not apply in adversary proceedings insofar as it authorizes the referral of fee matters to a master or a magistrate judge. The use of masters is not authorized in bankruptcy cases, *see* Rule 9031, and 28 U.S.C. § 636 does not authorize a magistrate judge to exercise jurisdiction upon referral by a bankruptcy judge. The remaining provision of Rule 54(d)(2)(D) is expressed in subdivision (b)(2)(B) of this rule.

Rule 54(d)(2)(C) refers to Rule 78 F.R. Civ. P., which is not applicable in adversary proceedings. Accordingly, that reference is not incorporated by this rule.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-010. States' Association of Bankruptcy Attorneys. The provision in Rule 7054(b)(1) that permits the award of costs against the United States, its officers, and agencies only to the extent permitted by law should be broadened to apply to all governmental units.

12-BK-044. Louis M. Bubala (Attorney, Reno, Nevada). I am pleased with the proposed elimination of Rule 7008(b) and addition of Rule 7054(b)(2) regarding claims for attorney's fees. The current rules have caused problems over the years, and the adoption of the procedure from the civil rules is a good one.

Rule 9023. New Trials; Amendment of Judgments

1 Rule 59 F.R.Civ.P. applies in cases under the Code, except
2 as provided in Rule 3008. In some circumstances, Rule 8008
3 governs post-judgment motion practice after an appeal has been
4 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-008. National Conference of Bankruptcy Judges (NCBJ). The cross-reference to Rule 8008 is more appropriately placed in a Committee Note than in the amended rule itself.

Rule 9024. Relief from Judgment or Order

1 Rule 60 F.R.Civ.P. applies in cases under the Code except
2 that (1) a motion to reopen a case under the Code or for the
3 reconsideration of an order allowing or disallowing a claim against
4 the estate entered without a contest is not subject to the one-year
5 limitation prescribed in Rule 60(c), (2) a complaint to revoke a
6 discharge in a chapter 7 liquidation case may be filed only within
7 the time allowed by § 727(e) of the Code, and (3) a complaint to
8 revoke an order confirming a plan may be filed only within the
9 time allowed by § 1144, § 1230, or § 1330. In some
10 circumstances, Rule 8008 governs post-judgment motion practice
11 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-008. National Conference of Bankruptcy Judges (NCBJ). The cross-reference to Rule 8008 is more appropriately placed in a Committee Note than in the amended rule itself.

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,

19 other than the party filing the notice of removal, shall file a

20 statement ~~admitting or denying any allegation in the notice~~

21 ~~of removal that upon removal of the claim or cause of~~

22 ~~action the proceeding is core or non-core. If the statement~~

23 ~~alleges that the proceeding is non-core, it shall state~~ that the

24 party does or does not consent to entry of final orders or

25 judgment by the bankruptcy ~~judge~~ court. A statement

26 required by this paragraph shall be signed pursuant to Rule

27 9011 and shall be filed not later than 14 days after the filing

28 of the notice of removal. Any party who files a statement

29 pursuant to this paragraph shall mail a copy to every other

30 party to the removed claim or cause of action.

31 * * * * *

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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-031. Insolvency Law Committee of the Business Law Section of the State Bar of California. The rule should clarify whether, in a removed action, a statement regarding consent included in a party's first pleading or motion satisfies the requirement of the rule, or whether a separate statement is required. The Committee Note states that no statement is required if a party to a removed action has not yet filed a pleading prior to removal, because the statement will be filed in a responsive pleading in accordance with Rule 7012. But that party may choose to file a pre-answer motion instead. The rule could also be read to require a separate statement even if the party files a pleading.

12-BK-040. Bankruptcy Clerks Advisory Group (BCAG). Proposed Rule 9027(e)(3) requires the party filing a statement regarding consent upon removal to "mail a copy to every other party to the removed cause of action." "Mail" should be changed to "transmit" because service can be accomplished electronically. Furthermore, the copy of the statement is unnecessary when a notice would be sufficient.

Rule 9033. ~~Review of~~ Proposed Findings of Fact and Conclusions of Law ~~in Non-Core Proceedings~~

1 (a) SERVICE. ~~In non-core proceedings heard pursuant to~~

2 ~~28 U.S.C. § 157(c)(1)~~In a proceeding in which the bankruptcy

3 court has issued ~~the bankruptcy judge shall file~~ proposed findings

4 of fact and conclusions of law,~~.~~ ~~T~~the clerk shall serve forthwith

5 copies on all parties by mail and note the date of mailing on the

6 docket.

7 * * * * *

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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-008. National Conference of Bankruptcy Judges (NCBJ). The requirement that the clerk serve proposed findings of fact and conclusions of law "by mail and note the date of mailing on the docket" should be altered to reflect electronic service. A mailing requirement is anachronistic and unnecessary. That portion of the rule should be eliminated, so that the rule would simply read "the clerk shall serve forthwith copies on all parties."

12-BK-040. Bankruptcy Clerks Advisory Group (BCAG). Rule 9033(a) should not require the clerk to serve copies of the proposed findings

and conclusions “by mail.” BCAG endorses the NCBJ’s comment that this language be revised to state: “The clerk shall serve forthwith copies on all parties.”

12-BK-009. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). Rule 9033 should address the treatment of a bankruptcy judge’s decision that is entered as a final order but later determined to be beyond the bankruptcy judge's constitutional authority to adjudicate finally. A new subpart of the rule should provide that the decision in those circumstances should be treated as proposed findings and conclusions. The subpart could provide that the bankruptcy court may indicate whether its decision should be so treated if it is determined that the judge lacked the authority to enter a final order or judgment.

The approach taken by some courts, such as the Southern District of New York, that have adopted an amended standing order of reference is insufficient. The S.D.N.Y. order does not include a deadline for the parties to file objections to the decision now deemed proposed findings and conclusions, and the briefs filed on appeal would not necessarily contain all objections to those findings and conclusions.

12-BK-033. Chief Judge Christopher M. Klein (Bankr. E.D. Cal.). Rule 9033 should designate a process for transmitting the report and recommendation to the district court, perhaps as in proposed Rule 8003(d). The rule should provide for the bankruptcy clerk to certify to the district court that objections to the proposed findings and conclusions were, or were not, filed.

A uniform national rule should be in place to determine the procedures for deeming a bankruptcy judge’s decision to be proposed findings and conclusions on appeal if the district court determines that the entry of a final judgment exceeded the authority of the bankruptcy judge. The rule should also authorize a bankruptcy appellate panel (BAP) to transfer an appeal to a district court if the BAP determines that the decision below was beyond the constitutional authority of the bankruptcy judge to enter final judgment.

12-BK-037. National Bankruptcy Conference (NBC). Because a bankruptcy court may not know whether its decision will later be determined to be beyond its constitutional authority to enter final judgment, the difference in procedures between proposed findings and conclusions

under Rule 9033 and judgments entered under Rule 7054 and Civil Rule 54(a) should be narrowed. If a district court concludes that a decision entered as a final judgment should be treated as proposed findings and conclusions, the losing party may be deprived of procedural rights under Rule 9033 to object to those proposed findings and conclusions.

THIS PAGE INTENTIONALLY BLANK

APPENDIX A.2

THIS PAGE INTENTIONALLY BLANK

Appendix A.2

FEDERAL RULES OF BANKRUPTCY PROCEDURE

PART VIII. BANKRUPTCY APPEALS

Rule

8001. Scope of Part VIII Rules; Definition of "BAP"; Method of Transmission

8002. Time for Filing Notice of Appeal

8003. Appeal as of Right—How Taken; Docketing the Appeal

8004. Appeal by Leave—How Taken; Docketing the Appeal

8005. Election to Have an Appeal Heard by the District Court Instead of the BAP

8006. Certifying a Direct Appeal to the Court of Appeals

8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

8008. Indicative Rulings

8009. Record on Appeal; Sealed Documents

8010. Completing and Transmitting the Record

8011. Filing and Service; Signature

8012. Corporate Disclosure Statement

8013. Motions; Intervention

8014. Briefs

8015. Form and Length of Briefs; Form of Appendices and Other Papers

8016. Cross-Appeals

8017. Brief of an Amicus Curiae

8018. Serving and Filing Briefs; Appendices

8019. Oral Argument

8020. Frivolous Appeal and Other Misconduct

8021. Costs

8022. Motion for Rehearing

8023. Voluntary Dismissal

8024. Clerk's Duties on Disposition of the Appeal

8025. Stay of a District Court or BAP Judgment

8026. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

8027. Notice of a Mediation Procedure

8028. Suspension of Rules in Part VIII

Summary of Public Comment

General Comments on the Revision of Part VIII

12-BK-008. National Conference of Bankruptcy Judges. The NCBJ applauds and endorses the revisions to Part VIII. Bringing the Part VIII rules more into line with the structure and organization of the Federal Rules of Appellate Procedure will reduce confusion and improve the quality of bankruptcy appellate practice.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.)**.** The proposed changes are welcome and reflect the fact that we are in the twenty-first century and electronic filing is here to stay. They will make the entire bankruptcy appellate process run more efficiently and effectively.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.)**.** The product is impressive and a great leap forward for bankruptcy appellate procedure.

One stylistic comment was submitted.

Rule 8001. Scope of Part VIII Rules; Definition of "BAP"; Method of Transmission

1 (a) GENERAL SCOPE. These Part VIII rules govern the
2 procedure in a United States district court and a bankruptcy
3 appellate panel on appeal from a judgment, order, or decree of a
4 bankruptcy court. They also govern certain procedures on appeal
5 to a United States court of appeals under 28 U.S.C. § 158(d).
6 (b) DEFINITION OF "BAP." "BAP" means a bankruptcy
7 appellate panel established by a circuit's judicial council and
8 authorized to hear appeals from a bankruptcy court under 28
9 U.S.C. § 158.
10 (c) METHOD OF TRANSMITTING DOCUMENTS. A
11 document must be sent electronically under these Part VIII rules,
12 unless it is being sent by or to an individual who is not represented
13 by counsel or the court's governing rules permit or require mailing
14 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

Several stylistic comments were submitted.

Rule 8002. Time for Filing Notice of Appeal

1 (a) IN GENERAL.

2 (1) *Fourteen-Day Period*. Except as provided in

3 subdivisions (b) and (c), a notice of appeal must be filed with the

4 bankruptcy clerk within 14 days after entry of the judgment, order,

5 or decree being appealed.

6 (2) *Filing Before the Entry of Judgment*. A notice of appeal

7 filed after the bankruptcy court announces a decision or order—but

8 before entry of the judgment, order, or decree—is treated as filed on

9 the date of and after the entry.

10 (3) *Multiple Appeals*. If one party files a timely notice of

11 appeal, any other party may file a notice of appeal within 14 days

12 after the date when the first notice was filed, or within the time

13 otherwise allowed by this rule, whichever period ends later.

14 (4) *Mistaken Filing in Another Court*. If a notice of appeal

15 is mistakenly filed in a district court, BAP, or court of appeals, the

16 clerk of that court must state on the notice the date on which it was

17 received and transmit it to the bankruptcy clerk. The notice of

18 appeal is then

19 considered filed in the bankruptcy court on the date so stated.

20 (b) EFFECT OF A MOTION ON THE TIME TO APPEAL.

21 (1) *In General*. If a party timely files in the bankruptcy

22 court any of the following motions, the time to file an appeal runs for

23 all parties from the entry of the order disposing of the last such

24 remaining motion:

25 (A) to amend or make additional findings under Rule

26 7052, whether or not granting the motion would alter the

27 judgment;

28 (B) to alter or amend the judgment under Rule 9023;

29 (C) for a new trial under Rule 9023; or

30 (D) for relief under Rule 9024 if the motion is filed

31 within 14 days after the judgment is entered.

32 (2) *Filing an Appeal Before the Motion is Decided*. If a

33 party files a notice of appeal after the court announces or enters a

34 judgment, order, or decree—but before it disposes of any motion

35 listed in subdivision (b)(1)—the notice becomes effective when the

36 order disposing of the last such remaining motion is entered.

37 (3) *Appealing the Ruling on the Motion*. If a party intends to

38 challenge an order disposing of any motion listed in subdivision

39 (b)(1)—or the alteration or amendment of a judgment, order, or

40 decree upon the motion—the party must file a notice of appeal or an

41 amended notice of appeal. The notice or amended notice must
42 comply with Rule 8003 or 8004 and be filed within the time
43 prescribed by this rule, measured from the entry of the order
44 disposing of the last such remaining motion.
45 (4) *No Additional Fee*. No additional fee is required to file
46 an amended notice of appeal.
47 (c) APPEAL BY AN INMATE CONFINED IN AN
48 INSTITUTION.
49 (1) *In General*. If an inmate confined in an institution files a
50 notice of appeal from a judgment, order, or decree of a bankruptcy
51 court, the notice is timely if it is deposited in the institution's
52 internal mail system on or before the last day for filing. If the
53 institution has a system designed for legal mail, the inmate must use
54 that system to receive the benefit of this rule. Timely filing may be
55 shown by a declaration in compliance with 28 U.S.C. § 1746 or by a
56 notarized statement, either of which must set forth the date of deposit
57 and state that first-class postage has been prepaid.
58 (2) *Multiple Appeals*. If an inmate files under this
59 subdivision the first notice of appeal, the 14-day period provided in
60 subdivision (a)(3) for another party to file a notice of appeal runs
61 from the date when the bankruptcy clerk dockets the first notice.
62 (d) EXTENDING THE TIME TO APPEAL.

63 (1) *When the Time May be Extended*. Except as provided in
64 subdivision (d)(2), the bankruptcy court may extend the time to file a
65 notice of appeal upon a party's motion that is filed:
66 (A) within the time prescribed by this rule; or
67 (B) within 21 days after that time, if the party shows
68 excusable neglect.
69 (2) *When the Time May Not be Extended*. The bankruptcy
70 court may not extend the time to file a notice of appeal if the
71 judgment, order, or decree appealed from:
72 (A) grants relief from an automatic stay under § 362,
73 922, 1201, or 1301 of the Code;
74 (B) authorizes the sale or lease of property or the use
75 of cash collateral under § 363 of the Code;
76 (C) authorizes the obtaining of credit under § 364 of
77 the Code;
78 (D) authorizes the assumption or assignment of an
79 executory contract or unexpired lease under § 365 of the
80 Code;
81 (E) approves a disclosure statement under § 1125 of
82 the Code; or
83 (F) confirms a plan under § 943, 1129, 1225, or 1325
84 of the Code.

85 (3) *Time Limits on an Extension*. No extension of time may

86 exceed 21 days after the time prescribed by this rule, or 14 days after

87 the order granting the motion to extend time is entered, whichever is

88 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.

Changes Made After Publication

Stylistic changes were made to the title of subdivision (b)(3) and to subdivision (c)(1).

Summary of Public Comment

12-BK-004. Thomas R. Morris (Attorney, Farmington Hills, Mich.)**.** The inmate mailbox rule prescribed by subdivision (c) should be made subject to the exceptions provided for in proposed Rule 8002(d)(2). These exceptions help to ensure the finality of certain types of bankruptcy court orders upon which transactions often rely. If the inmate mailbox rule is not made subject to the same exceptions, a transaction that depends on the finality of an order could be held hostage to the possibility of an inmate appeal or at least thrown into uncertainty if an inmate appeal becomes known after the expiration of the regular appeal period.

12-BK-011. Debtor/Creditor Rights Comm. of the Business Law Section of the State Bar of Michigan. The Committee agrees with the comment of Mr. Morris. The inmate appeal rule should not be added to Rule 8002, but, if it is, it should be limited to inmates who had previously opposed entry of the order from which an appeal is taken and disclosed their status as an inmate.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.)**.** Subdivision (b)(1) should recognize that parties frequently make motions for reconsideration and bankruptcy courts act on them, even though the rules do not specifically authorize this motion. A motion to reconsider should be added to the list of motions that toll the time for filing a notice of appeal.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.)**.** Rule 8002 should include a provision like FRAP 4(a)(6), which permits the district court to reopen the time to file an appeal for someone who did not receive notice of entry of the judgment within 21 days after its entry. This rule applies to bankruptcy cases appealed from the district court to the court of appeals, and there is no reason that it should not also be available for the first level of appeal. It would also be useful for Rule 8002 to have a provision similar to FRAP 4(a)(7), which addresses when a judgment or order is entered for purposes of Rule 4(a). The provision helps clarify timing issues presented by the separate-document requirement.

Several stylistic comments were submitted.

Rule 8003. Appeal as of Right—How Taken; Docketing the Appeal

1 (a) FILING THE NOTICE OF APPEAL.

2 (1) *In General*. An appeal from a judgment, order,
3 or decree of a bankruptcy court to a district court or BAP
4 under 28 U.S.C. § 158(a)(1) or (a)(2) may be taken only by
5 filing a notice of appeal with the bankruptcy clerk within
6 the time allowed by Rule 8002.

7 (2) *Effect of Not Taking Other Steps*. An
8 appellant's failure to take any step other than the timely
9 filing of a notice of appeal does not affect the validity of
10 the appeal, but is ground only for the district court or BAP
11 to act as it considers appropriate, including dismissing the
12 appeal.

13 (3) *Contents*. The notice of appeal must:

14 (A) conform substantially to the appropriate
15 Official Form;

16 (B) be accompanied by the judgment, order,
17 or decree, or the part of it, being appealed; and

18 (C) be accompanied by the prescribed fee.

19 (4) *Additional Copies*. If requested to do so, the
20 appellant must furnish the bankruptcy clerk with enough

21 copies of the notice to enable the clerk to comply with
22 subdivision (c).
23 (b) JOINT OR CONSOLIDATED APPEALS.
24 (1) *Joint Notice of Appeal*. When two or more
25 parties are entitled to appeal from a judgment, order, or
26 decree of a bankruptcy court and their interests make
27 joinder practicable, they may file a joint notice of appeal.
28 They may then proceed on appeal as a single appellant.
29 (2) *Consolidating Appeals*. When parties have
30 separately filed timely notices of appeal, the district court
31 or BAP may join or consolidate the appeals.
32 (c) SERVING THE NOTICE OF APPEAL.
33 (1) *Serving Parties and Transmitting to the United*
34 *States Trustee*. The bankruptcy clerk must serve the notice
35 of appeal on counsel of record for each party to the appeal,
36 excluding the appellant, and transmit it to the United States
37 trustee. If a party is proceeding pro se, the clerk must send
38 the notice of appeal to the party's last known address. The
39 clerk must note, on each copy, the date when the notice of
40 appeal was filed.
41 (2) *Effect of Failing to Serve or Transmit Notice*.
42 The bankruptcy clerk's failure to serve notice on a party or

43 transmit notice to the United States trustee does not affect

44 the validity of the appeal.

45 (3) *Noting Service on the Docket*. The clerk must

46 note on the docket the names of the parties served and the

47 date and method of the service.

48 (d) TRANSMITTING THE NOTICE OF APPEAL TO

49 THE DISTRICT COURT OR BAP; DOCKETING THE APPEAL.

50 (1) *Transmitting the Notice.* The bankruptcy clerk

51 must promptly transmit the notice of appeal to the BAP

52 clerk if a BAP has been established for appeals from that

53 district and the appellant has not elected to have the district

54 court hear the appeal. Otherwise, the bankruptcy clerk

55 must promptly transmit the notice to the district clerk.

56 (2) *Docketing in the District Court or BAP*. Upon

57 receiving the notice of appeal, the district or BAP clerk

58 must docket the appeal under the title of the bankruptcy

59 case and the title of any adversary proceeding, and must

60 identify the appellant, adding the appellant's name if

61 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.

Changes Made After Publication

In subdivision (d)(2), the direction for docketing a bankruptcy appeal was changed to reflect the fact that many bankruptcy appeals have dual titles—the bankruptcy case itself and the adversary proceeding that is the subject of the appeal. Stylistic changes were made to subdivision (c)(1). Conforming changes were made to the Committee Note.

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.)**.** The title of subdivision (c) refers to "serving" the notice of appeal, and subdivision (c)(3) refers to noting service on the docket. Subdivision (c)(1), however, requires the clerk to "transmit" the notice of appeal. "Transmit" should be substituted for "serve."

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Same.

12-BK-040. Bankruptcy Clerks Advisory Group. Same.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). The meaning of the concluding sentence of subdivision (b)(1)—"They may then proceed on appeal as a single appellant"—is unclear.

12-BK-040. Bankruptcy Clerks Advisory Group. Agrees with Judge Kressel's comment.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Subdivision (c)(1) should require the appellant rather than the bankruptcy clerk to serve the notice of appeal on the parties.

12-BK-008. National Conference of Bankruptcy Judges. Same. If the service duty remains on the bankruptcy clerk, Rule 8004(c)(1) concerning interlocutory appeals should be made consistent with Rule 8003(c)(1).

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). Same. If the service duty remains on the bankruptcy clerk, service should not be required on entities that received electronic notice of the docketing of the notice of appeal in the bankruptcy court.

12-BK-040. Bankruptcy Clerks Advisory Group. Agrees with Judge Kressel's and the NCBJ comments.

12-BK-010. The States' Association of Bankruptcy Attorneys. Subdivision (d)(1) should be revised to delay the transmission of the notice of appeal until the time has expired for all parties to the appeal to make an election to have the district court, rather than the BAP, hear the appeal. This change would avoid requiring the BAP to transfer an appeal to the district court if the appellee elects to have the district court hear it.

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). Sometimes the bankruptcy clerk will not have transmitted the notice of appeal to the BAP when an appellee files an election to have the district court hear the appeal. The rule should reflect that possibility.

12-BK-040. Bankruptcy Clerks Advisory Group. Subdivision (c)(1) requires the clerk to note on each copy of the notice of appeal the date when it was filed. This requirement is unnecessary because the electronic docket within CM/ECF will state the filing date.

12-BK-034. Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee. The change to Rule 8003 removing the delay of docketing an appeal provides greater clarity regarding the timing of the docketing of the appeal and will save bankruptcy clerks time and resources.

Several stylistic comments were submitted.

Rule 8004. Appeal by Leave—How Taken; Docketing the Appeal

1 (a) NOTICE OF APPEAL AND MOTION FOR LEAVE
2 TO APPEAL. To appeal from an interlocutory order or decree of a
3 bankruptcy court under 28 U.S.C. § 158(a)(3), a party must file
4 with the bankruptcy clerk a notice of appeal as prescribed by Rule
5 8003(a). The notice must:
6 (1) be filed within the time allowed by Rule 8002;
7 (2) be accompanied by a motion for leave to appeal
8 prepared in accordance with subdivision (b); and
9 (3) unless served electronically using the court's
10 transmission equipment, include proof of service in
11 accordance with Rule 8011(d).
12 (b) CONTENTS OF THE MOTION; RESPONSE.
13 (1) *Contents*. A motion for leave to appeal under
14 28 U.S.C. § 158(a)(3) must include the following:
15 (A) the facts necessary to understand the
16 question presented;
17 (B) the question itself;
18 (C) the relief sought;
19 (D) the reasons why leave to appeal should
20 be granted; and
21 (E) a copy of the interlocutory order or

22 decree and any related opinion or memorandum.

23 (2) *Response*. A party may file with the district or

24 BAP clerk a response in opposition or a cross-motion

25 within 14 days after the motion is served.

26 (c) TRANSMITTING THE NOTICE OF APPEAL AND

27 THE MOTION; DOCKETING THE APPEAL; DETERMINING

28 THE MOTION.

29 (1) *Transmitting to the District Court or BAP*. The

30 bankruptcy clerk must promptly transmit the notice of

31 appeal and the motion for leave to the BAP clerk if a BAP

32 has been established for appeals from that district and the

33 appellant has not elected to have the district court hear the

34 appeal. Otherwise, the bankruptcy clerk must promptly

35 transmit the notice and motion to the district clerk.

36 (2) *Docketing in the District Court or BAP*. Upon

37 receiving the notice and motion, the district or BAP clerk

38 must docket the appeal under the title of the bankruptcy

39 case and the title of any adversary proceeding, and must

40 identify the appellant, adding the appellant's name if

41 necessary.

42 (3) *Oral Argument Not Required*. The motion and

43 any response or cross-motion are submitted without oral

44 argument unless the district court or BAP orders otherwise.

45 (d) FAILURE TO FILE A MOTION WITH A

46 NOTICE OF APPEAL. If an appellant timely files a notice

47 of appeal under this rule but does not include a motion for

48 leave, the district court or BAP may order the appellant to

49 file a motion for leave, or treat the notice of appeal as a

50 motion for leave and either grant or deny it. If the court

51 orders that a motion for leave be filed, the appellant must

52 do so within 14 days after the order is entered, unless the

53 order provides otherwise.

54 (e) DIRECT APPEAL TO A COURT OF APPEALS. If

55 leave to appeal an interlocutory order or decree is required under

56 28 U.S.C. § 158(a)(3), an authorization of a direct appeal by the

57 court of appeals under 28 U.S.C. § 158(d)(2) satisfies the

58 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.

Changes Made After Publication

In subdivision (c)(2), the direction for docketing a bankruptcy appeal was changed to reflect the fact that many bankruptcy appeals have dual titles—the bankruptcy case itself and the adversary proceeding that is the subject of the appeal. As published, subdivision (c)(3) stated that the court must dismiss the appeal if the motion for leave to appeal is denied. That sentence was deleted.

Summary of Public Comment

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Subdivision (c)(3) should provide that the appellate court "may" (not "must") dismiss the appeal if leave to appeal is denied. We sometimes deny such motions as moot because the order appealed from was final, not interlocutory.

Subdivision (a) should refer to "an appeal from an interlocutory order,

decree, or judgment," not just "order or decree." We frequently see attempts to appeal a partial judgment, which can be interlocutory.

Subdivision (a)(3) requires the notice of appeal to be accompanied by proof of service unless it is served electronically. There is not a similar provision under Rule 8003. Moreover, the proof of service only applies to the notice of appeal and not to the motion for leave to appeal. It would be better to include in this rule the language of Rule 8003(c).

12-BK-010. The States' Association of Bankruptcy Attorneys. Subdivision (c)(1) presents the same issue as Rule 8003(d)(1) concerning the time for the bankruptcy clerk to transmit the notice of appeal to the BAP for docketing the appeal.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). It is not clear whether the harmless error provisions of proposed Rule 8003(a)(2) apply to this rule. Perhaps the Committee Note should indicate that they do apply.

Rule 8005(d) requires a motion for leave to appeal that is not accompanied by a notice of appeal to be treated as a notice of appeal for purposes of determining the timeliness of a statement of election to have a district court hear an appeal. Rule 8004(d), however, is silent about whether a motion for leave to appeal may be treated as a notice of appeal. The provision should expressly state that such a motion may be treated as a notice of appeal. The result should not differ based on whether or not a BAP has been authorized.

12-BK-031. Insolvency Law Comm. of the Business Law Section of the State Bar of California. Subdivision (b)(2) provides that a response in opposition or a cross-motion to a motion for leave to appeal is to be filed in the district court or BAP even though the original motion is filed in the bankruptcy court. This may cause confusion. The rule should be modified to provide that a response or cross-motion must be filed within 14 days after the bankruptcy clerk transmits the notice of appeal, rather than after the motion is served.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Rule 8004 should specify that motions for leave to appeal are not governed by Rule 9014. This addition would parallel proposed Rule 8006(f)(4) (a request for certification of a direct appeal is not governed by Rule 9014).

The rule should clarify the power of the bankruptcy court during an interlocutory appeal. This issue causes considerable confusion among courts.

12-BK-034. Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee. The change to Rule 8004 removing the delay of docketing an appeal provides greater clarity regarding the timing of the docketing of the appeal and will save bankruptcy clerks time and resources.

Several stylistic comments were submitted.

Rule 8005. Election to Have an Appeal Heard by the District Court Instead of the BAP

1 (a) FILING OF A STATEMENT OF ELECTION. To
2 elect to have an appeal heard by the district court, a party must:
3 (1) file a statement of election that conforms
4 substantially to the appropriate Official Form; and
5 (2) do so within the time prescribed by 28 U.S.C.
6 § 158(c)(1).
7 (b) TRANSMITTING THE DOCUMENTS RELATED
8 TO THE APPEAL. Upon receiving an appellant's timely
9 statement of election, the bankruptcy clerk must transmit to the
10 district clerk all documents related to the appeal. Upon receiving a
11 timely statement of election by a party other than the appellant, the
12 BAP clerk must transmit to the district clerk all documents related
13 to the appeal and notify the bankruptcy clerk of the transmission.
14 (c) DETERMINING THE VALIDITY OF AN
15 ELECTION. A party seeking a determination of the validity of an
16 election must file a motion in the court where the appeal is then
17 pending. The motion must be filed within 14 days after the
18 statement of election is filed.
19 (d) MOTION FOR LEAVE WITHOUT A NOTICE OF
20 APPEAL—EFFECT ON THE TIMING OF AN ELECTION. If
21 an appellant moves for leave to appeal under Rule 8004 but fails to

22 file a separate notice of appeal with the motion, the motion must be

23 treated as a notice of appeal for purposes of determining the

24 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). It applies only in districts in which an appeal to a BAP is authorized.

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. For appellants, that statement is included in the Notice of Appeal 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. Upon a timely election by any other party, the BAP clerk must promptly transmit the appeal documents to the district clerk and notify the bankruptcy clerk that the appeal has been transferred.

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.

Changes Made After Publication

In subdivision (b), a requirement was added that the BAP clerk notify the bankruptcy clerk if an appeal is transferred from the BAP to the district court upon the election of an appellee. Conforming and clarifying changes were made to the Committee Note.

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Subdivision (a) should emphasize that the official election form needs to be a separate document from the notice of appeal. The separate document requirement should be retained.

12-BK-010. The States' Association of Bankruptcy Attorneys. Is there an official form, or is it still being drafted? The election form should be combined with the notice of appeal. The current separate statement requirement causes confusion and, when not followed, leads to the voiding of an election to have the appeal heard in the district court. Putting the two forms together will ensure that they are filed at the same time.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). Subdivision (a) should make clear whether the statement of election must be set forth in a separate document. The current separate document requirement should be retained.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Subdivision (a) does not specify whether the election must be made by a separate document. Requiring a separate document makes things much clearer for the courts and parties.

12-BK-040. Bankruptcy Clerks Advisory Group. Subdivision (a) refers to an Official Form, but there is no such form.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). The provision in subdivision (b) for the BAP clerk to transmit documents to the district clerk may not be well received by district clerks. They are accustomed to receiving documents from bankruptcy clerks. The current practice (at least in the 8th Cir. BAP) of having the BAP clerk return the appeal to the bankruptcy clerk, who then transmits it to the district clerk, should be retained or allowed as an acceptable alternative.

12-BK-040. Bankruptcy Clerks Advisory Group. Subdivision (b) should be revised to require notification of the bankruptcy clerk if the BAP

clerk transmits the record to the district clerk.

12-BK-010. The States' Association of Bankruptcy Attorneys. Given the suggestion for revising proposed Rule 8003 to delay transmittal of the appeal until all parties' time to elect a district court has expired, subdivision (b)(1) should be revised to eliminate the possibility of a BAP clerk transmitting an appeal to the district clerk. If no parties file a statement of election, the bankruptcy clerk will transmit the appeal to the BAP clerk. If any party does elect a district court, the bankruptcy clerk will send the appeal to the district clerk.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). There are two problems with subdivision (c). First, it does not deal with the situation in which the bankruptcy court erroneously transmits a notice of appeal to the district court even though no election was made. In that case there should be a longer period of time to contest the transmittal to the district court. Second, even when a statement of election is filed, 14 days to contest the election is not long enough. The time should be the same as the appellee's time to file an election.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). The rule does not retain the provision of current Rule 8001(e)(2), which provides for the withdrawal of an election with the district court's acquiescence.

Several stylistic comments were submitted.

Rule 8006. Certifying a Direct Appeal to the Court of Appeals

1 (a) EFFECTIVE DATE OF A CERTIFICATION. A
2 certification of a judgment, order, or decree of a bankruptcy court
3 for direct review in a court of appeals under 28 U.S.C. § 158(d)(2)
4 is effective when:
5 (1) the certification has been filed;
6 (2) a timely appeal has been taken under Rule 8003
7 or 8004; and
8 (3) the notice of appeal has become effective under
9 Rule 8002.
10 (b) FILING THE CERTIFICATION. The certification
11 must be filed with the clerk of the court where the matter is
12 pending. For purposes of this rule, a matter remains pending in the
13 bankruptcy court for 30 days after the effective date under Rule
14 8002 of the first notice of appeal from the judgment, order, or
15 decree for which direct review is sought. A matter is pending in
16 the district court or BAP thereafter.
17 (c) JOINT CERTIFICATION BY ALL APPELLANTS
18 AND APPELLEES. A joint certification by all the appellants and
19 appellees under 28 U.S.C. § 158(d)(2)(A) must be made by using
20 the appropriate Official Form. The parties may supplement the
21 certification with a short statement of the basis for the certification,

22 which may include the information listed in subdivision (f)(2).

23 (d) THE COURT THAT MAY MAKE THE

24 CERTIFICATION. Only the court where the matter is pending, as

25 provided in subdivision (b), may certify a direct review on request

26 of parties or on its own motion.

27 (e) CERTIFICATION ON THE COURT'S OWN

28 MOTION.

29 (1) *How Accomplished*. A certification on the

30 court's own motion must be set forth in a separate

31 document. The clerk of the certifying court must serve it

32 on the parties to the appeal in the manner required for

33 service of a notice of appeal under Rule 8003(c)(1). The

34 certification must be accompanied by an opinion or

35 memorandum that contains the information required by

36 subdivision (f)(2)(A)-(D).

37 (2) *Supplemental Statement by a Party*. Within 14

38 days after the court's certification, a party may file with the

39 clerk of the certifying court a short supplemental statement

40 regarding the merits of certification.

41 (f) CERTIFICATION BY THE COURT ON REQUEST.

42 (1) *How Requested*. A request by a party for

43 certification that a circumstance specified in 28 U.S.C.

44 §158(d)(2)(A)(i)-(iii) applies—or a request by a majority of
45 the appellants and a majority of the appellees—must be
46 filed with the clerk of the court where the matter is pending
47 within 60 days after the entry of the judgment, order, or
48 decree.
49 (2) *Service and Contents*. The request must be
50 served on all parties to the appeal in the manner required
51 for service of a notice of appeal under Rule 8003(c)(1), and
52 it must include the following:
53 (A) the facts necessary to understand the
54 question presented;
55 (B) the question itself;
56 (C) the relief sought;
57 (D) the reasons why the direct appeal
58 should be allowed, including which circumstance
59 specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii)
60 applies; and
61 (E) a copy of the judgment, order, or decree
62 and any related opinion or memorandum.
63 (3) *Time to File a Response or a Cross-Request*. A
64 party may file a response to the request within 14 days after
65 the request is served, or such other time as the court where

66 the matter is pending allows. A party may file a cross-

67 request for certification within 14 days after the request is

68 served, or within 60 days after the entry of the judgment,

69 order, or decree, whichever occurs first.

70 (4) *Oral Argument Not Required*. The request,

71 cross-request, and any response are submitted without oral

72 argument unless the court where the matter is pending

73 orders otherwise.

74 (5) *Form and Service of the Certification*. If the

75 court certifies a direct appeal in response to the request, it

76 must do so in a separate document. The certification must

77 be served on the parties to the appeal in the manner

78 required for service of a notice of appeal under Rule

79 8003(c)(1).

80 (g) PROCEEDING IN THE COURT OF APPEALS

81 FOLLOWING A CERTIFICATION. Within 30 days after the

82 date the certification becomes effective under subdivision (a), a

83 request for permission to take a direct appeal to the court of

84 appeals must be filed with the circuit clerk in accordance with F.

R. App. P. 6(c).

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 with the circuit clerk, 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.

Changes Made After Publication

In subdivisions (b) and (g), cross-references were added. In subdivision (f)(4), the statement regarding the inapplicability of Rule 9014 was deleted as unnecessary. A clarifying change was made to the first paragraph of the Committee Note.

Summary of Public Comment

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (c) should provide an opportunity for the bankruptcy court to comment on the proceeding's suitability for direct appeal when a certification is jointly made by all appellants and appellees.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). Subdivision (d), in combination with subdivision (b), gives a bankruptcy court only 30 days after the effective date of the first notice of appeal, to certify a direct appeal. That is not enough time for the court that will be most knowledgeable about the case to make a decision. Either Rule 9006 should be amended to allow the bankruptcy court to extend this time period, or the period in which the case is deemed to remain pending in the bankruptcy court for purposes of this rule should be extended to at least 60 days. When a majority of appellants and appellees request a certification, they have 60 days after the entry of judgment to do so. Midway through this time period, the court that can make the certification will change, causing confusion.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). If a request for

certification is made within 30 days after the notice of appeal, but the bankruptcy court does not rule on it within that time period, the bankruptcy court loses jurisdiction to certify the appeal. The rule does not make clear how the bankruptcy court would transmit the motion to the appropriate appellate court.

Several stylistic comments were submitted.

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

1 (a) INITIAL MOTION IN THE BANKRUPTCY COURT.
2 (1) *In General*. Ordinarily, a party must move first
3 in the bankruptcy court for the following relief:
4 (A) a stay of a judgment, order, or decree of
5 the bankruptcy court pending appeal;
6 (B) the approval of a supersedeas bond;
7 (C) an order suspending, modifying,
8 restoring, or granting an injunction while an appeal
9 is pending; or
10 (D) the suspension or continuation of
11 proceedings in a case or other relief permitted by
12 subdivision (e).
13 (2) *Time to File*. The motion may be made either
14 before or after the notice of appeal is filed.
15 (b) MOTION IN THE DISTRICT COURT, THE BAP,
16 OR THE COURT OF APPEALS ON DIRECT APPEAL.
17 (1) *Request for Relief*. A motion for the relief
18 specified in subdivision (a)(1)—or to vacate or modify a
19 bankruptcy court's order granting such relief—may be
20 made in the court where the appeal is pending.
21 (2) *Showing or Statement Required*. The motion

22 must:

23 (A) show that moving first in the

24 bankruptcy court would be impracticable; or

25 (B) if a motion was made in the bankruptcy

26 court, either state that the court has not yet ruled on

27 the motion, or state that the court has ruled and set

28 out any reasons given for the ruling.

29 (3) *Additional Content*. The motion must also

30 include:

31 (A) the reasons for granting the relief

32 requested and the facts relied upon;

33 (B) affidavits or other sworn statements

34 supporting facts subject to dispute; and

35 (C) relevant parts of the record.

36 (4) *Serving Notice*. The movant must give

37 reasonable notice of the motion to all parties.

38 (c) FILING A BOND OR OTHER SECURITY. The

39 district court, BAP, or court of appeals may condition relief on

40 filing a bond or other appropriate security with the bankruptcy

41 court.

42 (d) BOND FOR A TRUSTEE OR THE UNITED

43 STATES. The court may require a trustee to file a bond or other

44 appropriate security when the trustee appeals. A bond or other

45 security is not required when an appeal is taken by the United

46 States, its officer, or its agency or by direction of any department

47 of the federal government.

48 (e) CONTINUATION OF PROCEEDINGS IN THE

49 BANKRUPTCY COURT. Despite Rule 7062 and subject to the

50 authority of the district court, BAP, or court of appeals, the

51 bankruptcy court may:

52 (1) suspend or order the continuation of other

53 proceedings in the case; or

54 (2) issue any other appropriate orders during the

55 pendency of an appeal to protect the rights of all parties in

56 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—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.

Subdivision (e) retains the provision of the former rule that authorizes the bankruptcy court to decide whether to suspend or allow the continuation of other proceedings in the bankruptcy case while the matter for which a stay has been sought is pending on appeal.

Changes Made After Publication

The clause "or where it will be taken" was deleted in subdivision (b)(1). Stylistic changes were made to the titles of subdivisions (b) and (e) and in subdivision (e)(1). A discussion of subdivision (e) was added to the Committee Note.

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Although it is appropriate to allow a motion for stay or other relief to be made in the bankruptcy court before a notice of appeal is filed, as subdivision (a)(2) provides, a notice of appeal should be required before an appellate court can hear such a motion. That is how the appellate court obtains jurisdiction. The rule does not explain how the motion gets before the appellate court if no notice of appeal has been filed.

12-BK-040. Bankruptcy Clerks Advisory Group. Agrees with Judge Kressel's comment.
12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). If the intent of subdivision (e) is to override the doctrine of exclusive appellate jurisdiction, the rule or Committee Note should be more explicit. Also

subdivision (b)(2)(B) should require a copy of any written ruling or order in the bankruptcy court to be included with the motion.

12-BK-010. The States' Association of Bankruptcy Attorneys. Subdivision (d) should except all governmental units, not just the United States, from the bond requirement.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). Asking the bankruptcy court to grant a stay pending appeal is almost always a waste of time—even though that is the long-standing practice. This step in the process should be permissive rather than mandatory. In addition, the rule should state that the appellate court's consideration of the stay motion should be *de novo* rather than a review of whether the bankruptcy court abused its discretion in denying the stay.

Several stylistic changes were submitted.

Rule 8008. Indicative Rulings

1 (a) RELIEF PENDING APPEAL. If a party files a timely
2 motion in the bankruptcy court for relief that the court lacks
3 authority to grant because of an appeal that has been docketed and
4 is pending, the bankruptcy court may:
5 (1) defer considering the motion;
6 (2) deny the motion; or
7 (3) state that the court would grant the motion if the
8 court where the appeal is pending remands for that purpose,
9 or state that the motion raises a substantial issue.
10 (b) NOTICE TO THE COURT WHERE THE APPEAL IS
11 PENDING. The movant must promptly notify the clerk of the
12 court where the appeal is pending if the bankruptcy court states
13 that it would grant the motion or that the motion raises a
14 substantial issue.
15 (c) REMAND AFTER AN INDICATIVE RULING. If the
16 bankruptcy court states that it would grant the motion or that the
17 motion raises a substantial issue, the district court or BAP may
18 remand for further proceedings, but it retains jurisdiction unless it
19 expressly dismisses the appeal. If the district court or BAP
20 remands but retains jurisdiction, the parties must promptly notify

21 the clerk of that court when the bankruptcy court has decided the

22 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). Subdivision (c) should be made applicable to courts of appeals on direct appeal. While FRAP 12.1 deals with remands by the courts of appeals after notification of indicative rulings, it does not authorize remand to bankruptcy courts.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Rather than completely ducking the question when an appeal limits or defeats the bankruptcy court's authority to act while the appeal is pending, the Committee Note should at least note the point on which there seems to be a consensus—that a trial court retains plenary authority when an interlocutory order is appealed, at least until the appellate court grants leave to appeal.

One stylistic comment was submitted.

Rule 8009. Record on Appeal; Sealed Documents

1 (a) DESIGNATING THE RECORD ON APPEAL;
2 STATEMENT OF THE ISSUES.
3 (1) *Appellant*.
4 (A) The appellant must file with the
5 bankruptcy clerk and serve on the appellee a
6 designation of the items to be included in the record
7 on appeal and a statement of the issues to be
8 presented.
9 (B) The appellant must file and serve the
10 designation and statement within 14 days after:
11 (i) the appellant's notice of appeal as
12 of right becomes effective under Rule 8002;
13 or
14 (ii) an order granting leave to appeal
15 is entered.
16 A designation and statement served prematurely
17 must be treated as served on the first day on which
18 filing is timely.
19 (2) *Appellee and Cross-Appellant.* Within 14 days
20 after being served, the appellee may file with the
21 bankruptcy clerk and serve on the appellant a designation

22 of additional items to be included in the record. An
23 appellee who files a cross-appeal must file and serve a
24 designation of additional items to be included in the record
25 and a statement of the issues to be presented on the cross-
26 appeal.
27 (3) *Cross-Appellee*. Within 14 days after service of
28 the cross-appellant's designation and statement, a cross-
29 appellee may file with the bankruptcy clerk and serve on
30 the cross-appellant a designation of additional items to be
31 included in the record.
32 (4) *Record on Appeal*. The record on appeal must
33 include the following:
34 • the docket entries kept by the
35 bankruptcy clerk;
36 • items designated by the parties;
37 • the notice of appeal;
38 • the judgment, order, or decree being
39 appealed;
40 • any order granting leave to appeal;
41 • any certification required for a direct appeal
42 to the court of appeals;
43 • any opinion, findings of fact, and

44 conclusions of law relating to the issues on appeal,

45 including transcripts of all oral rulings;

46 • any transcript ordered under subdivision (b);

47 any statement required by subdivision (c);

48 and

49 • any additional items from the record that the

50 court where the appeal is pending orders.

51 (5) *Copies for the Bankruptcy Clerk.* If paper

52 copies are needed, a party filing a designation of items

53 must provide a copy of any of those items that the

54 bankruptcy clerk requests. If the party fails to do so, the

55 bankruptcy clerk must prepare the copy at the party's

56 expense.

57 (b) TRANSCRIPT OF PROCEEDINGS.

58 (1) *Appellant's Duty to Order.* Within the time

59 period prescribed by subdivision (a)(1), the appellant must:

60 (A) order in writing from the reporter, as

61 defined in Rule 8010(a)(1), a transcript of such

62 parts of the proceedings not already on file as the

63 appellant considers necessary for the appeal, and

64 file a copy of the order with the bankruptcy clerk;

65 or

66 (B) file with the bankruptcy clerk a
67 certificate stating that the appellant is not ordering a
68 transcript.
69 (2) *Cross-Appellant's Duty to Order*. Within 14
70 days after the appellant files a copy of the transcript order
71 or a certificate of not ordering a transcript, the appellee as
72 cross-appellant must:
73 (A) order in writing from the reporter, as
74 defined in Rule 8010(a)(1), a transcript of such
75 additional parts of the proceedings as the cross-
76 appellant considers necessary for the appeal, and
77 file a copy of the order with the bankruptcy clerk;
78 or
79 (B) file with the bankruptcy clerk a
80 certificate stating that the cross-appellant is not
81 ordering a transcript.
82 (3) *Appellee's or Cross-Appellee's Right to Order*.
83 Within 14 days after the appellant or cross-appellant files a
84 copy of a transcript order or certificate of not ordering a
85 transcript, the appellee or cross-appellee may order in
86 writing from the reporter a transcript of such additional
87 parts of the proceedings as the appellee or cross-appellee

88 considers necessary for the appeal. A copy of the order
89 must be filed with the bankruptcy clerk.
90 (4) *Payment*. At the time of ordering, a party must
91 make satisfactory arrangements with the reporter for paying
92 the cost of the transcript.
93 (5) *Unsupported Finding or Conclusion.* If the
94 appellant intends to argue on appeal that a finding or
95 conclusion is unsupported by the evidence or is contrary to
96 the evidence, the appellant must include in the record a
97 transcript of all relevant testimony and copies of all
98 relevant exhibits.
99 (c) STATEMENT OF THE EVIDENCE WHEN A
100 TRANSCRIPT IS UNAVAILABLE. If a transcript of a hearing or
101 trial is unavailable, the appellant may prepare a statement of the
102 evidence or proceedings from the best available means, including
103 the appellant's recollection. The statement must be filed within
104 the time prescribed by subdivision (a)(1) and served on the
105 appellee, who may serve objections or proposed amendments
106 within 14 days after being served. The statement and any
107 objections or proposed amendments must then be submitted to the
108 bankruptcy court for settlement and approval. As settled and
109 approved, the statement must be included by the bankruptcy clerk

110 in the record on appeal.

111 (d) AGREED STATEMENT AS THE RECORD ON

112 APPEAL. Instead of the record on appeal as defined in

113 subdivision (a), the parties may prepare, sign, and submit to the

114 bankruptcy court a statement of the case showing how the issues

115 presented by the appeal arose and were decided in the bankruptcy

116 court. The statement must set forth only those facts alleged and

117 proved or sought to be proved that are essential to the court's

118 resolution of the issues. If the statement is accurate, it—together

119 with any additions that the bankruptcy court may consider

120 necessary to a full presentation of the issues on appeal—must be

121 approved by the bankruptcy court and must then be certified to the

122 court where the appeal is pending as the record on appeal. The

123 bankruptcy clerk must then transmit it to the clerk of that court

124 within the time provided by Rule 8010. A copy of the agreed

125 statement may be filed in place of the appendix required by Rule

126 8018(b) or, in the case of a direct appeal to the court of appeals, by

127 F.R.App.P. 30.

128 (e) CORRECTING OR MODIFYING THE RECORD.

129 (1) *Submitting to the Bankruptcy Court*. If any

130 difference arises about whether the record accurately

131 discloses what occurred in the bankruptcy court, the

132 difference must be submitted to and settled by the
133 bankruptcy court and the record conformed accordingly. If
134 an item has been improperly designated as part of the
135 record on appeal, a party may move to strike that item.
136 (2) *Correcting in Other Ways*. If anything material
137 to either party is omitted from or misstated in the record by
138 error or accident, the omission or misstatement may be
139 corrected, and a supplemental record may be certified and
140 transmitted:
141 (A) on stipulation of the parties;
142 (B) by the bankruptcy court before or after
143 the record has been forwarded; or
144 (C) by the court where the appeal is
145 pending.
146 (3) *Remaining Questions*. All other questions as to
147 the form and content of the record must be presented to the
148 court where the appeal is pending.
149 (f) SEALED DOCUMENTS. A document placed under
150 seal by the bankruptcy court may be designated as part of the
151 record on appeal. In doing so, a party must identify it without
152 revealing confidential or secret information, but the bankruptcy
153 clerk must not transmit it to the clerk of the court where the appeal

154 is pending as part of the record. Instead, a party must file a motion

155 with the court where the appeal is pending to accept the document

156 under seal. If the motion is granted, the movant must notify the

157 bankruptcy court of the ruling, and the bankruptcy clerk must

158 promptly transmit the sealed document to the clerk of the court

159 where the appeal is pending.

160 (g) OTHER NECESSARY ACTIONS. All parties to an

161 appeal must take any other action necessary to enable the

162 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).

Changes Made After Publication

In subdivision (a)(2) and (3), the place of filing was clarified. "Docket entries kept by the bankruptcy clerk" was added to the list in subdivision (a)(4).

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). The practice of designating the record is fairly archaic. The 8th Cir. BAP has a rule that the

record before the bankruptcy court is the record on appeal. The record does not have to be designated or copied. Instead the parties refer to the appropriate bankruptcy court docket numbers in their briefs, and BAP judges can review the entire bankruptcy court record. This rule should at the least accommodate that practice.

12-BK-015. Judge Barry S. Schermer (Bankr. E.D. Mo.). The bankruptcy judges of the E.D. Mo. agree with Judge Kressel's comment about designation of the record.

12-BK-040. Bankruptcy Clerks Advisory Group. Agrees with Judge Kressel's and Judge Schermer's comments.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Subdivision (a)(1)(A) provides that the appellant files its designation in the bankruptcy court, but subdivisions (a)(2) and (a)(3) do not specify the court where the appellee, cross-appellant, and cross-appellee file their designations.

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). "The docket entries maintained by the bankruptcy clerk" should be added as the first entry in the list of items to be included in the record on appeal. This is derived from FRAP 10(a)(3), although the certification requirement is deleted. In subdivision (a)(4), delete "from the record" from the last item, and authorize the bankruptcy court to order additional items added.

12-BK-008. National Conference of Bankruptcy Judges. Subdivision (a)(5) includes the possibility of the bankruptcy clerk having to prepare paper copies of items for the record on appeal at a party's expense if the clerk requests them and the party does not comply. Although this provision is part of existing Rule 8006, it should be eliminated. The parties should bear the burden of producing them, not the clerk.

12-BK-040. Bankruptcy Clerks Advisory Group. Agrees with the NCBJ comment.

12-BK-034. Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee. Proposed subdivision (a) provides stylistic changes that will assist practitioners in completing the record on appeal with greater ease.

12-BK-040. Bankruptcy Clerks Advisory Group. In subdivisions (b)(1), (b)(2), and (b)(3), if an appellant is not ordering a transcript, it must file with the bankruptcy clerk a certificate stating that fact. Since orders for transcripts must be filed with the clerk, as well as the reporter's receipt of a

transcript order, the filing of a certificate of no transcript seems unnecessary. The certificate requirement also suggests the need for a special form.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Subdivision (b)(5) should make clear that the transcript referred to is the one described in (b)(1) and not a transcript that a party has created on its own and included in a brief or submitted as a separate document.

Subdivision (c) is troubling, at least without a definition of "unavailable." Many appellants will argue that a transcript is unavailable because they cannot afford to pay for it.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Same (as comment about subdivision (c)).

12-BK-040. Bankruptcy Clerks Advisory Group. The group agrees with Judge Kressel's comment. This rule will require the bankruptcy clerk to check for service, track the time for filing objections, as well as the settlement and approval of the statement. It also appears that the clerk will have to verify that the transcript is unavailable. If the provision is retained, it needs to be revised.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Subdivision (d)—Agreed Statement as the Record on Appeal—will cause havoc and irritate bankruptcy judges.

12-BK-015. Judge Barry S. Schermer (Bankr. E.D. Mo.). The bankruptcy judges of the E.D. Mo. strongly oppose the addition of subdivision (d). It would cause much additional work for bankruptcy judges and their staff. The benefits to the parties and the appellate court are questionable.

12-BK-040. Bankruptcy Clerks Advisory Group. Agrees with Judge Schermer's comment.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (e)(1) authorizes a party to move to strike an item that has been improperly designated as part of the record on appeal. The FRAP provision on which this rule is modeled, FRAP 10(e), does not contain a similar sentence. Improper designation goes beyond whether the record accurately reflects what occurred in the bankruptcy court. It goes to the form and content of the record, which are governed by (e)(3) and are resolved by the appellate court. The sentence about moving to strike should therefore be moved from

subdivision (e)(1) to (e)(3).

12-BK-040. Bankruptcy Clerks Advisory Group. Subdivision (f) addresses sealed documents. Currently sealed documents remain under seal during the appeal. The rule suggests that, if a party does not file a motion with the appellate court to accept the document under seal, the document may be unsealed. The more protective approach would be to keep the document sealed unless requested otherwise.

Rule 8010. Completing and Transmitting the Record

1 (a) REPORTER'S DUTIES.

2 (1) *Proceedings Recorded Without a Reporter*

3 *Present.* If proceedings were recorded without a reporter

4 being present, the person or service selected under

5 bankruptcy court procedures to transcribe the recording is

6 the reporter for purposes of this rule.

7 (2) *Preparing and Filing the Transcript*. The

8 reporter must prepare and file a transcript as follows:

9 (A) Upon receiving an order for a transcript

10 in accordance with Rule 8009(b), the reporter must

11 file in the bankruptcy court an acknowledgment of

12 the request that shows when it was received, and

13 when the reporter expects to have the transcript

14 completed.

15 (B) After completing the transcript, the

16 reporter must file it with the bankruptcy clerk, who

17 will notify the district, BAP, or circuit clerk of its

18 filing.

19 (C) If the transcript cannot be completed

20 within 30 days after receiving the order, the reporter

21 must request an extension of time from the

22 bankruptcy clerk. The clerk must enter on the

23 docket and notify the parties whether the extension

24 is granted.

25 (D) If the reporter does not file the

26 transcript on time, the bankruptcy clerk must notify

27 the bankruptcy judge.

28 (b) CLERK'S DUTIES.

29 (1) *Transmitting the Record—In General*. Subject

30 to Rule 8009(f) and subdivision (b)(5) of this rule, when

31 the record is complete, the bankruptcy clerk must transmit

32 to the clerk of the court where the appeal is pending either

33 the record or a notice that the record is available

34 electronically.

35 (2) *Multiple Appeals*. If there are multiple appeals

36 from a judgment, order, or decree, the bankruptcy clerk

37 must transmit a single record.

38 (3) *Receiving the Record*. Upon receiving the

39 record or notice that it is available electronically, the

40 district, BAP, or circuit clerk must enter that information
41 on the docket and promptly notify all parties to the appeal.
42 (4) *If Paper Copies Are Ordered.* If the court
43 where the appeal is pending directs that paper copies of the
44 record be provided, the clerk of that court must so notify
45 the appellant. If the appellant fails to provide them, the
46 bankruptcy clerk must prepare them at the appellant's
47 expense.
48 (5) *When Leave to Appeal is Requested.* Subject to
49 subdivision (c), if a motion for leave to appeal has been
50 filed under Rule 8004, the bankruptcy clerk must prepare
51 and transmit the record only after the district court, BAP, or
52 court of appeals grants leave.
53 (c) RECORD FOR A PRELIMINARY MOTION IN THE
54 DISTRICT COURT, BAP, OR COURT OF APPEALS. This
55 subdivision (c) applies if, before the record is transmitted, a party
56 moves in the district court, BAP, or court of appeals for any of the
57 following relief:
58 • leave to appeal;
59 • dismissal;
60 • a stay pending appeal;
61 • approval of a supersedeas bond, or additional

62 security on a bond or undertaking on appeal; or

63 • any other intermediate order.

64 The bankruptcy clerk must then transmit to the clerk of the court

65 where the relief is sought any parts of the record designated by a

66 party to the appeal or a notice that those parts are available

67 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.

Changes Made After Publication

Subdivision (a)(1) was revised to more accurately reflect the way in which transcription services are selected. A cross-reference to Rule 8009(b) was added to subdivision (a)(2)(A).

Summary of Public Comment

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). In subdivision (a)(1), "bankruptcy court" should be changed to "bankruptcy clerk" because the clerk is the person who designates the person or service that transcribes the recording of a court proceeding. Worded as it is, the provision might lead to appellants bothering the court with motions to designate a court reporter or transcription service.

12-BK-040. Bankruptcy Clerks Advisory Group. Regarding subdivision (a)(1), bankruptcy clerks do not designate a single transcription service. Instead, in order to avoid favoritism, they provide a list of transcription services.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Regarding subdivision (a)(2)(A): Add a cross-reference to Rule 8009(b) to emphasize the need for making satisfactory arrangements for paying the court reporter. Nonpayment is a common cause of delays of bankruptcy appeals.

12-BK-008. National Conference of Bankruptcy Judges. Subdivision (b)(1) directs the bankruptcy clerk to transmit the record when it is complete. In some cases the record is never complete because the parties fail to designate what the record should contain. The provision should be revised to fix an outside deadline for the clerk's transmission of the record. Once the deadline passes, the clerk would transmit whatever items in the list in proposed Rule 8009(a)(4) the clerk has.

12-BK-034. Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee. Subdivision (b) does not specify the clerk's duties if the record is never completed.

12-BK-040. Bankruptcy Clerks Advisory Group. Endorses the NCBJ comment on this issue.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). In some cases when the appellate court orders paper copies of the record to be delivered, it may be appropriate for the appellee to provide them. Add to the end of the first sentence of subdivision (b)(4), "or the appellee where appropriate."

12-BK-008. National Conference of Bankruptcy Judges. Subdivision (b)(4) should be eliminated for the reasons stated regarding Rule 8009(a)(5).

12-BK-040. Bankruptcy Clerks Advisory Group. The group endorses the NCBJ comment on this issue.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). The requirement that a reporter file an acknowledgment of the order for a transcript may be more difficult for a reporter in the bankruptcy court than in the district court. In the bankruptcy court the reporter is unlikely to have a close relationship and familiarity with the court, and the duty imposed under this provision is more onerous than the requirement of FRAP 11(b)(1)(A). Also limit the reporter's duty under subdivision (a)(2)(A) to requests for transcripts that are designated for purposes of an appeal.

The requirements of subdivision (a)(2)(C)–(D) (reporter must seek extension of time, clerk must report tardiness) will be ineffectual. The bankruptcy judge has no tools and few incentives to do anything but shrug.

Consider authorizing a sanction of dismissal of an appeal if the appellant is delinquent in performing any of its duties regarding completion of the record.

12-BK-040. Bankruptcy Clerks Advisory Group. Subdivision (a)(2) does not make clear how a reporter will be able to estimate when the transcript will be completed or how the reporter requests an extension of time from the bankruptcy clerk.

Rule 8011. Filing and Service; Signature

1 (a) FILING.

2 (1*) With the Clerk*. A document required or permitted to be

3 filed in a district court or BAP must be filed with the clerk of that

4 court.

5 (2) *Method and Timeliness*.

6 (A) *In general*. Filing may be accomplished by

7 transmission to the clerk of the district court or BAP. Except

8 as provided in subdivision (a)(2)(B) and (C), filing is timely

9 only if the clerk receives the document within the time fixed

10 for filing.

11 (B) *Brief or Appendix*. A brief or appendix is also

12 timely filed if, on or before the last day for filing, it is:

13 (i) mailed to the clerk by first-class mail—or

14 other class of mail that is at least as

15 expeditious—postage prepaid, if the district court's

16 or BAP's procedures permit or require a brief or

17 appendix to be filed by mailing; or

18 (ii) dispatched to a third-party commercial
19 carrier for delivery within 3 days to the clerk, if the
20 court's procedures so permit or require.
21 (C) *Inmate Filing*. A document filed by an inmate
22 confined in an institution is timely if deposited in the
23 institution's internal mailing system on or before the last day
24 for filing. If the institution has a system designed for legal
25 mail, the inmate must use that system to receive the benefit
26 of this rule. Timely filing may be shown by a declaration in
27 compliance with 28 U.S.C. § 1746 or by a notarized
28 statement, either of which must set forth the date of deposit
29 and state that first-class postage has been prepaid.
30 (D) *Copies*. If a document is filed electronically, no
31 paper copy is required. If a document is filed by mail or
32 delivery to the district court or BAP, no additional copies are
33 required. But the district court or BAP may require by local
34 rule or by order in a particular case the filing or furnishing of
35 a specified number of paper copies.
36 (3) *Clerk's Refusal of Documents*. The court's clerk must
37 not refuse to accept for filing any document transmitted for that
38 purpose solely because it is not presented in proper form as required
39 by these rules or by any local rule or practice.

40 (b) SERVICE OF ALL DOCUMENTS REQUIRED. Unless a rule
41 requires service by the clerk, a party must, at or before the time of the filing
42 of a document, serve it on the other parties to the appeal. Service on a party
43 represented by counsel must be made on the party's counsel.
44 (c) MANNER OF SERVICE.
45 (1) *Methods*. Service must be made electronically, unless it
46 is being made by or on an individual who is not represented by
47 counsel or the court's governing rules permit or require service by
48 mail or other means of delivery. Service may be made by or on an
49 unrepresented party by any of the following methods:
50 (A) personal delivery;
51 (B) mail; or
52 (C) third-party commercial carrier for delivery
53 within 3 days.
54 (2) *When Service Is Complete*. Service by electronic means
55 is complete on transmission, unless the party making service
56 receives notice that the document was not transmitted successfully.
57 Service by mail or by commercial carrier is complete on mailing or
58 delivery to the carrier.
59 (d) PROOF OF SERVICE.
60 (1) *What Is Required*. A document presented for filing must
61 contain either:

62 (A) an acknowledgment of service by the person
63 served; or
64 (B) proof of service consisting of a statement by the
65 person who made service certifying:
66 (i) the date and manner of service;
67 (ii) the names of the persons served; and
68 (iii) the mail or electronic address, the fax
69 number, or the address of the place of delivery, as
70 appropriate for the manner of service, for each person
71 served.
72 (2) *Delayed Proof*. The district or BAP clerk may permit
73 documents to be filed without acknowledgment or proof of service,
74 but must require the acknowledgment or proof to be filed promptly
75 thereafter.
76 (3) *Brief or Appendix*. When a brief or appendix is filed, the
77 proof of service must also state the date and manner by which it was
78 filed.
79 (e) SIGNATURE. Every document filed electronically must
80 include the electronic signature of the person filing it or, if the person is
81 represented, the electronic signature of counsel. The electronic signature
82 must be provided by electronic means that are consistent with any technical
83 standards that the Judicial Conference of the United States establishes.

84 Every document filed in paper form must be signed by the person filing the

85 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). The rule allowing briefs and appendices to be timely filed if mailed by the deadline has always been a bad rule. Why shouldn't the filing rules be the same for these documents as for all others?

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). Subdivision (a)(2) should not follow the ill-advised rule of FRAP 25(a)(2)(B) of having different filing rules for briefs and appendices.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Subdivision (a)(2)(C) requires that a notarized statement state that first-class postage has been prepaid, but the rule does not require that the postage be paid. And subdivision (b) refers to service by the clerk. The rules should not require service by the clerk.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (a)(3), which is similar to Rule 5005(a)(1), should incorporate a provision similar to Rule 5005(c). Also the Committee Note's discussion of the signature requirement of subdivision (e) should refer to Rule 9011, unless Rule 9011 is to be qualified. In that case, there is a need for clarification.

One stylistic comment was submitted.

Rule 8012. Corporate Disclosure Statement

1 (a) WHO MUST FILE. Any nongovernmental corporate
2 party appearing in the district court or BAP must file a statement
3 that identifies any parent corporation and any publicly held
4 corporation that owns 10% or more of its stock or states that there
5 is no such corporation.
6 (b) TIME TO FILE; SUPPLEMENTAL FILING. A party
7 must file the statement with its principal brief or upon filing a
8 motion, response, petition, or answer in the district court or BAP,
9 whichever occurs first, unless a local rule requires earlier filing.
10 Even if the statement has already been filed, the party's principal
11 brief must include a statement before the table of contents. A party
12 must supplement its statement whenever the required information
13 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. Rule 9001 makes the definitions in § 101 of the Code applicable to these rules. Under § 101(9) the word "corporation" includes a limited liability company, limited liability partnership, business trust, and certain other entities that are not designated under applicable law as corporations.

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.

Changes Made After Publication

A sentence was added to the Committee Note to draw attention to the broad definition of "corporation" under § 101(9) of the Bankruptcy Code.

Summary of Public Comment

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). It may be worth explaining in the Committee Note that a "corporate party" includes limited liability partnerships, limited liability companies, and other entities that are included within the definition of "corporation" in § 101(9) of the Bankruptcy Code.

Rule 8013. Motions; Intervention

1 (a) CONTENTS OF A MOTION; RESPONSE; REPLY.

2 (1) *Request for Relief.* A request for an order or

3 other relief is made by filing a motion with the district or

4 BAP clerk, with proof of service on the other parties to the

5 appeal.

6 (2) *Contents of a Motion.*

7 (A) *Grounds and the Relief Sought.* A

8 motion must state with particularity the grounds for

9 the motion, the relief sought, and the legal argument

10 necessary to support it.

11 (B) *Motion to Expedite an Appeal.* A

12 motion to expedite an appeal must explain what

13 justifies considering the appeal ahead of other

14 matters. If the district court or BAP grants the

15 motion, it may accelerate the time to transmit the

16 record, the deadline for filing briefs and other

17 documents, oral argument, and the resolution of the

18 appeal. A motion to expedite an appeal may be

19 filed as an emergency motion under subdivision (d).

20 (C) *Accompanying Documents.*

21 (i) Any affidavit or other document

22 necessary to support a motion must be
23 served and filed with the motion.
24 (ii) An affidavit must contain only
25 factual information, not legal argument.
26 (iii) A motion seeking substantive
27 relief must include a copy of the bankruptcy
28 court's judgment, order, or decree, and any
29 accompanying opinion as a separate exhibit.
30 (D) *Documents Barred or Not Required.*
31 (i) A separate brief supporting or
32 responding to a motion must not be filed.
33 (ii) Unless the court orders
34 otherwise, a notice of motion or a proposed
35 order is not required.
36 (3) *Response and Reply; Time to File*. Unless the
37 district court or BAP orders otherwise,
38 (A) any party to the appeal may file a
39 response to the motion within 7 days after service of
40 the motion; and
41 (B) the movant may file a reply to a
42 response within 7 days after service of the response,
43 but may only address matters raised in the response.

44 (b) DISPOSITION OF A MOTION FOR A
45 PROCEDURAL ORDER. The district court or BAP may rule on a
46 motion for a procedural order—including a motion under Rule
47 9006(b) or (c)—at any time without awaiting a response. A party
48 adversely affected by the ruling may move to reconsider, vacate, or
49 modify it within 7 days after the procedural order is served.
50 (c) ORAL ARGUMENT. A motion will be decided
51 without oral argument unless the district court or BAP orders
52 otherwise.
53 (d) EMERGENCY MOTION.
54 (1) *Noting the Emergency*. When a movant
55 requests expedited action on a motion because irreparable
56 harm would occur during the time needed to consider a
57 response, the movant must insert the word "Emergency"
58 before the title of the motion.
59 (2) *Contents of the Motion*. The emergency motion
60 must
61 (A) be accompanied by an affidavit setting
62 out the nature of the emergency;
63 (B) state whether all grounds for it were
64 submitted to the bankruptcy court and, if not, why
65 the motion should not be remanded for the

66 bankruptcy court to consider;

67 (C) include the e-mail addresses, office

68 addresses, and telephone numbers of moving

69 counsel and, when known, of opposing counsel and

70 any unrepresented parties to the appeal; and

71 (D) be served as prescribed by Rule 8011.

72 (3) *Notifying Opposing Parties*. Before filing an

73 emergency motion, the movant must make every

74 practicable effort to notify opposing counsel and any

75 unrepresented parties in time for them to respond. The

76 affidavit accompanying the emergency motion must state

77 when and how notice was given or state why giving it was

78 impracticable.

79 (e) POWER OF A SINGLE BAP JUDGE TO

80 ENTERTAIN A MOTION.

81 (1) *Single Judge's Authority*. A BAP judge may

82 act alone on any motion, but may not dismiss or otherwise

83 determine an appeal, deny a motion for leave to appeal, or

84 deny a motion for a stay pending appeal if denial would

85 make the appeal moot.

86 (2) *Reviewing a Single Judge's Action*. The BAP

87 may review a single judge's action, either on its own

88 motion or on a party's motion.

89 (f) FORM OF DOCUMENTS; PAGE LIMITS; NUMBER

90 OF COPIES.

91 (1) *Format of a Paper Document*. Rule 27(d)(1)

92 F.R.App.P. applies in the district court or BAP to a paper

93 version of a motion, response, or reply.

94 (2) *Format of an Electronically Filed Document*.

95 A motion, response, or reply filed electronically must

96 comply with the requirements for a paper version regarding

97 covers, line spacing, margins, typeface, and type style. It

98 must also comply with the page limits under paragraph (3).

99 (3) *Page Limits*. Unless the district court or BAP

100 orders otherwise:

101 (A) a motion or a response to a motion must

102 not exceed 20 pages, exclusive of the corporate

103 disclosure statement and accompanying documents

104 authorized by subdivision (a)(2)(C); and

105 (B) a reply to a response must not exceed

106 10 pages.

107 (4) *Paper Copies*. Paper copies must be provided

108 only if required by local rule or by an order in a particular
109 case.
110 (g) INTERVENING IN AN APPEAL. Unless a statute
111 provides otherwise, an entity that seeks to intervene in an appeal
112 pending in the district court or BAP must move for leave to
113 intervene and serve a copy of the motion on the parties to the
114 appeal. The motion or other notice of intervention authorized by
115 statute must be filed within 30 days after the appeal is docketed. It
116 must concisely state the movant's interest, the grounds for
117 intervention, whether intervention was sought in the bankruptcy
118 court, why intervention is being sought at this stage of the
119 proceeding, and why participating as an amicus curiae would not
120 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.

Changes After Publication

Subdivision (a)(2)(D) was changed to allow the court to require a notice of motion or proposed order. A stylistic change was made to subdivision (d)(2)(B).

Summary of Public Comment

12-BK-008. National Conference of Bankruptcy Judges. Subdivision (a)(2)(D)(ii) provides that a notice of motion is not required. This provision is contrary to the motion practice in some district courts, such as the Northern District of Illinois, which require a notice of motion for all motions. The provision should either be deleted or modified to add "unless required by local rule."

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). Modify subdivision (a)(2)(D)(iii) by adding at the end of the provision, "unless required by local rule or order of the court in which the appeal is pending." A district court or BAP should have discretion to require a proposed order.

Modify subdivision (d)(2)(B). Sometimes it would not be appropriate to file a motion relating to an appeal in the bankruptcy court.

12-BK-008. National Conference of Bankruptcy Judges. Subdivision (f)(3)(A) provides that a motion may not exceed 20 pages. Some districts have local rules with more restrictive requirements. The provision should therefore be prefaced with "Unless otherwise provided by local rule."

Subdivision (g), which allows intervention in an appeal, should be deleted. It does not have a counterpart in the general appellate rules, although some circuits have recognized an inherent power to permit intervention. It is not clear why a special bankruptcy appellate intervention rule is needed or who

would have standing to participate on appeal if they had not participated in proceedings in the bankruptcy court.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). It is unclear why subdivision (g) is necessary or whether a party moving to intervene would have standing

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (d) appears to require irreparable harm to support an emergency motion. There could be situations, however, such as expediting an appeal, that may warrant emergency consideration even though irreparable harm will not ensue.

Several stylistic comments were submitted.

Rule 8014. Briefs

1 (a) APPELLANT'S BRIEF. The appellant's brief must
2 contain the following under appropriate headings and in the order
3 indicated:
4 (1) a corporate disclosure statement, if required by
5 Rule 8012;
6 (2) a table of contents, with page references;
7 (3) a table of authorities—cases (alphabetically
8 arranged), statutes, and other authorities—with references
9 to the pages of the brief where they are cited;
10 (4) a jurisdictional statement, including:
11 (A) the basis for the bankruptcy court's
12 subject-matter jurisdiction, with citations to
13 applicable statutory provisions and stating relevant
14 facts establishing jurisdiction;
15 (B) the basis for the district court's or
16 BAP's jurisdiction, with citations to applicable
17 statutory provisions and stating relevant facts
18 establishing jurisdiction;
19 (C) the filing dates establishing the
20 timeliness of the appeal; and
21 (D) an assertion that the appeal is from a

22 final judgment, order, or decree, or information

23 establishing the district court's or BAP's

24 jurisdiction on another basis;

25 (5) a statement of the issues presented and, for each

26 one, a concise statement of the applicable standard of

27 appellate review;

28 (6) a concise statement of the case setting out the

29 facts relevant to the issues submitted for review, describing

30 the relevant procedural history, and identifying the rulings

31 presented for review, with appropriate references to the

32 record;

33 (7) a summary of the argument, which must contain

34 a succinct, clear, and accurate statement of the arguments

35 made in the body of the brief, and which must not merely

36 repeat the argument headings;

37 (8) the argument, which must contain the

38 appellant's contentions and the reasons for them, with

39 citations to the authorities and parts of the record on which

40 the appellant relies;

41 (9) a short conclusion stating the precise relief

42 sought; and

43 (10) the certificate of compliance, if required by

44 Rule 8015(a)(7) or (b).

45 (b) APPELLEE'S BRIEF. The appellee's brief must

46 conform to the requirements of subdivision (a)(1)-(8) and (10),

47 except that none of the following need appear unless the appellee

48 is dissatisfied with the appellant's statement:

49 (1) the jurisdictional statement;

50 (2) the statement of the issues and the applicable

51 standard of appellate review; and

52 (3) the statement of the case.

53 (c) REPLY BRIEF. The appellant may file a brief in reply

54 to the appellee's brief. A reply brief must comply with the

55 requirements of subdivision (a)(2)-(3).

56 (d) STATUTES, RULES, REGULATIONS, OR

57 SIMILAR AUTHORITY. If the court's determination of the

58 issues presented requires the study of the Code or other statutes,

59 rules, regulations, or similar authority, the relevant parts must be

60 set out in the brief or in an addendum.

61 (e) BRIEFS IN A CASE INVOLVING MULTIPLE

62 APPELLANTS OR APPELLEES. In a case involving more than

63 one appellant or appellee, including consolidated cases, any

64 number of appellants or appellees may join in a brief, and any

65 party may adopt by reference a part of another's brief. Parties may

66 also join in reply briefs.

77 (f) CITATION OF SUPPLEMENTAL AUTHORITIES.

78 If pertinent and significant authorities come to a party's attention

79 after the party's brief has been filed—or after oral argument but

80 before a decision—a party may promptly advise the district or

81 BAP clerk by a signed submission setting forth the citations. The

82 submission, which must be served on the other parties to the

83 appeal, must state the reasons for the supplemental citations,

84 referring either to the pertinent page of a brief or to a point argued

85 orally. The body of the submission must not exceed 350 words.

86 Any response must be made within 7 days after the party is served,

87 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).

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). In subdivision (a)(4)(D), consider requiring an assertion that leave to appeal has been granted in the case of an interlocutory appeal under § 158(a)(3).

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Subdivision (f), which governs supplemental authorities, requires a party to inform the court by way of a "signed submission." Proceeding by a motion would be preferable.

One stylistic comment was submitted.

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers.

1 (a) PAPER COPIES OF A BRIEF. If a paper copy of a
2 brief may or must be filed, the following provisions apply:
3 (1) *Reproduction*.
4 (A) A brief may be reproduced by any
5 process that yields a clear black image on light
6 paper. The paper must be opaque and unglazed.
7 Only one side of the paper may be used.
8 (B) Text must be reproduced with a clarity
9 that equals or exceeds the output of a laser printer.
10 (C) Photographs, illustrations, and tables
11 may be reproduced by any method that results in a
12 good copy of the original. A glossy finish is
13 acceptable if the original is glossy.
14 (2) *Cover*. The front cover of a brief must contain:
15 (A) the number of the case centered at the
16 top;
17 (B) the name of the court;
18 (C) the title of the case as prescribed by
19 Rule 8003(d)(2) or 8004(c)(2);
20 (D) the nature of the proceeding and the
21 name of the court below;

22 (E) the title of the brief, identifying the

23 party or parties for whom the brief is filed; and

24 (F) the name, office address, telephone

25 number, and e-mail address of counsel representing

26 the party for whom the brief is filed.

27 (3) *Binding*. The brief must be bound in any

28 manner that is secure, does not obscure the text, and

29 permits the brief to lie reasonably flat when open.

30 (4) *Paper Size, Line Spacing, and Margins*. The

31 brief must be on 8½-by-11 inch paper. The text must be

32 double-spaced, but quotations more than two lines long

33 may be indented and single-spaced. Headings and

34 footnotes may be single-spaced. Margins must be at least

35 one inch on all four sides. Page numbers may be placed in

36 the margins, but no text may appear there.

37 (5) *Typeface*. Either a proportionally spaced or

38 monospaced face may be used.

39 (A) A proportionally spaced face must

40 include serifs, but sans-serif type may be used in

41 headings and captions. A proportionally spaced

42 face must be 14-point or larger.

43 (B) A monospaced face may not contain

44 more than 10½ characters per inch.

45 (6) *Type Styles*. A brief must be set in plain, roman

46 style, although italics or boldface may be used for

47 emphasis. Case names must be italicized or underlined.

48 (7) *Length*.

49 (A) *Page limitation*. A principal brief must

50 not exceed 30 pages, or a reply brief 15 pages,

51 unless it complies with (B) and (C).

52 (B) *Type-volume limitation*.

53 (i) A principal brief is acceptable if:

54 • it contains no more

55 than 14,000 words; or

56 • it uses a monospaced

57 face and contains no more

58 than 1,300 lines of text.

59 (ii) A reply brief is acceptable if it

60 contains no more than half of the type

61 volume specified in item (i).

62 (iii) Headings, footnotes, and

63 quotations count toward the word and line

64 limitations. The corporate disclosure

65 statement, table of contents, table of

66 citations, statement with respect to oral
67 argument, any addendum containing
68 statutes, rules, or regulations, and any
69 certificates of counsel do not count toward
70 the limitation.
71 (C) *Certificate of Compliance*.
72 (i) A brief submitted under
73 subdivision (a)(7)(B) must include a
74 certificate signed by the attorney, or an
75 unrepresented party, that the brief complies
76 with the type-volume limitation. The person
77 preparing the certificate may rely on the
78 word or line count of the word-processing
79 system used to prepare the brief. The
80 certificate must state either:
81 • the number of words in the
82 brief; or
83 • the number of lines of
84 monospaced type in the brief.
85 (ii) The certification requirement is
86 satisfied by a certificate of compliance that
87 conforms substantially to the appropriate

88 Official Form.

89 (b) ELECTRONICALLY FILED BRIEFS. A brief filed
90 electronically must comply with subdivision (a), except for (a)(1),
91 (a)(3), and the paper requirement of (a)(4).

92 (c) PAPER COPIES OF APPENDICES. A paper copy of
93 an appendix must comply with subdivision (a)(1), (2), (3), and (4),
94 with the following exceptions:

95 (1) An appendix may include a legible photocopy
96 of any document found in the record or of a printed
97 decision.

98 (2) When necessary to facilitate inclusion of odd-
99 sized documents such as technical drawings, an appendix
100 may be a size other than 8½-by-11 inches, and need not lie
101 reasonably flat when opened.

102 (d) ELECTRONICALLY FILED APPENDICES. An
103 appendix filed electronically must comply with subdivision (a)(2)
104 and (4), except for the paper requirement of (a)(4).

105 (e) OTHER DOCUMENTS.

106 (1) *Motion*. Rule 8013(f) governs the form of a
107 motion, response, or reply.

108 (2) *Paper Copies of Other Documents*. A paper
109 copy of any other document, other than a submission under

110 Rule 8014(f), must comply with subdivision (a), with the

111 following exceptions:

112 (A) A cover is not necessary if the caption

113 and signature page together contain the information

114 required by subdivision (a)(2).

115 (B) Subdivision (a)(7) does not apply.

116 (3) *Other Documents Filed Electronically*. Any

117 other document filed electronically, other than a

118 submission under Rule 8014(f), must comply with the

119 appearance requirements of paragraph (2).

120 (f) LOCAL VARIATION. A district court or BAP must

121 accept documents that comply with the applicable requirements of

122 this rule. By local rule, a district court or BAP may accept

123 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 length of briefs, as measured by the number of pages, that was permitted by former Rule 8010(c). Page limits are reduced from 50 to 30 pages for a principal brief and from 25 to 15 for a reply brief in order to achieve consistency with F.R.App.P. 32(a)(7). But as permitted by the appellate rule, subdivision (a)(7) 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. Basing the calculation of brief length on either of the type-volume methods specified in subdivision (a)(7)(B) will result in briefs that may exceed the designated page limits in (a)(7)(A) and that may be approximately as long as allowed by the prior page limits.

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, under Rule 8028 by order in a particular case, choose to accept briefs and documents that do not comply with all of this rule's requirements. The decision whether to accept a brief that appears not to be in compliance with the rules must be made by the court. Under Rule 8011(a)(3), the clerk may not refuse to accept a document for filing solely because it is not presented in proper form as required by these rules or any local rule or practice.

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).

Changes Made After Publication

In subdivision (f), "or order in a particular case" was deleted as unnecessary. The discussion in the Committee Note about brief lengths was revised, and the discussion of subdivision (f) was expanded.

Summary of Public Comment

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (f) seems inconsistent with Rule 8011(a)(3). Perhaps it would be more accurate to provide that nonconforming documents must be accepted for filing (Rule 8011(a)(3)), but that a court may order a document not conforming to the requirements of Rule 8015 to be stricken if prompt corrective action is not taken.

12-BK-010. The States' Association of Bankruptcy Attorneys. The Committee Note incorrectly suggests that the page limits of proposed subdivision (a)(7) will be shorter than the existing page limits provided by current Rule 8010(c). Although the page limitation of proposed subdivision (a)(7)(A) reduces the number of pages from 50 to 30, the Committee Note to FRAP 32 indicates that the type-volume limitation that is adopted by subdivision (a)(7)(B) is expected to approximate 50 pages. The 30-page limit is merely a safe harbor. The Committee Note to Rule 8015 should make clear that no significant reduction in brief length is being imposed.

12-BK-034. Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee. We support the proposed reduction of brief page length, as this will bring greater consistency with the FRAP and Oregon Local Bankruptcy Rules.

Several stylistics comments were submitted.

Rule 8016. Cross-Appeals

1 (a) APPLICABILITY. This rule applies to a case in which
2 a cross-appeal is filed. Rules 8014(a)-(c), 8015(a)(7)(A)-(B), and
3 8018(a)(1)-(3) do not apply to such a case, except as otherwise
4 provided in this rule.
5 (b) DESIGNATION OF APPELLANT. The party who
6 files a notice of appeal first is the appellant for purposes of this
7 rule and Rule 8018(a)(4) and (b) and Rule 8019. If notices are
8 filed on the same day, the plaintiff, petitioner, applicant, or movant
9 in the proceeding below is the appellant. These designations may
10 be modified by the parties' agreement or by court order.
11 (c) BRIEFS. In a case involving a cross-appeal:
12 (1) *Appellant's Principal Brief*. The appellant must
13 file a principal brief in the appeal. That brief must comply
14 with Rule 8014(a).
15 (2) *Appellee's Principal and Response Brief*. The
16 appellee must file a principal brief in the cross-appeal and
17 must, in the same brief, respond to the principal brief in the
18 appeal. That brief must comply with Rule 8014(a), except
19 that the brief need not include a statement of the case
20 unless the appellee is dissatisfied with the appellant's
21 statement.

22 (3) *Appellant's Response and Reply Brief*. The
23 appellant must file a brief that responds to the principal
24 brief in the cross-appeal and may, in the same brief, reply
25 to the response in the appeal. That brief must comply with
26 Rule 8014(a)(2)-(8) and (10), except that none of the
27 following need appear unless the appellant is dissatisfied
28 with the appellee's statement in the cross-appeal:
29 (A) the jurisdictional statement;
30 (B) the statement of the issues and the
31 applicable standard of appellate review; and
32 (C) the statement of the case.
33 (4) *Appellee's Reply Brief*. The appellee may file a
34 brief in reply to the response in the cross-appeal. That brief
35 must comply with Rule 8014(a)(2)-(3) and (10) and must
36 be limited to the issues presented by the cross-appeal.
37 (d) LENGTH.
38 (1) *Page Limitation*. Unless it complies with
39 paragraphs (2) and (3), the appellant's principal brief must
40 not exceed 30 pages; the appellee's principal and response
41 brief, 35 pages; the appellant's response and reply brief, 30
42 pages; and the appellee's reply brief, 15 pages.
43 (2) *Type-Volume Limitation*.

44 (A) The appellant's principal brief or the
45 appellant's response and reply brief is acceptable if:
46 (i) it contains no more than 14,000
47 words; or
48 (ii) it uses a monospaced face and
49 contains no more than 1,300 lines of text.
50 (B) The appellee's principal and response
51 brief is acceptable if:
52 (i) it contains no more than 16,500
53 words; or
54 (ii) it uses a monospaced face and
55 contains no more than 1,500 lines of text.
56 (C) The appellee's reply brief is acceptable
57 if it contains no more than half of the type volume
58 specified in subparagraph (A).
59 (D) Headings, footnotes, and quotations
60 count toward the word and line limitations. The
61 corporate disclosure statement, table of contents,
62 table of citations, statement with respect to oral
63 argument, any addendum containing statutes, rules,
64 or regulations, and any certificates of counsel do not
65 count toward the limitation.

66 (3) *Certificate of Compliance*. A brief submitted
67 either electronically or in paper form under paragraph (2)
68 must comply with Rule 8015(a)(7)(C).
69 (e) TIME TO SERVE AND FILE A BRIEF. Briefs must
70 be served and filed as follows, unless the district court or BAP by
71 order in a particular case excuses the filing of briefs or specifies
72 different time limits:
73 (1) the appellant's principal brief, within 30 days
74 after the docketing of notice that the record has been
75 transmitted or is available electronically;
76 (2) the appellee's principal and response brief,
77 within 30 days after the appellant's principal brief is
78 served;
79 (3) the appellant's response and reply brief, within
80 30 days after the appellee's principal and response brief is
81 served; and
82 (4) the appellee's reply brief, within 14 days after
83 the appellant's response and reply brief is served, but at
84 least 7 days before scheduled argument unless the district
85 court or BAP, for good cause, allows a later filing.

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).

Changes Made After Publication

Subdivision (d)(2)(D) was added, and subdivision (f) was deleted. In subdivision (a), the statement that Rule 8018(a) does not apply was changed to refer to Rule 8018(a)(1)-(3). In subdivision (b), Rule 8018(a)(4) was added to the list of rules. Conforming changes were made to the Committee Note.

Summary of Public Comment

12-BK-008. National Conference of Bankruptcy Judges. Subdivision (f) addresses the consequences of an appellant's or an appellee's failure to file a brief on time. This provision is misplaced because it applies to all

appeals, not just to cross-appeals. Moreover, another provision —Rule 8018(a)(4)—addresses the same subject, but differs in scope. A single rule addressing the issue would be better.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). It is unclear why subdivision (f) is tucked in here. It also appears to duplicate Rule 8018(a)(4).

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). In subdivision (f) the authorization for dismissal of an appeal or cross-appeal should require notice and an opportunity to show cause why dismissal ought not be ordered. This issue is more logically addressed in Rule 8018.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (d) addresses length and type-volume limitations similar to those in Rule 8015. A counterpart to Rule 8015(f) should be incorporated.

Rule 8017. Brief of an Amicus Curiae

1 (a) WHEN PERMITTED. The United States or its officer
2 or agency or a state may file an amicus-curiae brief without the
3 consent of the parties or leave of court. Any other amicus curiae
4 may file a brief only by leave of court or if the brief states that all
5 parties have consented to its filing. On its own motion, and with
6 notice to all parties to an appeal, the district court or BAP may
7 request a brief by an amicus curiae.
8 (b) MOTION FOR LEAVE TO FILE. The motion must
9 be accompanied by the proposed brief and state:
10 (1) the movant's interest; and
11 (2) the reason why an amicus brief is desirable and
12 why the matters asserted are relevant to the disposition of
13 the appeal.
14 (c) CONTENTS AND FORM. An amicus brief must
15 comply with Rule 8015. In addition to the requirements of Rule
16 8015, the cover must identify the party or parties supported and
17 indicate whether the brief supports affirmance or reversal. If an
18 amicus curiae is a corporation, the brief must include a disclosure
19 statement like that required of parties by Rule 8012. An amicus
20 brief need not comply with Rule 8014, but must include the
21 following:

22 (1) a table of contents, with page references;

23 (2) a table of authorities—cases (alphabetically

24 arranged), statutes, and other authorities—with references

25 to the pages of the brief where they are cited;

26 (3) a concise statement of the identity of the amicus

27 curiae, its interest in the case, and the source of its

28 authority to file;

29 (4) unless the amicus curiae is one listed in the first

30 sentence of subdivision (a), a statement that indicates

31 whether:

32 (A) a party's counsel authored the brief in

33 whole or in part;

34 (B) a party or a party's counsel contributed

35 money that was intended to fund preparing or

36 submitting the brief; and

37 (C) a person—other than the amicus curiae,

38 its members, or its counsel—contributed money that

39 was intended to fund preparing or submitting the

40 brief and, if so, identifies each such person;

41 (5) an argument, which may be preceded by a

42 summary and need not include a statement of the applicable

43 standard of review; and

44 (6) a certificate of compliance, if required by Rule
45 8015(a)(7)(C) or 8015(b).
46 (d) LENGTH. Except by the district court's or BAP's
47 permission, an amicus brief must be no more than one-half the
48 maximum length authorized by these rules for a party's principal
49 brief. If the court grants a party permission to file a longer brief,
50 that extension does not affect the length of an amicus brief.
51 (e) TIME FOR FILING. An amicus curiae must file its
52 brief, accompanied by a motion for filing when necessary, no later
53 than 7 days after the principal brief of the party being supported is
54 filed. An amicus curiae that does not support either party must file
55 its brief no later than 7 days after the appellant's principal brief is
56 filed. The district court or BAP may grant leave for later filing,
57 specifying the time within which an opposing party may answer.
58 (f) REPLY BRIEF. Except by the district court's or
59 BAP's permission, an amicus curiae may not file a reply brief.
60 (g) ORAL ARGUMENT. An amicus curiae may
61 participate in oral argument only with the district court's or BAP's
62 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).

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-010. The States' Association of Bankruptcy Attorneys. All governmental units should be permitted to file an amicus brief without consent or leave of court.

One stylistic comment was submitted.

Rule 8018. Serving and Filing Briefs; Appendices

1 (a) TIME TO SERVE AND FILE A BRIEF. The
2 following rules apply unless the district court or BAP by order in a
3 particular case excuses the filing of briefs or specifies different
4 time limits:
5 (1) The appellant must serve and file a brief within
6 30 days after the docketing of notice that the record has
7 been transmitted or is available electronically.
8 (2) The appellee must serve and file a brief within
9 30 days after service of the appellant's brief.
10 (3) The appellant may serve and file a reply brief
11 within 14 days after service of the appellee's brief, but a
12 reply brief must be filed at least 7 days before scheduled
13 argument unless the district court or BAP, for good cause,
14 allows a later filing.
15 (4) If an appellant fails to file a brief on time or
16 within an extended time authorized by the district court or
17 BAP, an appellee may move to dismiss the appeal—or the
18 district court or BAP, after notice, may dismiss the appeal
19 on its own motion. An appellee who fails to file a brief
20 will not be heard at oral argument unless the district court
21 or BAP grants permission.

22 (b) DUTY TO SERVE AND FILE AN APPENDIX TO
23 THE BRIEF.
24 (1) *Appellant*. Subject to subdivision (e) and Rule
25 8009(d), the appellant must serve and file with its principal
26 brief excerpts of the record as an appendix. It must contain
27 the following:
28 (A) the relevant entries in the bankruptcy
29 docket;
30 (B) the complaint and answer, or other
31 equivalent filings;
32 (C) the judgment, order, or decree from
33 which the appeal is taken;
34 (D) any other orders, pleadings, jury
35 instructions, findings, conclusions, or opinions
36 relevant to the appeal;
37 (E) the notice of appeal; and
38 (F) any relevant transcript or portion of it.
39 (2) *Appellee*. The appellee may also serve and file
40 with its brief an appendix that contains material required to
41 be included by the appellant or relevant to the appeal or
42 cross-appeal, but omitted by the appellant.
43 (3) *Cross-Appellee*. The appellant as cross-

44 appellee may also serve and file with its response an
45 appendix that contains material relevant to matters raised
46 initially by the principal brief in the cross-appeal, but
47 omitted by the cross-appellant.
48 (c) FORMAT OF THE APPENDIX. The appendix must
49 begin with a table of contents identifying the page at which each
50 part begins. The relevant docket entries must follow the table of
51 contents. Other parts of the record must follow chronologically.
52 When pages from the transcript of proceedings are placed in the
53 appendix, the transcript page numbers must be shown in brackets
54 immediately before the included pages. Omissions in the text of
55 documents or of the transcript must be indicated by asterisks.
56 Immaterial formal matters (captions, subscriptions,
57 acknowledgments, and the like) should be omitted.
58 (d) EXHIBITS. Exhibits designated for inclusion in the
59 appendix may be reproduced in a separate volume or volumes,
60 suitably indexed.
61 (e) APPEAL ON THE ORIGINAL RECORD WITHOUT
62 AN APPENDIX. The district court or BAP may, either by rule for
63 all cases or classes of cases or by order in a particular case,
64 dispense with the appendix and permit an appeal to proceed on the
65 original record, with the submission of any relevant parts of the

66 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).

Changes Made After Publication

Subdivision (a)(4) was revised to provide more detail about the procedure for dismissing an appeal due to appellant's failure to timely file a brief.

Summary of Public Comment

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). In Rule 8016(f), the authorization for dismissal of an appeal or cross-appeal should require notice and an opportunity to show cause why dismissal ought not be ordered. This issue is more logically addressed in Rule 8018.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Subdivision (e) allows the appellate court to dispense with the appendix and permit an appeal to proceed on the original record. Similar language should be included in Rule 8009.

One stylistic comment was submitted.

Rule 8019. Oral Argument

1 (a) PARTY'S STATEMENT. Any party may file, or a
2 district court or BAP may require, a statement explaining why oral
3 argument should, or need not, be permitted.
4 (b) PRESUMPTION OF ORAL ARGUMENT AND
5 EXCEPTIONS. Oral argument must be allowed in every case
6 unless the district judge—or all the BAP judges assigned to hear
7 the appeal—examine the briefs and record and determine that oral
8 argument is unnecessary because
9 (1) the appeal is frivolous;
10 (2) the dispositive issue or issues have been
11 authoritatively decided; or
12 (3) the facts and legal arguments are adequately
13 presented in the briefs and record, and the decisional
14 process would not be significantly aided by oral argument.
15 (c) NOTICE OF ARGUMENT; POSTPONEMENT. The
16 district court or BAP must advise all parties of the date, time, and
17 place for oral argument, and the time allowed for each side. A
18 motion to postpone the argument or to allow longer argument must
19 be filed reasonably in advance of the hearing date.
20 (d) ORDER AND CONTENTS OF ARGUMENT. The
21 appellant opens and concludes the argument. Counsel must not

22 read at length from briefs, the record, or authorities.

23 (e) CROSS-APPEALS AND SEPARATE APPEALS. If

24 there is a cross-appeal, Rule 8016(b) determines which party is the

25 appellant and which is the appellee for the purposes of oral

26 argument. Unless the district court or BAP directs otherwise, a

27 cross-appeal or separate appeal must be argued when the initial

28 appeal is argued. Separate parties should avoid duplicative

29 argument.

30 (f) NONAPPEARANCE OF A PARTY. If the appellee

31 fails to appear for argument, the district court or BAP may hear the

32 appellant's argument. If the appellant fails to appear for argument,

33 the district court or BAP may hear the appellee's argument. If

34 neither party appears, the case will be decided on the briefs unless

35 the district court or BAP orders otherwise.

36 (g) SUBMISSION ON BRIEFS. The parties may agree to

37 submit a case for decision on the briefs, but the district court or

38 BAP may direct that the case be argued.

39 (h) USE OF PHYSICAL EXHIBITS AT ARGUMENT;

40 REMOVAL. Counsel intending to use physical exhibits other than

41 documents at the argument must arrange to place them in the

42 courtroom on the day of the argument before the court convenes.

43 After the argument, counsel must remove the exhibits from the

44 courtroom unless the district court or BAP directs otherwise. The

45 clerk may destroy or dispose of the exhibits if counsel does not

46 reclaim them within a reasonable time after the clerk gives notice

47 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 (f) 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). There should not be a presumption in favor of oral argument. Furthermore, the grounds for not allowing it should not be limited. It is sometimes not granted for other reasons, such as the need for an expedited decision or issues of cost.
12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). There is an

inconsistency between subdivisions (b) and (g). Subdivision (b) requires unanimity among the panel of BAP judges to dispense with oral argument, yet subdivision (g) says that the BAP may direct a case to be argued even though the parties agreed to submit it on the briefs. A simple majority of the judges should be sufficient in either situation.

12-BK-027. William McNeil (Attorney, Malvern, Pennsylvania). The Committee Note regarding subdivision (f) is inconsistent with the rule. The note states that if the appellee does not appear, the court is authorized to postpone oral argument. Subdivision (f), however, authorizes postponement only if both parties fail to appear. An appellant who appears for oral argument should not be forced to reappear at a postponed argument just because the other party failed to appear.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Subdivision (d) regarding order and contents of argument is unnecessary. Subdivision (g) does not provide the means by which the parties inform the court of their agreement to submit the case for decision on the briefs.

One stylistic comment was submitted.

Rule 8020. Frivolous Appeal and Other Misconduct

1 (a) FRIVOLOUS APPEAL—DAMAGES AND COSTS.
2 If the district court or BAP determines that an appeal is frivolous,
3 it may, after a separately filed motion or notice from the court and
4 reasonable opportunity to respond, award just damages and single
5 or double costs to the appellee.
6 (b) OTHER MISCONDUCT. The district court or BAP
7 may discipline or sanction an attorney or party appearing before it
8 for other misconduct, including failure to comply with any court
9 order. First, however, the court must afford the attorney or party
10 reasonable notice, an opportunity to show cause to the contrary,
11 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (b) provides sanctioning authority for the "failure to comply with any court order." It would be better to add "or local rule" after "order." The Committee Note states that failure to comply with a court order may include a failure to comply with a local court rule, but people do not always read Committee Notes, and some courts do not consider them authoritative.

Rule 8021. Costs

1 (a) AGAINST WHOM ASSESSED. The following rules
2 apply unless the law provides or the district court or BAP orders
3 otherwise:
4 (1) if an appeal is dismissed, costs are taxed against
5 the appellant, unless the parties agree otherwise;
6 (2) if a judgment, order, or decree is affirmed, costs
7 are taxed against the appellant;
8 (3) if a judgment, order, or decree is reversed, costs
9 are taxed against the appellee;
10 (4) if a judgment, order, or decree is affirmed or
11 reversed in part, modified, or vacated, costs are taxed only
12 as the district court or BAP orders.
13 (b) COSTS FOR AND AGAINST THE UNITED
14 STATES. Costs for or against the United States, its agency, or its
15 officer may be assessed under subdivision (a) only if authorized
16 by law.
17 (c) COSTS ON APPEAL TAXABLE IN THE
18 BANKRUPTCY COURT. The following costs on appeal are
19 taxable in the bankruptcy court for the benefit of the party entitled
20 to costs under this rule:
21 (1) the production of any required copies of a brief,

22 appendix, exhibit, or the record;

23 (2) the preparation and transmission of the record;

24 (3) the reporter's transcript, if needed to determine

25 the appeal;

26 (4) premiums paid for a supersedeas bond or other

27 bonds to preserve rights pending appeal; and

28 (5) the fee for filing the notice of appeal.

29 (d) BILL OF COSTS; OBJECTIONS. A party who wants

30 costs taxed must, within 14 days after entry of judgment on appeal,

31 file with the bankruptcy clerk, with proof of service, an itemized

32 and verified bill of costs. Objections must be filed within 14 days

33 after service of the bill of costs, unless the bankruptcy court

34 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-010. The States' Association of Bankruptcy Attorneys.
Subdivision (b) should be expanded to apply to all governmental units, not just to the United States and its agencies and officers.

Rule 8022. Motion for Rehearing.

1 (a) TIME TO FILE; CONTENTS; RESPONSE; ACTION
2 BY THE DISTRICT COURT OR BAP IF GRANTED.
3 (1) *Time.* Unless the time is shortened or extended
4 by order or local rule, any motion for rehearing by the
5 district court or BAP must be filed within 14 days after
6 entry of judgment on appeal.
7 (2) *Contents*. The motion must state with
8 particularity each point of law or fact that the movant
9 believes the district court or BAP has overlooked or
10 misapprehended and must argue in support of the motion.
11 Oral argument is not permitted.
12 (3) *Response*. Unless the district court or BAP
13 requests, no response to a motion for rehearing is
14 permitted. But ordinarily, rehearing will not be granted in
15 the absence of such a request.
16 (4) *Action by the District Court or BAP*. If a
17 motion for rehearing is granted, the district court or BAP
18 may do any of the following:
19 (A) make a final disposition of the appeal
20 without reargument;
21 (B) restore the case to the calendar for

22 reargument or resubmission; or

23 (C) issue any other appropriate order.

24 (b) FORM OF THE MOTION; LENGTH. The motion

25 must comply in form with Rule 8013(f)(1) and (2). Copies must

26 be served and filed as provided by Rule 8011. Unless the district

27 court or BAP orders otherwise, a motion for rehearing must not

28 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).

Changes Made After Publication

In subdivision (b), the reference to local rule was deleted as unnecessary.

Summary of Public Comment

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). It would give the courts more flexibility to state in subdivision (a)(2) that there is no oral argument on a motion for rehearing unless the court orders otherwise. An absolute prohibition seems unnecessary.

One stylistic comment was submitted.

Rule 8023. Voluntary Dismissal

1 The clerk of the district court or BAP must dismiss an
2 appeal if the parties file a signed dismissal agreement specifying
3 how costs are to be paid and pay any fees that are due. An appeal
4 may be dismissed on the appellant's motion on terms agreed to by
5 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-008. National Conference of Bankruptcy Judges. The proposed rule is consistent with current practice under Rule 8001(c), and the NCBJ supports its adoption. The rule, however, presents two issues that the Committee should consider in the near future. (1) It does not account for the possibility that an appeal may concern an objection to discharge under § 727(a). In the bankruptcy court, Rule 7041 provides that a plaintiff may not dismiss this type of action without giving notice and obtaining a court order

containing appropriate terms and conditions. Consideration should be given to including similar safeguards in this rule. (2) The rule also does not take into account that a bankruptcy trustee may be a party to an appeal that is voluntarily dismissed. Under Rule 9019 the trustee is required to obtain court approval of any compromise. The rule does not make clear how it relates to Rule 9019.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). The rule provides that the appellate court must dismiss if the parties file an agreement. Since they are requesting relief, according to Rule 8013(a) they should have to file a motion.

Rule 8024. Clerk's Duties on Disposition of the Appeal

1 (a) JUDGMENT ON APPEAL. The district or BAP clerk
2 must prepare, sign, and enter the judgment after receiving the
3 court's opinion or, if there is no opinion, as the court instructs.
4 Noting the judgment on the docket constitutes entry of judgment.
5 (b) NOTICE OF A JUDGMENT. Immediately upon the
6 entry of a judgment, the district or BAP clerk must:
7 (1) transmit a notice of the entry to each party to
8 the appeal, to the United States trustee, and to the
9 bankruptcy clerk, together with a copy of any opinion; and
10 (2) note the date of the transmission on the docket.
11 (c) RETURNING PHYSICAL ITEMS. If any physical
12 items were transmitted as the record on appeal, they must be
13 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 only items in the record that are physically, as opposed to electronically, transmitted to the district court or BAP need to be returned to the bankruptcy clerk. Other changes to the former rule are stylistic.

Changes Made After Publication

Stylistic changes were made to subdivision (c) and the Committee Note.

Summary of Public Comment

12-BK-040. Bankruptcy Clerks Advisory Group. Subdivision (c) refers to returning "original" documents. The bankruptcy clerk would not be transmitting original documents as the record on appeal. It therefore would be better to refer to "any paper documents."

12-BK-008. National Conference of Bankruptcy Judges. The proposed rule carries forward a problem in current rule 8016. It fails to address when jurisdiction revests in the bankruptcy court after an appeal. The Federal Rules of Appellate Procedure resolve this problem for appeals from the district court to the court of appeals by providing for the issuance of a mandate by the appellate court. Until the mandate is issued, the district court generally lacks authority to take any action with respect to the matters involved in the appeal. Proposed Rule 8024 lacks any comparable provision, even though it provides for the appellate clerk's transmission of notice of entry of judgment, with a copy of any opinion, to the parties, the U.S. trustee, and the bankruptcy clerk. The rule should adopt a mandate requirement with time limits for the issuance of the mandate and a provision for when it becomes effective. Because the problem exists with the current rule and does not seem to be disrupting bankruptcy administration unduly, promulgation of this rule should not be delayed. But the Committee should consider the issue in the near future.

Rule 8025. Stay of a District Court or BAP Judgment

1 (a) AUTOMATIC STAY OF JUDGMENT ON APPEAL.
2 Unless the district court or BAP orders otherwise, its judgment is
3 stayed for 14 days after entry.
4 (b) STAY PENDING APPEAL TO THE COURT OF
5 APPEALS.
6 (1) *In General*. On a party's motion and notice to
7 all other parties to the appeal, the district court or BAP may
8 stay its judgment pending an appeal to the court of appeals.
9 (2) *Time Limit*. The stay must not exceed 30 days
10 after the judgment is entered, except for cause shown.
11 (3) *Stay Continued*. If, before a stay expires, the
12 party who obtained the stay appeals to the court of appeals,
13 the stay continues until final disposition by the court of
14 appeals.
15 (4) *Bond or Other Security*. A bond or other
16 security may be required as a condition for granting or
17 continuing a stay of the judgment. A bond or other security
18 may be required if a trustee obtains a stay, but not if a stay
19 is obtained by the United States or its officer or agency or
20 at the direction of any department of the United States
21 government.

22 (c) AUTOMATIC STAY OF AN ORDER, JUDGMENT,
23 OR DECREE OF A BANKRUPTCY COURT. If the district court
24 or BAP enters a judgment affirming an order, judgment, or decree
25 of the bankruptcy court, a stay of the district court's or BAP's
26 judgment automatically stays the bankruptcy court's order,
27 judgment, or decree for the duration of the appellate stay.
28 (d) POWER OF A COURT OF APPEALS NOT
29 LIMITED. This rule does not limit the power of a court of appeals
30 or any of its judges to do the following:
31 (1) stay a judgment pending appeal;
32 (2) stay proceedings while an appeal is pending;
33 (3) suspend, modify, restore, vacate, or grant a stay
34 or an injunction while an appeal is pending; or
35 (4) issue any order appropriate to preserve the
36 status quo or the effectiveness of any judgment to be
37 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted.

Rule 8026. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

1 (a) LOCAL RULES BY CIRCUIT COUNCILS AND
2 DISTRICT COURTS.
3 (1) *Adopting Local Rules*. A circuit council that
4 has authorized a BAP under 28 U.S.C. § 158(b) may make
5 and amend rules governing the practice and procedure on
6 appeal from a judgment, order, or decree of a bankruptcy
7 court to the BAP. A district court may make and amend
8 rules governing the practice and procedure on appeal from
9 a judgment, order, or decree of a bankruptcy court to the
10 district court. Local rules must be consistent with, but not
11 duplicative of, Acts of Congress and these Part VIII rules.
12 Rule 83 F.R.Civ.P. governs the procedure for making and
13 amending rules to govern appeals.
14 (2) *Numbering*. Local rules must conform to any
15 uniform numbering system prescribed by the Judicial
16 Conference of the United States.
17 (3) *Limitation on Imposing Requirements of Form*.
18 A local rule imposing a requirement of form must not be
19 enforced in a way that causes a party to lose any right
20 because of a nonwillful failure to comply.
21 (b) PROCEDURE WHEN THERE IS NO

22 CONTROLLING LAW.

23 (1) *In General*. A district court or BAP may

24 regulate practice in any manner consistent with federal law,

25 applicable federal rules, the Official Forms, and local rules.

26 (2) *Limitation on Sanctions*. No sanction or other

27 disadvantage may be imposed for noncompliance with any

28 requirement not in federal law, applicable federal rules, the

29 Official Forms, or local rules unless the alleged violator has

30 been furnished in the particular case with actual notice of

31 the requirement.

COMMITTEE NOTE

This rule is derived from former Rule 8018. The changes to the former rule are stylistic.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted.

Rule 8027. Notice of a Mediation Procedure

1 If the district court or BAP has a mediation procedure
2 applicable to bankruptcy appeals, the clerk must notify the parties
3 promptly after docketing the appeal of:
4 (a) the requirements of the mediation procedure; and
5 (b) any effect the mediation procedure has on the time to
6 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted.

Rule 8028. Suspension of Rules in Part VIII

1 In the interest of expediting decision or for other cause in a
2 particular case, the district court or BAP, or where appropriate the
3 court of appeals, may suspend the requirements or provisions of
4 the rules in Part VIII, except Rules 8001, 8002, 8003, 8004, 8005,
5 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.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted.

THIS PAGE INTENTIONALLY BLANK

APPENDIX A.3

THIS PAGE INTENTIONALLY BLANK

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*: **$1,213**
   ❑ 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 file this bankruptcy case. 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 Below

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 for services 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 later extends your deadline. 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
Date ________ MM / DD / YYYY

✘ ______________________ Signature of Debtor 2
Date ________ MM / DD / YYYY

✘ ______________________ Your attorney's name and signature, if you used one
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 filing under:
- ❑ 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.

________________ Month / day / year

By the court: ____
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 of when you file, and the court must approve your payment timetable. If necessary after the court establishes the initial schedule, 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. 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.

Changes Made After Publication

The instruction that the debtor must propose to pay the entire fee no later than 120 days after "you first file for bankruptcy" was changed to "after you file this bankruptcy case."

Reference to the possibility of an extension to pay the fee beyond 120 days after filing was moved from the form to the instructions.

The instruction in the signature box regarding payments to others before the filing fee is paid was revised by adding the words "for services" as follows: "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 for services in connection with your bankruptcy case."

Summary of Public Comment

12-BK-012. Walter Oney[1] (Attorney, Fitchburg, Massachusetts). The form should take a position on whether the debtor may pay part of the filing fee through the chapter 13 plan. The form should include space for a debtor to explain why an extension of the final date for payment is needed. The instruction that the debtor must propose to pay the entire fee no later than 120 days after "you first file for bankruptcy" should be changed to "after you file this bankruptcy case." It is not clear why the debtor's attorney is asked to sign the form.

12-BK-046. National Association of Consumer Bankruptcy Attorneys. The instruction in the signature box not to pay

[1] Comments 12-BK-007, -019, -021, -023, -030, -039, -041 expressed agreement with Mr. Oney.

"anyone else in connection with your bankruptcy case" until the entire filing fee is paid should be removed because chapter 13 debtors often make payments to the trustee while their filing fee installments are still being paid. The order should include an option for paying the filing fee installments through a chapter 13 plan.

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).

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).

   Check all that apply:
   ❑ You
   ❑ Your spouse
   ❑ Your dependents __________ How many dependents? __________ Total number of people

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.

   Add your income and your spouse's income. Include the value (if known) of any non-cash governmental assistance that you receive, such as food stamps (benefits under the Supplemental Nutrition Assistance Program) or housing subsidies.
   If you have already filled out *Schedule I: Your Income,* see line 10 of that schedule.

	That person's average monthly net income (take-home pay)
You	$__________
Your spouse ... +	$__________
Subtotal............	$__________

   Subtract any non-cash governmental assistance that you included above. − $__________

   Your family's average monthly net income Total................. $__________

3. **Do you receive non-cash governmental assistance?**
   ❑ No
   ❑ Yes. Describe........... **Type of assistance**

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.** If you have some additional circumstances that cause you to not be able to pay your filing fee in installments, explain them.

Part 2: Tell the Court About Your Monthly Expenses

6. Estimate your average monthly expenses.
Include amounts paid by any government assistance that you reported on line 2. $__________

If you have already filled out *Schedule J, Your Expenses,* copy line 22 from that form.

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?
If you have already filled out *Schedule I: Your Income*, copy the total from line 11.
❑ No
❑ Yes. How much do you regularly receive as contributions? $_________ monthly

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 180 days?

❑ 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?** *Check all that apply:*

- ❑ 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?** *Check all that apply:*

- ❑ 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?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else ______________

Who paid? *Check all that apply:*

- ❑ Parent
- ❑ Brother or sister
- ❑ Friend
- ❑ Pastor or clergy
- ❑ Someone else _________

How much did someone else pay?

$_____________________

20. Have you filed for bankruptcy within the last 8 years?

❑ No

❑ Yes. District ___________________________ When ____________ Case number ___________________
MM/ DD/ YYYY

District ___________________________ When ____________ Case number ___________________
MM/ DD/ YYYY

District ___________________________ When ____________ Case number ___________________
MM/ DD/ YYYY

Part 5: Sign Below

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 you have some additional circumstances that cause you to not be able to pay your filing fee in installments, explain them on line 5 of the form.
- 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 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.

Changes Made After Publication

At line 2 of the form the calculation of the debtor's average monthly income was changed. The debtor is first instructed to report income including non-cash governmental assistance, if known, and then is instructed to subtract non-cash governmental assistance from that figure to calculate average monthly net income.

The following sentence was added at line 5 of the form: "If you have some additional circumstances that cause you to not be able to pay your filing fee in installments, explain them."

At line 6, the debtor is directed to include in the estimate of average monthly expenses any governmental assistance that was reported on line 2 of the form.

At line 20, the instruction to report any bankruptcy filing by the debtor's non-filing spouse was removed.

Summary of Public Comment

12-BK-012. Walter Oney[1] (Attorney, Fitchburg, Massachusetts). Mr. Oney submitted a 58-page comment that reviewed and critiqued the published forms on a line-by-line basis. His comments were detailed and addressed both stylistic and substantive matters. With regard to Official Form 3B, his most significant substantive comments were the following:

- The instructions in part 1 about non-cash governmental assistance are confusing. The debtor should be instructed to subtract the value of non-cash assistance included on Schedule I before filling out Line 2. The order of Lines 2 and 3 should be reversed.

- Schedule I does not capture all of the family income that 28 U.S.C. § 1930(f)(1) contemplates, and a pro se debtor is unlikely to know what to include on Form 3B.

- It is not clear why six months is a relevant time period for possible changes in income and expenses on Lines 4 and 9. Most chapter 7 cases are over in three months, and installment payments generally have to be completed in 120 days.

- Consider omitting Lines 12-16. If the reason for asking about these assets is to determine if the debtor could liquidate them in order to pay the filing fee, liens that might be avoided under § 522(f) should not be subtracted from the values. Because these assets are property of the estate, the debtor won't be able to liquidate them until the trustee abandons them, and that won't happen until after the fee is paid.

- Omit Line 20. The statute does not condition a fee waiver on the debtor not being a serial filer. It is not relevant to a fee waiver application whether a non-filing spouse has filed for bankruptcy. Consider adding a line for calculating 150% of the applicable poverty guidelines, which might be helpful to the court. Pro se debtors should be instructed not to complete this line.

12-BK-013. Judge James D. Walker, Jr. (Bankr. M.D. Ga.). Two questions should be added: (1) "Is your current financial situation the result of unusual circumstances? If yes, explain." (2) "Has anyone assisted you in the preparation of this form? If yes, what is your relationship to that person?" The first question would

[1] Comments 12-BK-007, -019, -021, -023, -030, -039, and -041 expressed agreement with Mr. Oney.

provide information necessary for deciding whether to grant a waiver – i.e., the circumstances that led to the bankruptcy filing and whether those circumstances are likely to be temporary or permanent. The answer to the second question could help the judge gauge the reliability of the information reported. For example, it may reveal that the debtor was assisted by an attorney acting pro bono.

12-BK-019. Penny Souhrada (Attorney, Davenport, Iowa). I do not believe that the Code requires revealing information about whether someone else paid for the services of an attorney or petition preparer. Will the court follow up by reviewing the listed person's finances and asking that person to help pay the debtor's debts?

12-BK-045. David S. Yen (Attorney, Legal Assistance Foundation of Metropolitan Chicago). The first question in Part 1 should be revised to instruct, like the current form, not to include a spouse if the debtor is separated and not filing jointly. The question about family members should be revised to capture information about an adult living with the debtor who is neither a spouse nor a dependent. Question 3 in Part 1 should be deleted because it is difficult to put a dollar value on non-cash government benefits, such as Medicaid, free or reduced price lunches, and public housing benefits. Instead, Question 6 should be revised to instruct: "If some of your expenses are paid for by non-cash government assistance such as food stamps or housing subsidies, list only the cash that your household spends on the subsidized items." The revised question addresses the relevant issue—the ability of the debtor to come up with cash. Question 20 should be revised to ask about previous bankruptcy cases of debtor 1 and debtor 2, not about a "spouse," who may not be filing with the debtor.

The order should include space for stating the reasons for denial without a hearing. It should also indicate that, if the waiver is denied and circumstances change or the reasons for the denial no longer apply, the debtor can ask the court to reconsider the denial.

12-BK-046. National Association of Consumer Bankruptcy Attorneys. There is no need to ask about non-cash government housing assistance. The debtor is unlikely to know that value and the difference between the market rent and the subsidized amount the debtor pays does not indicate anything about the debtor's ability to pay the filing fee. The current form seems cleaner and easier to read and fill out.

Draft April 9, 2013

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
- ❑ A supplement showing post-petition chapter 13 income as of the following date:
  ____
  MM / DD / YYYY

Official Form 6I

Schedule I: Your Income

12/13

Be as complete and accurate as possible. If two married people are filing together (Debtor 1 and Debtor 2), both are equally responsible for supplying correct information. If you are married and not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse. 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 part-time, seasonal, or self-employed work.

   Occupation may 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.**	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. **Tax, Medicare, and Social Security deductions**	5a.	$____________	$____________
5b. **Mandatory contributions for retirement plans**	5b.	$____________	$____________
5c. **Voluntary contributions for retirement plans**	5c.	$____________	$____________
5d. **Required repayments of retirement fund loans**	5d.	$____________	$____________
5e. **Insurance**	5e.	$____________	$____________
5f. **Domestic support obligations**	5f.	$____________	$____________
5g. **Union dues**	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 that you regularly receive** Include cash assistance and the value (if known) of any non-cash assistance that you receive, such as food stamps (benefits under the Supplemental Nutrition Assistance Program) or housing subsidies. 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. **State all other regular contributions to the expenses that you list in *Schedule J.***
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 the last column of line 10 to the amount in line 11.** The result is the combined monthly income.
Write that amount on the *Summary of Schedules* and *Statistical Summary of Certain Liabilities and Related Data,* if it applies 12. $____________
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 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 seasonally, you would simply divide the amount you expect to earn in a year 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*) / 12 (*number of months in year*) = $2,667 *monthly income*

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*) / 12 (*number of months in year*) = $600 *monthly income*

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 pay all household expenses together 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*. Do not list on line 11 contributions that you already disclosed elsewhere on the form.

Note that the income you report on *Schedule I* may be different from the income you report on other bankruptcy forms. For example, the *Statement of Current Monthly Income and Means Test Calculation (Chapter 7)* (Official Form 22A), *Statement of Current Monthly Income (Chapter 11)* (Official Form 22B), and the *Statement of Current Monthly Income and Calculation of Commitment Period (Chapter 13)* (Official Form 22C) 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.

If, after filing *Schedule I*, you need to file an estimate of income in a chapter 13 case for a date after your bankruptcy, you may complete a supplemental *Schedule I*. To do so you must check the "supplement" box at the top of the form and fill in the date.

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.

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
- ❑ A supplement showing post-petition chapter 13 expenses as of the following date:
  ____
  MM / DD / YYYY
- ❑ A separate filing for Debtor 2 because Debtor 2 maintains a separate household

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 another 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. **Is this a joint case?**
   - ❑ No. Go to line 2.
   - ❑ Yes. **Does Debtor 2 live in a separate household?**
     - ❑ No
     - ❑ Yes. Debtor 2 must file a separate Schedule J.

2. **Do you have dependents?**

   Do not list Debtor 1 and Debtor 2.

   Do not state the dependents' names.

   - ❑ No
   - ❑ Yes. Fill out this information for each dependent..........................

Dependent's relationship to Debtor 1 or Debtor 2	Dependent's age	Does dependent live with you?
______________________	________	❑ No ❑ Yes
______________________	________	❑ No ❑ Yes
______________________	________	❑ No ❑ Yes
______________________	________	❑ No ❑ Yes
______________________	________	❑ No ❑ Yes

3. **Do your expenses include expenses of people other than yourself and your dependents?**
   - ❑ No
   - ❑ Yes

Part 2: Estimate Your Ongoing Monthly Expenses

Estimate your expenses as your bankruptcy filing date unless you are using this form as supplement in a Chapter 13 case to report expenses as of a date after the bankruptcy is filed. If this is a supplemental *Schedule J*, check the box at the top of the form and fill in the applicable date.

Include expenses paid for with non-cash government assistance if you know the value of such assistance and have included it on *Schedule I: Your Income* (Official Form 6I.)

		Your expenses
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.	$____________________

		Your expenses
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. Other. Specify:_______________	17c.	$_______________
17d. Other. Specify:_______________	17d.	$_______________
18. **Your payments of alimony, maintenance, and support that you did not report as deducted from your pay on line 5, *Schedule I, Your Income* (Official Form 6I).**	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.***		
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

Schedule J: Your Expenses (Official Form 6J) provides an 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). On your initial filing in Part 2 select "Initial estimate at the beginning of the case".

If you are married and are filing individually, include your non-filing spouse's expenses unless you are separated.

If you are filing jointly and Debtor 1 and Debtor 2 keep separate households, fill out a separate *Schedule J* for each debtor. Check the box at the top of page 1 of the form for Debtor 2 to show that a separate form is being filed.

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.

If, after filing *Schedule J*, you need to file an estimate of expenses in a chapter 13 case for a date after your bankruptcy, you may complete a supplemental *Schedule J*. To do so you must check the "supplement" box at the top of the form and fill in the date.

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 the 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 the 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, the initial Schedule J will provide estimated expenses at the beginning of the case and the debtor will so indicate in Part 2 of the form.

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 or 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 may also be used as a supplement to the initial filing if the debtor checks the appropriate box in the caption and indicates the pertinent post-filing date of the estimate.

New lines 1, 2, and 3 on revised Schedule J request information about the debtor's household. Line 1 requires joint debtors who maintain separate households to file separate Schedule J forms. A check box has been added to the caption to identify such filings. Line 2 requires information about each dependent

who lives with the debtor and each dependent who lives separately. In order to allow a full understanding of the debtor's expenses, Line 3 requires debtors to state whether their expenses include the expenses of persons other than themselves and their dependents. In addition, new line 23 on the form includes a calculation of the debtor's monthly net income.

Changes Made After Publication

Official Form 6I

A checkbox was added to the top of the form for the following statement: "A supplement showing post-petition chapter 13 income as of the following date _____."

The following two sentences were added to the directions at the top of the form: "If you are married and not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse."

At line 1 of the form, the direction to include employment information about a non-filing spouse was removed.

At line 5, the entry for listing contributions to retirement plans was divided into separate entries for mandatory and voluntary contributions, and an entry was added for union dues.

Line 8f, regarding government assistance, was revised with a direction to include the value of any non-cash assistance such as food stamps or housing subsidies, if known.

Official Form 6J

A checkbox was added to the top of the form for the following statement: "A supplement showing post-petition chapter 13 income as of the following date _____."

A checkbox was added to the top of the form for the following statement, identifying the form as "A separate filing for Debtor 2 because Debtor 2 maintains a separate household".

A new line 1 was added to Part 1, directing Debtor 2 to fill out a separate Schedule J if the case is a joint case and Debtor 2 lives in a separate household. The remaining questions in Part 1 were reorganized, and an instruction to not list dependent names was added.

In Part 2, Column A was relabeled "Your expenses," and Column B was eliminated.

At line 17, Installment or lease payments, the separate entry for student loan payments was removed.

At line 18, an instruction was added to clarify that alimony, maintenance, and support should be listed as an expense only to the extent that it has not already been accounted for as a payroll deduction on line 5 of Schedule I.

Summary of Public Comment on Schedule I

12-BK-007. Brian Flick (Attorney, Cincinnati, Ohio). Schedule I is too long and the information requested is redundant. Use the existing Schedule I, and change only the payroll expense itemization to include liens for retirement loans and retirement deductions.

12-BK-008. National Conference of Bankruptcy Judges. The deleted language contained in current Schedule I that refers to the "Spouse" column should be restored so that the "Spouse" column is completed in every case filed by joint debtors and by every married debtor, unless the spouses are separated and a joint petition is not filed. This would provide more complete disclosure, continue existing practice, and conform the revised form to the instructions for filling it out.

12-BK-012. Walter Oney[1] (Attorney, Fitchburg, Massachusetts). Mr. Oney submitted a 58-page comment that reviewed and critiqued the published forms on a line-by-line basis. His comments were detailed and addressed both stylistic and substantive matters. With regard to Schedule I, among his most significant substantive comments were the following:

- Married debtors will not easily understand when they should report their spouse's income.

---

[1] Comments 12-BK-007, -017, -019, -021, -023, -030, -039, and -041 concurred with Mr. Oney's comments.

- It is unlikely that pro se filers will be able to reliably combine their income from multiple jobs with different pay periods, as the revised form directs. The instructions about how to determine a monthly income are overwhelmingly confusing, even for a filer who has only one job.

- Debtors often lack even rudimentary bookkeeping skills, so asking them to attach a statement concerning real estate and business income is problematic. There should be a form for reporting business and real estate income expenses. Alternatively, debtors could be directed to use their bookkeeping software to generate a profit and loss statement covering a specific time period.

- All non-cash government benefits should be shown in Schedule I, which will make it easier for pro se debtors to complete the fee waiver form. Debtors may not realize that they are supposed to report as income items such as food stamps, housing subsidies, WIC vouchers, and fuel assistance that they receive in kind or directly.

- Joint filers who live in separate households may each be receiving contributions to their separate household expenses from other people. This schedule lumps these separate contributions together.

- Line 5b combines voluntary and involuntary retirement contributions. If this embodies a policy decision that both kinds of deductions are reasonable expenses in every chapter, it is likely that some chapter 13 trustees and most chapter 7 trustees would strongly disagree.

12-BK-025. Stuart Gold (Attorney, Southfield, Michigan). Schedule I should include a line to reflect if the debtor is using savings (retirement or otherwise) to balance his or her budget. This issue comes up from time to time in overcoming hardship concerns for a reaffirmation.

12-BK-030. Jeanne Hovenden (Attorney, Chesterfield, Virginia). The instructions for Schedule I need to include—above the "Part 1" line, rather than on the side—the statement about not including a non-filing spouse if the debtor is separated from that spouse.

12-BK-038. John Gustafson (Chapter 13 Standing Trustee, Toledo, Ohio). Changes on Schedules I and J do not reflect the costs and benefits of changing the line number or letter designations. The cost is the loss of the ability to search Lexis and Westlaw for cases discussing various items that have been listed for years using the same numbering system by using line numbers. The form could easily preserve the old numbering system.

Part 2 of Schedule I should say to include the non-filing spouse "unless you are legally separated, or maintain separate households." The instruction should be at the top of the form.

12-BK-039. Caralyce M. Lassner (Attorney, Utica, Michigan). Rather than revising Schedule I to make it easier for pro se debtors to use, the instructions could be revised. The revised form is unnecessarily longer without adding substantive information that would justify additional length. The lengthening appears to be directly due to partial incorporation of the instructions into the face of the form.

Child support, spousal support, or other domestic support obligations should be listed as specific payroll deductions. To maximize accurate and full disclosure, the Instructions for Schedule I should provide additional instruction about what "income" is. To simplify the form, change the column heading to "Debtor 2/Spouse," because "non-filing spouse" may be confusing to a pro se debtor.

12-BK-040. Bankruptcy Clerks Advisory Group. The instructions are difficult to understand and likely will create confusion for debtors, especially pro se debtors, which could result in clerk's office staff spending more time responding to questions, reviewing forms, issuing deficiencies, and possibly scheduling hearings to address form completion problems. The examples given for the treatment of a roommate's contribution to household expenses are inconsistent in the instructions for Schedule I and for Schedule J. The Committee Note provides a much clearer description.

12-BK-041. Daniel Press (Attorney, McLean, Virginia). Although Schedules I and J should be updated to reflect some expenses that debtors incur now that did not exist when the original schedules were adopted, such as telecommunications, there is no need for a wholesale overhaul.

12-BK-042. Joe Wittman (Attorney, Topeka, Kansas). The additional length of Schedules I and J—double that of the current forms—is unnecessary. The current form or some version of it is adequate. There are too many variations of what "income" and "expenses" are and whether they are "routine" or intermittent, which will confuse pro se debtors. People who are trained in the law can easily put the information on the forms and deal with the unusual case.

12-BK-043. American Legal and Financial Network Executive Bankruptcy Sub-Committee on Local Rules and Rules Changes. Comments are all positive with respect to the new Schedules I and J. The forms are a vast improvement over the current forms. They provide significantly more transparency, are more intuitive, and provide greater disclosures for creditors and the court to consider in analyzing the debtor's current financial situation as it relates to a reorganization or liquidation process.

The inclusion of court and district information at the top of Schedule I is extremely helpful to creditors who typically manage a nationwide portfolio. The more user-friendly format and instructions should help in many cases, especially with pro se debtors. Line 11 in Part 2 is a welcome addition in this age of merged and non-traditional households. It will help debtors and creditors in ascertaining the true contributions to the overall household income.

12-BK-044. Louis M. Bubala (Attorney, Reno, Nevada). Strongly supports the revisions to forms for individual debtors, which add clarity to the financial disclosures. The broad exclusion for employment of and income of the debtor's non-filing, separated spouse should be removed. The exclusion is inconsistent with Nevada's community property law. The use of the word "separated" on Schedule I may have unintended consequences in Nevada and possibly other community property states in avoiding disclosure of post-petition income. Given the state law nature of marriage and property, you should reconsider removing this reporting exception.

Applauds the directive in Part 1 of Schedule I that the debtor attach a separate page with information about additional employers. This additional reporting could be added to Part 2 about monthly income. The committee should require not only the combined amounts, but also separate reporting of income for each employer.

12-BK-045. David S. Yen (Attorney, Legal Assistance Foundation of Metropolitan Chicago). The reference in column 2 throughout Schedule I to "Debtor 2 or non-filing spouse" is a change from the current form, which does not require the income of a non-filing spouse if the couple is separated. The new form should instruct the filer not to include income of a spouse if the couple is separated and not filing jointly.

Income from primary employers of Debtor 1 and Debtor 2 or a non-filing spouse living with Debtor 1 should be listed in detail on Schedule I in order to provide information on how the debtor arrived at the numbers. The form should ask only for net income from other employers. This strikes a balance between the benefit of having complete itemization and the cost of having to file longer forms.

The word "cash" should be inserted in the heading and first sentence of Part 2 of Schedule I between "Monthly" and "Income," and in line 8f, after "Other" and before "government."

The current 10% threshold should be retained for expected changes in income and expenses. Income and many expenses change either seasonably or for some other reason, but most pro se debtors will mark the box saying that there are no expected changes. In our free market economy, every debtor should say that he or she expects an increase or decrease.

12-BK-046. National Association of Consumer Bankruptcy Attorneys (NACBA). NACBA questions the relocation of the list of dependents from Schedule I to Schedule J. The proposed forms do not fix the problem that the current forms have no place to include second job information.

Carl Barnes. (Software Developer, Best Case Bankruptcy, not officially submitted). Part 1: Describe Employment. Tighten up to fit dependents information on the page.

Line 5a. Payroll taxes and social security payments. Use of "payments" is confusing. The correct term is "contributions" (FICA is the Federal Insurance Contributions Act).

Lines 5f through 5h should be changed back to a single line, as it is in the current form, to make the Schedule I data fit on one page. Additional detail could be provided in an attachment if necessary.

Line 10. Calculate monthly income. Move the total joint income to a separate line. This will make more room in the lines above by not having space reserved for a third column. It also avoids confusing references in the instructions to "last column of line 10." All of the income data could be on a single page, making it easier to read.

Summary of Public Comment on Schedule J

12-BK-006. Raymond P. Bell, Jr. (Vice President of Bankruptcy Management Services, Mercantile Adjustment Bureau, LLC, Willow Grove, Pennsylvania). Column B starting on page 2 asks "[w]hat your expenses will be if your current plan is confirmed." This could be confusing, and could just replicate what is in Column A if the debtor wants to be safe. There is a long period of time between filing and the confirmation hearing, and things could change. Given that the dismissal rate for chapter 13s is high, it is not clear why this column is needed or what useful information it will provide. The second paragraph of the Instructions for Schedule J relating to Column B is also confusing.

12-BK-007. Brian Flick (Attorney, Cincinnati, Ohio). The forms are too long and the information requested is redundant. For example, "Dependents in Home you are supporting, Dependents not supporting, other non-dependents."

12-BK-012. Walter Oney[2] (Attorney, Fitchburg, Massachusetts). Mr. Oney submitted a 58-page comment that reviewed and critiqued the published forms on a line-by-line basis. His comments were detailed and addressed both stylistic and substantive matters. With regard to Schedule J, among his most significant substantive comments were the following:

- Pro se filers will not understand the instructions for filing separate copies of the form when they are married but separated versus filing jointly. The second column will confuse pro se filers. There should be two versions of Schedule J based on whether there is one household or two.

- Eliminate the chapter 13 column.

[2] Comments 12-BK-007, -017, -019, -021, -023, -030, -039, and -041 concurred with Mr. Oney's comments.

- Neither the form nor the instructions say how to treat expenses that will be paid through a chapter 12 or 13 plan. Schedule J should capture contractually required payments, even if the plan provides for surrender of the collateral, cram down, or conduit payments. But plan feasibility requires consideration of debtor's expected cash flow, so Schedule J should not show expenses that will be paid by the trustee. The form instructions should be changed to ask for all expenses as of the filing date in the first column, and projected out-of-pocket expenses in the second column.

- The line items for food & housekeeping supplies and personal care services should be replaced with a single item labeled "Food and other household expenses."

- Explanatory comments that give examples inhibit responses, because people interpret them to mean that only the type of expense listed in the example should be included.

- Including student loan payments in line 17c appears to embody a policy decision that the payments are proper deductions in all chapters. This view is not universally accepted, and the form or instructions need to be explicit about the underlying policy of allowing debtors to be able to continue making contractually required student loan payments without being accused of unfair discrimination.

12-BK-020. Susan Silveira (Attorney, San Jose, California). The request that debtors list their "future" expenses on Schedule J should be omitted. It would be speculative and does not seem necessary to comply with the Bankruptcy Code. It could produce difficulties for trustees, debtors, creditors, and judges.

12-BK-028. Nathan Horowitz (Attorney, White Plains, New York). I do not see the usefulness of the two columns for expenses. A vast majority of debtors expect their expenses to be the same at filing as they will at confirmation in 6 months. There can be changes in financial circumstances, but those are often unexpected. Expected changes (avoiding a second lien, paying off a car loan within the year) can be included in the footnote provided on the current form. The two columns will in most cases simply be duplicated.

"Clothing" and "laundry and dry cleaning" are distinct expenses that should not be lumped together, as this makes it more difficult

for a trustee to focus on a particular expense. The trustee will simply ask for a breakdown of the expenses, which will cause additional work. The same is true for lumping together child care and education. Keeping separate expenses separate allows a complete look at a debtor's financial obligations and reduces potential inquiries.

12-BK-030. Jeanne Hovenden (Attorney, Chesterfield, Virginia). The portion of Schedule J dealing with dependents is confusing. Asking multiple questions about dependents will lead to less clarity, not more, from debtors who are already confused by the current forms. Column B is confusing and unnecessary. The description in line 5 needs to include the words "second mortgage" and "HELOC" in addition to "home equity loans." Many debtors are fixated on these terms and will not include them unless specifically prompted.

12-BK-038. John Gustafson (Chapter 13 Standing Trustee, Toledo, Ohio). Line 17c lists student loan payments as a deduction. This should be deleted. There is no line item for restitution payments, payments on nondischargeable debts, co-signed loans, or payments on credit cards the debtor wants to keep using. Including a line item for student loan payments makes it look like the Official Forms endorse deducting student loan payments, because after deducting all of the line items, line 22 says "The result is your monthly expenses." That is not correct if student loans are being paid through a plan.

12-BK-039. Caralyce M. Lassner (Attorney, Utica, Michigan). The form is expanded from one page to three with little additional information being solicited.

Part 1. Moving dependent information from Schedule I to Schedule J is logical. But asking about other household residents is misplaced if the goal is to create a more pro se debtor friendly form to assist in getting more accurate and complete disclosures. Line 8 of Schedule I, which asks for "all other income regularly received," does not ask for disclosure of income or contributions from individuals listed in Schedule J, line 3. There should be an additional column of check boxes, potentially applicable to all individuals identified in Part 1, asking "Does this individual contribute to your household expenses?" There should be additional instructions to Schedule J explaining that for each individual identified on Schedule J as contributing, their contribution must be included on Schedule I.

Part 2. The use of two columns, and specifically the limitation of Column B to chapter 13 cases, is cumbersome and unnecessary. If the purpose is to show the debtor's pre- and postpetition expenses, Column B should not be limited to chapter 13. All debtors will experience changes in their budget upon filing their petitions.

Line 20. Not many debtors will have second properties, so there is no reason to include this line item in all cases, thereby lengthening the form.

12-BK-040. Bankruptcy Clerks Advisory Group. There may be credit reporting issues if a non-filing spouse is identified as Debtor 2. The form requires a non-filing spouse to be identified as "Debtor 2." If a non-filing spouse is identified as a debtor in the schedules, credit reporting agencies might use the bankruptcy of the non-filing spouse in a credit report. Calling the non-filing spouse "Debtor 2" could lead to an assumption that the non-filing spouse is filing bankruptcy.

The instructions to Schedule J require a non-filing spouse to be identified as "Debtor 2," but the box at the top of page 1 identifies "Debtor 2" as "Spouse, if filing." There is no place on the form to clearly delineate the non-filing spouse. Remaining pages list only "Debtor 1" at the top. If the non-filing spouse must fill out this form, there is no way to identify him or her. Schedule I and Form 22 provide a Column B identified as "Debtor 2 or non-filing spouse," which suggests that Debtor 2 is not the same as a non-filing spouse.

Column B could be difficult to complete, because it might be hard for debtors to estimate what expenses will change if the current plan is confirmed. It is likely that only line 21 would change. The plan can address changes, so this column is duplicitous.

Questions 1 through 3 are repetitive. They should be condensed into a single question that clearly addresses which dependents are living in each household.

12-BK-045. David S. Yen (Attorney, Legal Assistance Foundation of Metropolitan Chicago). For chapter 13 cases, any benefit of having two columns is outweighed by the extra work and confusion that would result from including two columns. It appears that the intent of Column B is that an expense for a secured debt where the trustee is paying the secured creditor should be listed as zero. Thus, if the plan provides that the trustee will make the car payment, the entry in line 17a, Column B would

be zero. But this may not be clear to a pro se debtor, who may enter the car payment in Column B, even though the plan provides that the trustee will be making the payment. The instructions should clarify that if an expense will be paid by the chapter 13 trustee, the amount in Column B should be zero.

The instructions should include this statement: "If some of your expenses are paid for by non-cash government assistance such as food stamps or housing subsidies, list only the cash that your household spends on the subsidized items."

The current 10% threshold for expected changes in expenses should be retained. Many expenses change either seasonably or for some other reason, but most pro se debtors will mark the box saying that there are no expected changes.

12-BK-046. National Association of Consumer Bankruptcy Attorneys. The two columns in Part 2 for chapter 13 debtors are unnecessary. They would require chapter 13 debtors to complete three separate budgets. There is no Code requirement for this, and it is very burdensome on the debtors. There is no reason for the pre-bankruptcy budget. The form should include a second check box for amendments, to indicate that budget amounts are based on circumstances as of the date of any amendment to Schedule J.

Student loan payments are an appropriate expense in chapter 7 cases, as in most cases they will be nondischargeable and need to be paid. In appropriate circumstances, chapter 13 debtors should be allowed to separately classify student loan claims and continue to pay them. But because many courts and trustees object to including these payments in chapter 7 and 13 budgets, including the payments in Schedule J is a trap for the unwary. The instructions should indicate that debtors can include student loan payments under the "Other" category if appropriate.

Line 18 should note that a debtor should not duplicate amounts paid through payroll deduction that are reported on Schedule I. Schedule J should specifically include a line or lines for emergencies and miscellaneous, as is provided in the National Standards under food and clothing on the B22 forms. The types of educational expenses should mirror the B22 line items more closely.

Carl Barnes. (Software Developer, Best Case Bankruptcy, not officially submitted). The information about dependents should be put back on Schedule I. Putting the information in Schedule I fits

the income/expense data better across the two forms, uses less space, and splits the data across pages for better reading.

APPENDIX A.4

THIS PAGE INTENTIONALLY BLANK

UNITED STATES BANKRUPTCY COURT

__________ District Of __________

In re ____, Case No. ____________________
Debtor

Chapter ____________

DEBTOR'S CERTIFICATION OF COMPLETION OF POSTPETITION INSTRUCTIONAL COURSE CONCERNING PERSONAL FINANCIAL MANAGEMENT

This from should not be filed if an approved provider of a postpetition instructional course concerning personal financial management has already notified the court of the debtor's completion of the course. Otherwise, every individual debtor in a chapter 7 or a chapter 13 case or in a chapter 11 case in which § 1141(d)(3) applies must file this certification. If a joint petition is filed and this certification is required, each spouse must complete and file a separate certification. Complete one of the following statements and file by the deadline stated below:

☐ I, ____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that on __________________ (Date), I completed an instructional course in personal financial management provided by ____, an approved personal financial
(Name of Provider)
management provider.

Certificate No. (if any):_________________________________.

☐ I, ____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that no personal financial management course is required because of *[Check the appropriate box.]*:

☐ Incapacity or disability, as defined in 11 U.S.C. § 109(h);

☐ Active military duty in a military combat zone; or

☐ Residence in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses are not adequate at this time to serve the additional individuals who would otherwise be required to complete such courses.

Signature of Debtor: ______________________________________

Date: _____________

Instructions: Use this form only to certify whether you completed a course in personal financial management and only if your course provider has not already notified the court of your completion of the course. (Fed. R. Bankr. P. 1007(b)(7).) Do NOT use this form to file the certificate given to you by your prepetition credit counseling provider and do NOT include with the petition when filing your case.

Filing Deadlines: In a chapter 7 case, file within 60 days of the first date set for the meeting of creditors under § 341 of the Bankruptcy Code. In a chapter 11 or 13 case, file no later than the last payment made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. (See Fed. R. Bankr. P. 1007(c).)

COMMITTEE NOTE

The form is amended to reflect the amendment of Rule 1007(b)(7). As amended, that rule allows an approved provider of a personal financial management course to notify the court directly of the debtor's completion of the course. That notification relieves the debtor of the obligation to file this form.

Because this amendment is being made to conform to an amendment to Rule 1007(b)(7) that will take effect on December 1, 2013, final approval is sought without publication.

APPENDIX B

THIS PAGE INTENTIONALLY BLANK

APPENDIX B.1

THIS PAGE INTENTIONALLY BLANK

Appendix B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

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

(a) TWENTY-ONE-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), (*l*), (p), and (q) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of:

* * * * *

(7) the time fixed for filing proofs of claims pursuant to Rule 3003(c); ~~and~~

(8) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan; and

(9) the time fixed for filing objections to confirmation of a chapter 13 plan.

(b) TWENTY-EIGHT-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than

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

16 (1) 28 days' notice by mail of the time fixed ~~(1)~~ for filing

17 objections and the hearing to consider approval of a disclosure statement or, under

18 §1125(f), to make a final determination whether the plan provides adequate

19 information so that a separate disclosure statement is not necessary; ~~and~~

20 (2) 28 days' notice by mail of the time fixed for filing objections

21 and the hearing to consider confirmation of a chapter 9~~,~~ or chapter 11~~, or chapter~~

22 ~~13~~ plan; and

23 (3) 28 days' notice by mail of the time fixed for the hearing to

24 consider confirmation of a chapter 13 plan.

25 * * * * *

COMMITTEE NOTE

Subdivisions (a) and (b) are amended and reorganized to alter the provisions governing notice under this rule in chapter 13 cases. Subdivision (a)(9) is added to require at least 21 days' notice of the time for filing objections to confirmation of a chapter 13 plan. Subdivision (b)(3) is added to provide separately for 28 days' notice of the date of the confirmation hearing in a chapter 13 case. These amendments conform to amended Rule 3015, which governs the time for presenting objections to confirmation of a chapter 13 plan. Other changes are stylistic.

Rule 3002. Filing Proof of Claim or Interest

(a) NECESSITY FOR FILING. ~~An~~ A secured creditor, unsecured creditor, or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005. A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim.

(b) PLACE OF FILING. A proof of claim or interest shall be filed in accordance with Rule 5005.

(c) TIME FOR FILING. In a voluntary chapter 7 ~~liquidation~~ case, chapter 12 ~~family farmer's debt adjustment~~ case, or chapter 13 ~~individual's debt adjustment~~ case, a proof of claim is timely filed if it is filed not later than ~~90~~ 60 days after the date the petition is filed or the date of the order of conversion to a chapter 12 or 13 case. In an involuntary chapter 7 case, a proof of claim is timely filed if it is filed not later than 90 days after the order for relief is entered, ~~the first date set for the meeting of creditors called under § 341(a) of the Code,~~ except as follows:

* * * * *

(6) ~~If notice of the time to file a proof of claim has been mailed to a creditor at a foreign address, o~~On motion filed by ~~the~~ a creditor before or after the expiration of the time to file a proof of claim, the court may extend the time to file a proof of claim by not more than 60 days from the date of the order granting the motion. The motion may be granted if the court finds that ~~the notice was~~

22 ~~insufficient under the circumstances to give the creditor a reasonable time to file a~~

23 ~~proof of claim~~

24 (A) the notice was insufficient under the circumstances to

25 give the creditor a reasonable time to file a proof of claim because the debtor

26 failed to timely file the list of creditors' names and addresses required by Rule

27 1007(a), or

28 (B) the notice was insufficient under the circumstances to

29 give the creditor a reasonable time to file a proof of claim, and notice of the time

30 to file a proof of claim was mailed to the creditor at a foreign address.

31 (7) A proof of claim filed by the holder of a claim that is secured

32 by a security interest in the debtor's principal residence is timely filed if

33 (A) the proof of claim, together with the attachments

34 required by Rule 3001(c)(2)(C), is filed not later than 60 days after the order for

35 relief is entered, and

36 (B) any attachments required by Rule 3001(c)(1) and (d)

37 are filed as a supplement to the holder's claim not later than 120 days after the

38 order for relief is entered.

COMMITTEE NOTE

Subdivision (a) is amended to clarify that a creditor, including a secured creditor, must file a proof of claim in order to have an allowed claim. The amendment also clarifies, in accordance with § 506(d), that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. The amendment preserves the existing exceptions to this rule under Rules 1019(3), 3003, 3004, and 3005. Under Rule 1019(3), a creditor does not need to file another proof of claim after conversion of a case to chapter 7. Rule 3003 governs the filing of a proof of claim in chapter 9 and chapter 11 cases. Rules

3004 and 3005 govern the filing of a proof of claim by the debtor, trustee, or another entity if a creditor does not do so in a timely manner.

Subdivision (c) is amended to alter the calculation of the bar date for proofs of claim in chapter 7, chapter 12, and chapter 13 cases. The amendment changes the time for filing a proof of claim in a voluntary chapter 7 case, a chapter 12 case, or a chapter 13 case from 90 days after the § 341 meeting of creditors to 60 days after the petition date. If a case is converted to chapter 12 or chapter 13, the 60-day time for filing runs from the order of conversion. In an involuntary chapter 7 case, a 90-day time for filing applies and runs from the entry of the order for relief.

Subdivision (c)(6) is amended to expand the exception to the bar date for cases in which a creditor received insufficient notice of the time to file a proof of claim. The amendment provides that the court may extend the time to file a proof of claim if the debtor fails to file a timely list of names and addresses of creditors as required by Rule 1007(a). The amendment also clarifies that if a court grants a creditor's motion under this rule to extend the time to file a proof of claim, the extension runs from the date of the court's decision on the motion.

Subdivision (c)(7) is added to provide a two-stage deadline for filing mortgage proofs of claim secured by an interest in the debtor's principal residence. Those proofs of claim must be filed with the appropriate Official Form mortgage attachment within 60 days of the order for relief. The claim will be timely if any additional documents evidencing the claim, as required by Rule 3001(c)(1) and (d), are filed within 120 days of the order for relief. The order for relief is the commencement of the case upon filing a petition, except in an involuntary case. See § 301 and § 303(h). The confirmation of a plan within the 120-day period set forth in subdivision (c)(7)(B) does not prohibit an objection to the proof of claim.

Rule 3007. Objections to Claims

(a) OBJECTIONS TO CLAIMS. An objection to the allowance of a claim shall be in writing and filed. ~~A~~ Except to the extent that the amount of a claim is determined under Rule 3012 in connection with plan confirmation in a chapter 12 or 13 case, a copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to provide that an objection to a claim is unnecessary if the determination of the amount of the claim is made through a chapter 12 or chapter 13 plan in accordance with Rule 3012.

Rule 3012. ~~Valuation of Security~~ Determination of the Amount of Secured and Priority Claims

~~The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.~~

(a) DETERMINATION OF AMOUNT OF CLAIM. On request by a party in interest and after notice—to the holder of the claim and any other entity the court designates—and a hearing, the court may determine

(1) the amount of a secured claim under § 506(a) of the Code, or

(2) the amount of a claim entitled to priority under § 507 of the Code.

(b) REQUEST FOR DETERMINATION; HOW MADE. Except as provided in subdivision (c), a request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a plan filed in a chapter 12 or 13 case. A request to determine the amount of a claim entitled to priority may be made by motion or in a claim objection. The request shall be served on the holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by Rule 7004.

(c) CLAIMS OF GOVERNMENTAL UNITS. A request to determine the amount of a secured claim of a governmental unit may be made by motion or in a

20 claim objection after the governmental unit files a proof of claim or after the time

21 for filing one under Rule 3002(c)(1) has expired.

COMMITTEE NOTE

This rule is amended and reorganized.

Subdivision (a) provides, in keeping with the former version of this rule, that a party in interest may seek a determination of the amount of a secured claim. The amended rule provides that the amount of a claim entitled to priority may also be determined by the court.

Subdivision (b) is added to provide that a request to determine the amount of a secured claim may be made in a chapter 12 or chapter 13 plan, as well as by a motion or a claim objection. Secured claims of governmental units are not included in this subdivision and are governed by subdivision (c). The amount of a claim entitled to priority may be determined through a motion or a claim objection.

Subdivision (c) clarifies that a determination under this rule with respect to a secured claim of a governmental unit may be made by motion or in a claim objection, but not until the governmental unit has filed a proof of claim or its time for filing a proof of claim has expired.

Rule 3015. Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 ~~Family Farmer Debt Adjustment~~ or a Chapter 13 ~~Individual's Debt Adjustment~~ Case

(a) FILING OF CHAPTER 12 PLAN. The debtor may file a chapter 12 plan with the petition. If a plan is not filed with the petition, it shall be filed within the time prescribed by § 1221 of the Code.

(b) FILING OF CHAPTER 13 PLAN. The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct. If a case is converted to chapter 13, a plan shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct.

(c) ~~DATING. Every proposed plan and any modification thereof shall be dated.~~FORM OF CHAPTER 13 PLAN. The plan filed in a chapter 13 case shall be prepared as prescribed by the appropriate Official Form. Provisions not otherwise included in the Official Form or deviating from the Official Form are effective only if they are included in a section of the Official Form designated for nonstandard provisions and are also identified in accordance with any other requirements of the Official Form.

(d) NOTICE~~ AND COPIES~~. If the plan ~~The plan or a summary of the plan shall be~~ is not included with the ~~each~~ notice of the hearing on confirmation mailed pursuant to Rule 2002, the debtor shall serve the plan on the trustee and all creditors when it is filed with the court. ~~If required by the court, the debtor shall~~

21 ~~furnish a sufficient number of copies to enable the clerk to include a copy of the~~

22 ~~plan with the notice of the hearing.~~

23 (e) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall

24 forthwith transmit to the United States trustee a copy of the plan and any

25 modification thereof filed pursuant to subdivision (a) or (b) of this rule.

26 (f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD

27 FAITH IN THE ABSENCE OF AN OBJECTION. An objection to confirmation

28 of a plan shall be filed and served on the debtor, the trustee, and any other entity

29 designated by the court, and shall be transmitted to the United States trustee,

30 ~~before confirmation of the plan~~ at least seven days before the hearing on

31 confirmation. An objection to confirmation is governed by Rule 9014. If no

32 objection is timely filed, the court may determine that the plan has been proposed

33 in good faith and not by any means forbidden by law without receiving evidence

34 on such issues.

35 (g) EFFECT OF CONFIRMATION. Any determination made under Rule

36 3012 of the amount of a secured claim under § 506(a) of the Code in a chapter 12

37 or 13 case is binding on the holder of the claim, even if the holder files a contrary

38 proof of claim under Rule 3002 or the debtor schedules that claim under § 521(a)

39 of the Code, and regardless of whether any objection to the claim has been filed

40 under Rule 3007.

41 ~~(g)~~ (h) MODIFICATION OF PLAN AFTER CONFIRMATION. A

42 request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify

43 the proponent and shall be filed together with the proposed modification. The

44 clerk, or some other person as the court may direct, shall give the debtor, the

45 trustee, and all creditors not less than 21 days notice by mail of the time fixed for

46 filing objections and, if an objection is filed, the hearing to consider the proposed

47 modification, unless the court orders otherwise with respect to creditors who are

48 not affected by the proposed modification. A copy of the notice shall be

49 transmitted to the United States trustee. A copy of the proposed modification, or a

50 summary thereof, shall be included with the notice. ~~If required by the court, the~~

51 ~~proponent shall furnish a sufficient number of copies of the proposed~~

52 ~~modification, or a summary thereof, to enable the clerk to include a copy with~~

53 ~~each notice.~~ If a copy is not included with the notice and the proposed

54 modification is sought by the debtor, a copy shall be served on the trustee and all

55 creditors in the manner provided for service of the plan by subdivision (d) of this

56 rule. Any objection to the proposed modification shall be filed and served on the

57 debtor, the trustee, and any other entity designated by the court, and shall be

58 transmitted to the United States trustee. An objection to a proposed modification

59 is governed by Rule 9014.

COMMITTEE NOTE

This rule is amended and reorganized.

Subdivision (c) is amended to require use of the Official Form for chapter 13 plans. The amended rule also provides that nonstandard provisions in a chapter 13 plan must be set out in the section of the Official Form specifically designated for such provisions and identified in the manner required by the Official Form.

Subdivision (d) is amended to ensure that the trustee and creditors are served with the plan in advance of confirmation. Service may be made either at the time the plan is filed or with the notice under Rule 2002 of the hearing to consider confirmation of the plan.

Subdivision (f) is amended to require service of an objection to confirmation at least seven days before the hearing to consider confirmation of a plan. The seven-day notice period may be altered in a particular case by the court under Rule 9006.

Subdivision (g) is amended to provide that the amount of a secured claim under § 506(a) may be determined through a chapter 12 or chapter 13 plan in accordance with Rule 3012. That determination controls over a contrary proof of claim, without the need for a claim objection under Rule 3007, and over the schedule submitted by the debtor under § 521(a). The amount of a secured claim of a governmental unit, however, may not be determined through a chapter 12 or chapter 13 plan under Rule 3012.

Subdivision (h) was formerly subdivision (g). It is redesignated and amended to clarify that service of a proposed plan modification must be made in accordance with subdivision (d) of this rule.

Rule 4003. Exemptions

* * * * *

(d) AVOIDANCE BY DEBTOR OF TRANSFERS OF EXEMPT PROPERTY. A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be commenced by motion in the manner provided for by ~~in accordance with~~ Rule 9014, or by a chapter 12 or 13 plan served in the manner provided by Rule 7004 for service of a summons and complaint. Notwithstanding the provisions of subdivision (b), a creditor may object to a motion or chapter 12 or 13 plan provision filed under § 522(f) by challenging the validity of the exemption asserted to be impaired by the lien.

COMMITTEE NOTE

Subdivision (d) is amended to provide that a request under § 522(f) to avoid a lien or other transfer of exempt property may be made by motion or by a chapter 12 or chapter 13 plan. A plan that proposes lien avoidance in accordance with this rule must be served as provided under Rule 7004 for service of a summons and complaint. Lien avoidance not governed by this rule requires an adversary proceeding.

Rule 5005. Filing, Electronic Signatures, and Transmittal of Papers

1 (a) FILING and SIGNATURES.

2 (1) *Place of Filing*.

3 * * * * *

4 (2) *Filing by Electronic Means.* A court may by local rule permit

5 or require documents to be filed~~, signed, or verified~~ by electronic means that are

6 consistent with technical standards, if any, that the Judicial Conference of the

7 United States establishes. A local rule may require filing by electronic means

8 only if reasonable exceptions are allowed. A document filed by electronic means

9 in compliance with a local rule constitutes a written paper for the purpose of

10 applying these rules~~, the Federal Rules of Civil Procedure made applicable by~~

11 ~~these rules,~~ and § 107 of the Code.

12 (3) *Signatures on Documents Filed by Electronic Means.*

13 (A) *The Signature of a Registered User*. The user name

14 and password of an individual who is registered to use the court's electronic filing

15 system serves as that individual's signature on any electronically filed document.

16 The signature may be used with the same force and effect as a written signature

17 under these rules and for any other purpose for which a signature is required in

18 proceedings before the court.

19 (B) *Signature of Other Individuals*. When an individual

20 other than a registered user of the court's electronic filing system is required to

21 sign a document that is filed electronically, the individual shall include in a single

22 filing with the document a scanned or otherwise electronically replicated copy of

23 the document's signature page bearing the individual's original signature. Once a

24 document has been properly filed under this rule, the original document bearing

25 the individual's original signature need not be retained. The electronic signature

26 may then be used with the same force and effect as a written signature under these

27 rules and for any other purpose for which a signature is required in proceedings

28 before the court.

29 * * * * *

COMMITTEE NOTE

The rule is amended to address the treatment of electronic signatures in documents filed in connection with bankruptcy cases, a matter previously addressed only in local bankruptcy rules. New provisions are added that prescribe the circumstances under which electronic signatures may be treated in the same manner as handwritten signatures without the need for anyone to retain paper documents with original signatures. The amended rule supersedes any conflicting local rules.

The title of the rule and subdivision (a) are amended to reflect the rule's expanded scope. The reference to "the Federal Rules of Civil Procedure made applicable by these rules" in subdivision (a)(2) is stricken as unnecessary.

Subdivision (a)(3) is added to address the effect of signatures in documents that are electronically filed. Subparagraph (A) applies to persons who are registered users of a court's electronic filing system. It adopts as the national rule the practice that previously existed in virtually all districts. The user name and password of an individual who is registered to use the CM/ECF system are treated as that person's signature for all documents that are electronically filed. That signature may then be treated the same as a written signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

Subparagraph (B) applies to the signatures of persons who are not registered users of the court's electronic filing system. When documents require the signature of a debtor or other individual who is not a registered user of CM/ECF—such as petitions, schedules, and declarations—they may be filed electronically along with a scanned or otherwise electronically replicated image of the signature page bearing the individual's actual signature. Those documents will then be stored electronically by the court, and neither the court nor the filing attorney is required to retain paper copies of the filed documents. This

amendment, which changes the practice that previously existed in many districts, was prompted by several concerns: the lack of uniformity of retention periods required by local rules, the burden placed on lawyers and courts to retain a large volume of paper, and potential conflicts of interest imposed on lawyers who were required to retain documents that could be used as evidence against their clients. When scanned signature pages are filed in accordance with this rule, the electronically filed signature may be treated the same as a written signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

Just as someone may challenge in court proceedings the validity of a handwritten signature, nothing in this rule prevents a challenge to the validity of an electronic signature that is filed in compliance the rule's provisions.

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; Order Declaring Lien Satisfied

1 (a) CLOSING OF CASES UNDER CHAPTERS 7, 12, AND 13. If in a
2 chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and
3 final account and has certified that the estate has been fully administered, and if
4 within 30 days no objection has been filed by the United States trustee or a party
5 in interest, there shall be a presumption that the estate has been fully
6 administered.

7 * * * * *

8 (d) ORDER DECLARING LIEN SATISFIED. In a chapter 12 or chapter
9 13 case, if a claim that was secured by property of the estate is subject to a lien
10 under applicable nonbankruptcy law, the debtor may request entry of an order
11 determining that the lien on that property has been satisfied. The request shall be
12 made by motion and shall be served on the holder of the claim and any other
13 entity the court designates in the manner provided by Rule 7004 for service of a
14 summons and complaint. An order entered under this subdivision is effective as a
15 release of the lien.

COMMITTEE NOTE

Subdivision (d) is added to provide a procedure by which a debtor in a chapter 12 or chapter 13 case may request an order declaring a lien satisfied. A debtor may need documentation for title purposes of the elimination of a second mortgage or other lien that was secured by property of the estate. Although requests for such orders are likely to be made at the time the case is being closed, the rule does not prohibit a request at another time if the lien has been satisfied and any other requirements for entry of the order have been met.

Other changes to this rule are stylistic.

Rule 7001. Scope of Rules of Part VII

1 An adversary proceeding is governed by the rules of this Part VII. The

2 following are adversary proceedings:

3 * * * * *

4 (2) a proceeding to determine the validity, priority, or extent of a lien or

5 other interest in property,~~ other than~~ not including a proceeding under Rule 3012

6 or Rule 4003(d);

7 * * * * *

COMMITTEE NOTE

Subdivision (2) is amended to provide that the determination of the validity, priority, or extent of a lien under Rule 3012 or Rule 4003(d) does not require an adversary proceeding. The determination of the amount of a secured claim may be sought through a chapter 12 or chapter 13 plan in accordance with Rule 3012. Thus, a debtor may propose to eliminate a wholly unsecured junior lien in a chapter 12 or chapter 13 plan without a separate adversary proceeding. Similarly, the avoidance of a lien on exempt property may be sought through a chapter 12 or chapter 13 plan in accordance with Rule 4003(d). An adversary proceeding continues to be required for lien avoidance not governed by Rule 4003(d).

Rule 9006. Computing and Extending Time

* * * * *

(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D), (E), OR (F) F.R. CIV. P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after ~~service~~ being served and that service is by mail or under Rule 5(b)(2)(D), (E), or (F) F.R. Civ. P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).

* * * * *

COMMITTEE NOTE

Subdivision (f) is amended to conform to a corresponding amendment of Civil Rule 6(d). The amendment clarifies that only the party that is served by mail or under the specified provisions of Civil Rule 5—and not the party making service—is permitted to add three days to any prescribed period for taking action after service is made.

Rule 9009. Forms

1 (a) OFFICIAL FORMS. ~~Except as otherwise provided in Rule 3016(d),~~
2 ~~the~~ The Official Forms prescribed by the Judicial Conference of the United States
3 shall be ~~observed and~~ used ~~with alterations as may be appropriate~~ without
4 alteration, except as otherwise provided in these rules or in a particular Official
5 Form. Official Forms may be modified

6 (1) to use font faces substantially similar to those prescribed,
7 maintaining the prescribed size and style;

8 (2) to expand the prescribed areas for responses in order to permit
9 complete responses;

10 (3) to delete space not needed for responses;

11 (4) to delete items requiring detail in a question or category if the
12 filer indicates—either by checking "no" or "none" or by stating in words—that
13 there is nothing to report on that question or category; and

14 (5) for court orders in a particular case only, to make any change
15 that does not conflict with an applicable rule or with an Official Form that the
16 order addresses or implements. ~~Forms may be combined and their contents~~
17 ~~rearranged to permit economies in their use.~~

18 (b) DIRECTOR'S FORMS. The Director of the Administrative Office of
19 the United States Courts may issue additional forms for use under the Code.

20 (c) CONSTRUCTION. The forms shall be construed to be consistent with

21 these rules and the Code.

COMMITTEE NOTE

This rule is amended and reorganized into separate subdivisions.

Subdivision (a) addresses permissible modifications to Official Forms. It requires that an Official Form be used without alteration, except when another rule or the Official Form itself permits alteration. The former language generally permitting alterations has been deleted, but the rule preserves the ability of a filer to modify an Official Form to use a typeface substantially similar to the prescribed size and style, to expand or delete the space for responses as appropriate, and to delete inapplicable items so long as the filer indicates that no response is intended. For example, when more space will be necessary to completely answer a question on an Official Form without an attachment, the answer space may be expanded. On the other hand, many Official Forms indicate on their face that certain changes are not appropriate. The Official Form chapter 13 plan, for example, requires that topics be addressed in a particular order, and that nonstandard provisions be addressed in a specified section of the plan. Any changes that contravene the instructions on the Official Form chapter 13 plan would be prohibited by this rule.

The rule permits modification of court orders included in the Official Forms, provided that the modification does not conflict with any applicable rule or Official Form. For example, the court may add an additional provision to the Order Approving Payment of Filing Fee in Installments, which is part of Official Form 3A.

The creation of subdivision (b) and subdivision (c) is stylistic.

THIS PAGE INTENTIONALLY BLANK

APPENDIX B.2

THIS PAGE INTENTIONALLY BLANK

Fill in this information to identify your case:

Debtor 1 ____
First Name Middle Name Last Name

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

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

Case number ____
(If known)

Check one box only as directed in this form and in Form 22A-1Supp:

- ❑ 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

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known). If you believe that you are exempted from a presumption of abuse because you do not have primarily consumer debts or because of qualifying military service, complete and file Official Form 22A-1Supp with this form.

Part 1: Calculate Your Current Monthly Income

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

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

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

Debtor 1 ______________________________ Case number (*if known*)______________________
First Name Middle Name Last Name

	Column A **For you**	*Column B* **Debtor 2 or non-filing spouse**
8. **Unemployment compensation**	$________	$________
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here:		
For you .... $____________		
For your spouse .... $____________		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$________	$________
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: Determine Whether the Means Test Applies to You

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

12a. Copy your total current monthly income from line 11 .... **Copy line 11 here**→ 12a. $________

Multiply by 12 (the number of months in a year). **x** 12

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

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

Fill in the state in which you live. [ ]

Fill in the number of people in your household. [ ]

Fill in the median family income for your state and size of household. .... 13. $________

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.

14. **How do the lines compare?**

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

14b. ❑ Line 12b is more than line 13. On the top of page 1, check box 2, *The presumption of abuse is determined by Form 22A-2.* Go to Part 3 and fill out Form 22A–2*.*

Part 3: Sign Below

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

✘ ______________________________ ✘ ______________________________
Signature of Debtor 1 Signature of Debtor 2

Date ____________ Date ____________
MM / DD / YYYY MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Official Form 22A–2, *Chapter 7 Means Test Calculation.*

If you checked line 14b, fill out Official Form 22A–2, *Chapter 7 Means Test Calculation* and file it with this form.

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 22A–1Supp

Statement of Exemption from Presumption of Abuse Under § 707(b)(2) 12/14

File this supplement together with *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1) if you believe that you are exempted from a presumption of abuse. Be as complete and accurate as possible. If two married people are filing together, and any of the exclusions in this statement applies to only one of you, the other person should complete a separate Official Form 22A-1 if you believe that this is required by 11 U.S.C. § 707(b)(2)(C).

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 1 of the *Voluntary Petition* (Official Form 1).

   ❑ No. Go to the top of page 1 of Official Form 22A-1, and check box 1, *There is no presumption of abuse.* Then sign Part 3 of that form, and submit this supplement with that form.

   ❑ Yes. Go to Part 2.

Part 2: Determine Whether Military Service Provisions Apply to You

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? 10 U.S.C. § 101(d)(1)); 32 U.S.C. § 901(1).

   ❑ No. Go to line 3.

   ❑ Yes. Go to the top of page 1 of Official Form 22A-1, and check box 1, *There is no presumption of abuse.* Then sign Part 3 of that form, and submit this supplement with that form.

3. **Are you or have you been a Reservist or member of the National Guard?**

   ❑ No. Complete Official Form 22A-1. Do not submit this supplement.

   ❑ 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. Complete Official Form 22A-1. Do not submit this supplement.

   ❑ 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 checked one of the categories to the left, go to the top of page 1 of Official Form 22A-1, and check box 3, *The Means Test does not apply now because of qualified military service but it could apply later.* Then sign Part 3 of that form, and submit this supplement with that form.

You are not required to fill out the rest of Official Form 22A-1 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 Official Form 22A-1.

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 the appropriate box 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

12/14

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 11 from Official Form 22A-1 here➔** ....1. $__________

2. **Did you fill out Column B in Part 1 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 11, 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 6-15. 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 5 and 6 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 costs 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 filed 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 13e 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 own term life insurance. If two married people are filing together, include payments that you make for your spouse's term life insurance. Do not include premiums for life insurance on your dependents, for a non-filing spouse's life insurance, or for any form of life insurance other than term. $________

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 6 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 $156.25* 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 4/01/16, 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. 26 U.S.C. § 170(c)(1)-(2). $_______

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.**

Do not deduct mortgage payments previously deducted as an operating expense in Line 9. 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 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 ➔ $________

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. .... 39d. $____________ **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 $7,475*.** 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 $12,475*.** 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 $7,475*, but not more than $12,475*.** Go to line 41.

* Subject to adjustment on 4/01/16, 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 *A Summary of Your Assets and Liabilities and Certain Statistical Information Schedules* (Official Form 6), you may refer to line 3b on that form. 38a. $__________

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.

Give Details About Special Circumstances

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
____________________	$__________
____________________	$__________
____________________	$__________
____________________	$__________

Sign Below

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

✘ ______________________________ Signature of Debtor 1

✘ ______________________________ Signature of Debtor 2

Date ____________ MM / DD / YYYY

Date ____________ MM / DD / YYYY

Official Forms 22A–1, 22A-1Supp and 22A–2

Instructions for the Chapter 7 Statement of Your Current Monthly Income and Means Test Calculation

United States Bankruptcy Court 12/01/14

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.

Similarly, Official Form 22A-1Supp determines whether you may be exempted from the presumption of abuse because you do not have primarily consumer debts or because you have provided certain military or homeland defense services. If one of these exemptions applies, you should file a supplement, Official Form 22A-1Supp, and verify the supplement by completing Part 3 of Official Form 22A-1. If you qualify for an exemption, you are not required to fill out any part of Form 22A-1 other than the verification. If the exemptions do not apply, you should complete all of the parts of Official Form 22A-1 and file it without the supplemental form.

If you and your spouse are filing together, you and your spouse may file a single Official Form 22A-1. However, if an exemption on Official Form 22A-1Supp applies to only one of you, separate forms may be required. 11 U.S.C. § 707(b)(2)(C).

If your completed Official Form 22A-1 shows income 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.

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.

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)

Draft May 7, 2013

❒ Check if this is an amended filing

Official Form 22B

Chapter 11 Statement of Your Current Monthly Income

12/14

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.** Do not include payments from a spouse if Column B is filled in.			$__________	$__________
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$__________	$__________
5. **Net income from operating a business, profession, or farm**				
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 Below

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

✘ ______________________ Signature of Debtor 2

Date ______________ MM / DD / YYYY

Date ______________ MM / DD / YYYY

Official Form 22B

Instructions for the Chapter 11 Statement of Your Current Monthly Income

United States Bankruptcy Court 12/01/14

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.

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

12/14

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.** Do not include payments from a spouse if Column B is filled in.			$__________	$__________
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$__________	$__________
5. **Net income from operating a business, profession, or farm**				
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 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. ________________________________ + $________

13d. 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. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 3, *The commitment period is 3 years*. Go to Part 4.

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

Part 4: Sign Below

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

✘ ______________________________ Signature of Debtor 1

✘ ______________________________ Signature of Debtor 2

Date ____________ MM / DD / YYYY

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)

Draft May 7, 2013

❑ Check if this is an amended filing

Official Form 22C–2

Chapter 13 Calculation of Your Disposable Income

12/14

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 6-15. 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 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.

Note: Line numbers 1-4 are not used in this form. These numbers apply to information required by a similar form used in chapter 7 cases.

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**

Refer to the U.S. Trustee website 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. $__________

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. Next divide by 60.

Name of the creditor	Average monthly payment
______________________	$__________
______________________	$__________
______________________	+ $__________

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 number is less than $0, enter $0. $__________ **Copy 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 costs 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
______________________________	$_____________

Copy13b here➔ – $____________ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this number is less than $0, enter $0. $____________ **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 number 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 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. 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 own term life insurance. If two married people are filing together, include payments that you make for your spouse's term life insurance.

    Do not include premiums for life insurance on your dependents, for a non-filing spouse's life insurance, or for any form of life $_______

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 for you and your dependents, such as pagers, call waiting, caller identification, special long distance, 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.

24. **Add all of the expenses allowed under the IRS expense allowances.** Add lines 6 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. **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. $_______

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 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.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $156.25* 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 4/01/16, 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). + _________

Do not include any amount more than 15% of your gross monthly income.

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.**

Do not deduct mortgage payments previously deducted as an operating expense in line 9.

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. **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 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 $____________ 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 2: Determine Your Disposable Income Under 11 U.S.C. § 1325(b)(2)

39. **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.*** .... $________

40. **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. $____________

41. **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 11 U.S.C. § 541(b)(7) plus all required repayments of loans from retirement plans, as specified in 11 U.S.C. § 362(b)(19). $____________

42. **Total of all deductions allowed under 11 U.S.C. § 707(b)(2)(A)**. Copy line 38 here .... ➔ $____________

43. **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 circumstances	Amount of expense
43a. ______________________________	$___________
43b. ______________________________	$___________
43c. ______________________________	+ $___________
43d. **Total**. Add lines 43a through 43c	$___________

Copy 43d here ➔ + $____________

44. **Total adjustments.** Add lines 40, 41, 42, and 43d. .... ➔ $____________ Copy total here ➔ − $______

45. **Calculate your monthly disposable income under § 1325(b)(2).** Subtract line 44 from line 39. $_______

Part 3: Change in Income or Expenses

46. **Change in income or expenses.** If the income in Form 22C-1 or the expenses you reported in this form have changed or are virtually certain to change after the date you filed your bankruptcy petition and during the time your case will be open, 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
☐ 22C–1 ☐ 22C–2	____	______________________	___________	☐ Increase ☐ Decrease	$___________
☐ 22C–1 ☐ 22C–2	____	______________________	___________	☐ Increase ☐ Decrease	$___________
☐ 22C–1 ☐ 22C–2	____	______________________	___________	☐ Increase ☐ Decrease	$___________
☐ 22C–1 ☐ 22C–2	____	______________________	___________	☐ Increase ☐ Decrease	$___________

Part 4: Sign Below

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 12/01/14

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 at or 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, unless the court orders otherwise.

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.

COMMITTEE NOTE

Official Forms 22A-1, 22A-1Supp, 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. The prior version of Official Form 22A was introduced by several questions bearing on the applicability of the means test. Debtors who do not have primarily consumer debts, as well as certain members of the armed forces, are exempt from a presumption of abuse under the means test, and so are excused from completing the form. However, the great majority of individual debtors in chapter 7 do not fall within the exemptions. Accordingly, the exemptions from means testing have been placed in a separate supplement, Official Form 22A-1Supp, that will be filed only where applicable, making Form 22A present the relevant information more directly and in a manner consistent with the parallel chapter 13 form.

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 pendency of the case. 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 22C-2 that are virtually certain to occur while the case is pending. 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, Official Forms 22A-2 and 22C-2 permit, at line 23, 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 line also states 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. Also, Official Forms 22A-2 and 22C-2 now provide, at line 18, for deductions of the premiums paid by one jointly filing debtor on term life insurance policies of the other joint debtor as well for premium payments on the debtor's own policies.

THIS PAGE INTENTIONALLY BLANK

APPENDIX B.3

THIS PAGE INTENTIONALLY BLANK

No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
OFFICIAL FORMS Chart Draft -- 05022013						
B 1	Voluntary Petition	B101	Voluntary Petition for Individuals Filing for Bankruptcy *(incorporates exhibits – carves out eviction judgment statement as new form B101AB)*	Yes	Fall 2012	August 2013
		B101A B101B	Your Statement About an Eviction Judgment Against You – Parts A and B *(was in Form B1)*	Yes	Fall 2012	August 2013
		B201	Voluntary Petition for Non-Individuals Filing for Bankruptcy	Yes	Fall 2013	August 2014
	Exhibit A	B201A	Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11	Yes	Fall 2013	August 2014
	Exhibit C	B101 B201	*Hazardous Property or Property That Needs Immediate Attention -- incorporated in Forms B101 and B201*	Yes		
	Exhibit D	B101	*Individual Debtor's Statement of Compliance with Credit Counseling Requirement – Incorporated in Form B101*	Yes		
B 2	Declaration under Penalty of Perjury on Behalf of a Corporation or Partnership	B202	Declaration Under Penalty of Perjury On Behalf of a Corporation or Partnership *(For petition, schedules, SOFA, etc)*	Yes	Fall 2013	August 2014
B 3A	Application and Order to Pay Filing Fee in Installments	B103A	Application for Individuals to Pay the Filing Fee in Installments	Yes	Spring 2011	August 2012
B 3B	Application for Waiver of Chapter 7 Filing Fee	B103B	Application to Have the Chapter 7 Filing Fee Waived	Yes	Spring 2011	August 2012

*1XX = Individual Fling Package 2XX = Non-Individual Filing Package 3XX = Orders and Court Notices
4XX = Add. Official Forms XXXX = director's forms

No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
B 4	List of Creditors Holding 20 Largest Unsecured Claims	B104	For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(individuals)*	Yes	Fall 2012	August 2013
		B204? B404?	For Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(non-individuals)*	Yes	Fall 2013	August 2014
B 5	Involuntary Petition	B105	Involuntary Petition Against an Individual	Yes	Fall 2012	August 2013
		B205	Involuntary Petition Against a Non-Individual	Yes	Fall 2013	August 2014
B6	Cover Sheet for Schedules	**No coversheet created**				
B6	Summary of Schedules (Includes Statistical Summary of Certain Liabilities)	B106 -- Summary	A Summary of Your Assets and Liabilities and Certain Statistical Information (*individuals)*	Yes	Fall 2012	August 2013
		B206 -- Summary	A Summary of Your Assets and Liabilities (*non-individuals)*	Yes	Fall 2013	August 2014
B 6A	Schedule A - Real Property	} B106A/B	Schedule A/B: Property (*combines real and personal property, individuals)*	Yes	Fall 2012	August 2013
B 6B	Schedule B - Personal Property	} B206A/B	Schedule A/B: Property (*combines real and personal property, non-individuals)*	Yes	Fall 2013	August 2014
B 6C	Schedule C - Property Claimed as Exempt	B106C	Schedule C: The Property You Claim as Exempt (*individuals)*	Yes	Fall 2012	August 2013
B 6D	Schedule D - Creditors Holding Secured Claims	B106D	Schedule D: Creditors Who Hold Claims Secured By Property (*against individuals*)	Yes	Fall 2012	August 2013
		B206D	Schedule D: Creditors Who Hold Claims Secured By	Yes	Fall 2013	August

*1XX = Individual Fling Package 2XX = Non-Individual Filing Package 3XX = Orders and Court Notices
4XX = Add. Official Forms XXXX = director's forms

No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
			Property *(against non-individuals)*			2014
B 6E	Schedule E - Creditors Holding Unsecured Priority Claims	} B106E/F	Schedule E/F: Creditors Who Have Unsecured Claims *(against individuals, combines priority and non-priority)*	Yes	Fall 2012	August 2013
B 6F	Schedule F - Creditors Holding Unsecured Nonpriority Claims	} B206E/F	Schedule E/F: Creditors Who Have Unsecured Claims (*against non-individuals, combines priority and non-priority)*	Yes	Fall 2013	August 2014
B 6G	Schedule G - Executory Contracts and Unexpired Leases	B106G	Schedule G: Executory Contracts and Unexpired Leases (*individuals)*	Yes	Fall 2012	August 2013
		B206G	Schedule G: Executory Contracts and Unexpired Leases (*non-individuals)*	Yes	Fall 2013	August 2014
B 6H	Schedule H - Codebtors	B106H	Schedule H: Your Codebtors (*individuals)*	Yes	Fall 2012	August 2013
		B206H	Schedule H: Your Codebtors (*non-individuals)*	Yes	Fall 2013	August 2014
B 6I	Schedule I - Current Income of Individual Debtor(s)	B106I	Schedule I: Your Income (*individuals – published as 6I)*	Yes	Fall 2011	August 2012
		B206I	Schedule I: Your Income (*non-individuals)*	Yes		
B 6J	Schedule J- Current Expenditures of Individual Debtor(s)	B106J	Schedule J: Your Expenses (*individuals- published as 6J)*	Yes	Fall 2011	August 2012
		B206J	Schedule J: Your Expenses (*non-individuals)*	Yes		
B 6	Declaration Concerning Debtor's Schedules	B106 -- Declaration	Declaration About an Individual Debtor's Schedules	Yes	Fall 2012	August 2013
		B202	Declaration Under Penalty of Perjury On Behalf of a Corporation or Partnership *(For petition, schedules,*	Yes	Fall 2013	August

*1XX = Individual Fling Package 2XX = Non-Individual Filing Package 3XX = Orders and Court Notices
4XX = Add. Official Forms XXXX = director's forms

No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
			SOFA, etc)			2014
B 7	Statement of Financial Affairs	B107	Your Statement of Financial Affairs for Individuals Filing for Bankruptcy	Yes	Fall 2012	August 2013
		B207	Statement of Your Financial Affairs *(non-Individuals)*	Yes	Fall 2013	August 2014
B 8	Chapter 7 Individual Debtor's Statement of Intention	B112	Statement of Intention for Individuals Filing Under Chapter 7	Yes	Fall 2012	August 2013
B 9	Notice of Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Deadlines	**No coversheet created.**				
B 9A	Chapter 7 Individual or Joint Debtor No Asset Case	B 309A	(For Individuals or Joint Debtors) Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline	Yes	Spring 2013	August 2014
B 9B	Chapter 7 Corporation/Partnership No Asset Case	B 309C	(For Corporations or Partnerships) Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline Set	Yes	Spring 2013	August 2014
B 9C	Chapter 7 Individual or Joint Debtor Asset Case	B 309B	(For Individuals or Joint Debtors) Notice of Chapter 7 Bankruptcy Case – Proof of Claim Deadline Set	Yes	Spring 2013	August 2014
B 9D	Chapter 7 Corporation/Partnership Asset Case (12/11)	B 309D	(For Corporations or Partnerships) Notice of Chapter 7 Bankruptcy Case – Proof of Claim Deadline Set	Yes	Spring 2013	August 2014
B 9E	Chapter 11 Individual or Joint Debtor Case	} B 309E	(For Individuals or Joint Debtors) Notice of Chapter 11 Bankruptcy Case *(former Alt version combined with Form B309-E)*	Yes	Spring 2013	August 2014
B 9E(Alt.)	Chapter 11 Individual or Joint Debtor Case					
B 9F	Chapter 11 Corporation/Partnership Case	} B 309F	(For Corporations or Partnerships) Notice of Chapter 11 Bankruptcy Case *(former Alt version combined with Form B309-F)*	Yes	Spring 2013	August 2014
B 9F(Alt.)	Chapter 11 Corporation/Partnership Case					
B 9G	Chapter 12 Individual or Joint	B 309G	(For Individuals or Joint Debtors) Notice of Chapter	Yes	Spring 2013	August

*1XX = Individual Fling Package 2XX = Non-Individual Filing Package 3XX = Orders and Court Notices
4XX = Add. Official Forms XXXX = director's forms

No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
	Debtor Family Farmer		12 Bankruptcy Case			2014
B 9H	Chapter 12 Corporation/Partnership Family Farmer	B 309H	(For Corporations or Partnerships) Notice of Chapter 12 Bankruptcy Case	Yes	Spring 2013	August 2014
B 9I	Chapter 13 Case	B 309I	Notice of Chapter 13 Bankruptcy Case	Yes	Spring 2013	August 2014
B 10	Proof Of Claim	B 410	Proof Of Claim		Fall 2013	August 2014
B 10A	Proof Of Claim, Attachment A	B 410A	Proof Of Claim, Attachment A		Fall 2013	August 2014
B 10S1	Proof Of Claim, Supplement 1	B 410S1	Proof Of Claim, Supplement 1		Fall 2013	August 2014
B 10S2	Proof Of Claim, Supplement 2	B 410S2	Proof Of Claim, Supplement 2		Fall 2013	August 2014
B 11A	General Power of Attorney	B 411A				August 2014
B 11B	Special Power of Attorney	B 411B				August 2014
B 12	Order and Notice for Hearing on Disclosure Statement	B 312				August 2014
B 13	Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof	B 313				August 2014
B 14	Ballot for Accepting or Rejecting Plan	B 414				August 2014
B 15	Order Confirming Plan	B 315				August 2014
B 16A	Caption	B 416A				August

*1XX = Individual Fling Package 2XX = Non-Individual Filing Package 3XX = Orders and Court Notices
4XX = Add. Official Forms XXXX = director's forms

No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
						2014
B 16B	Caption (Short Title)	B 416B				August 2014
B 16C	[Abrogated]	N/A				August 2014
B 16D	Caption for Use in Adversary Proceeding other than for a Complaint Filed by a Debtor	B 416D				August 2014
B 17	Notice of Appeal under 28 U.S.C. §158(a) or (b) from a Judgment, Order or Decree of a Bankruptcy Court	B 417				August 2014
B 18	Discharge of Debtor	B 318	Discharge of Debtor in a Chapter 7 Case	Yes	Fall 2012	August 2013
B 19	Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer	B119	Bankruptcy Petition Preparer's Notice, Declaration and Signature *(was B 113)*	Yes	Fall 2012	August 2013
B 20A	Notice of Motion or Objection	B 420A	Notice of Motion or Objection	Yes	Spring 2013	August 2014
B 20B	Notice of Objection to Claim	B 420B	Notice of Objection to Claim	Yes	Spring 2013	August 2014
B 21	Statement of Social Security Number	B 121 *updated from B102*	Your Statement About Your Social Security Numbers	Yes	Fall 2012	August 2013
B 22A	Statement of Current Monthly Income and Means Test Calculation (Chapter 7)	B 108-1	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation *(published as 22A-1)*	Yes	Spring 2011 Spring 2012	August 2012, 13
		B 108-1Supp	Chapter 7 means test exemption attachment (*published as 22A-1Supp*)	Yes	Spring 2013	August 2013
		B 108-2	Chapter 7 Means Test Calculation *(published as 22A-2)*	Yes	Spring 2011 Spring 2012	August 2012, 13
B 22B	Statement of Current Monthly Income (Chapter 11)	B 109	Chapter 11 Statement of Your Current Monthly Income *(published as 22B)*	Yes	Spring 2011	August

*1XX = Individual Fling Package 2XX = Non-Individual Filing Package 3XX = Orders and Court Notices
4XX = Add. Official Forms XXXX = director's forms

No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
					Spring 2012	2012, 13
B 22C	Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Chapter 13)	B 110-1	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period *(published as 22C-1)*	Yes	Spring 2011 Spring 2012	August 2012, 13
		B 110-2	Chapter 13 Calculation of Your Disposable Income *(published as 22C-2)*	Yes	Spring 2011 Spring 2012	August 2012, 13
B 23	Debtor's Certification of Completion of Instructional Course Concerning Financial Management	B 423	Certification About a Financial Management Course *(was B 113)*	Yes	Fall 2012	August 2013
B 24	Certification to Court of Appeals	B 424				August 2014
B 25A	Plan of Reorganization in Small Business Case under Chapter 11	B 425A				
B 25B	Disclosure Statement in Small Business Case under Chapter 11	B 425B				
B 25C	Small Business Monthly Operating Report	B 425C				
B 26	Periodic Report Regarding Value, Operations and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest	B 426				
B 27	Reaffirmation Agreement Cover Sheet	B427	Cover Sheet for Reaffirmation Agreement	Yes	Fall 2012	August 2013
			DIRECTOR FORMS			
B 13S	Order Conditionally Approving	B 1300S				

*1XX = Individual Fling Package 2XX = Non-Individual Filing Package 3XX = Orders and Court Notices
4XX = Add. Official Forms XXXX = director's forms

No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
	Disclosure Statement, Fixing Time for Filing Acceptances or Rejections of Plan, and Fixing the Time for Filing Objections to the Disclosure Statement and to the Confirmation of the Plan, Combined with Notice Thereof and of the Hearing on Final Approval of the Disclosure Statement and the Hearing on Confirmation of the Plan					
B 15S	Order Finally Approving Disclosure Statement and Confirming Plan	B 1500S				
B 18F	Discharge of Debtor After Completion of Chapter 12 Plan	B 1800F				
B 18FH	Discharge of Debtor Before Completion of Chapter 12 Plan	B 1800FH				
B 18J	Discharge of Joint Debtors (Chapter 7)	B 318	Order of Discharge *(combined with Forms 18 and 18JO)*			
B 18JO	Discharge of One Joint Debtor (Chapter 7)	B 318	Order of Discharge *(combined with Forms 18 and 18J)*			
B 18RI	Discharge of Individual Debtor in a Chapter 11 Case	B 1800RI				
B 18W	Discharge of Debtor After Completion of Chapter 13 Plan	B 1800W				
B 18WH	Order Discharging Debtor Before Completion of Chapter 13 Plan	B 1800WH				
B 104	Adversary Proceeding Cover Sheet	B 1040				
B 131	Exemplification Certificate	B 1310				
B 132	Application for Search of Bankruptcy Records	B 1320				

*1XX = Individual Fling Package 2XX = Non-Individual Filing Package 3XX = Orders and Court Notices
4XX = Add. Official Forms XXXX = director's forms

No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
B 133	Claims Register	B 1330				
B 200	Required Lists, Schedules, Statements and Fees	B 2000				
B 201A	Notice to Individual Consumer Debtor	B 2010				
B 201B	Certification of Notice to Individual Consumer Debtor(s)	B 101	Not needed because certification is in petition			
B 202	Statement of Military Service	B 2020				
B 203	Disclosure of Compensation of Attorney for Debtor	B 2030	Attorney's Disclosure of Compensation			
B 204	Notice of Need to File Proof of Claim Due to Recovery of Assets	B 2040				
B 205	Notice to Creditors and Other Parties in Interest	B 2050				
B 206	Certificate of Commencement of Case	B 2060				
B 207	Certificate of Retention of Debtor In Possession	B 2070				
B 210A	Transfer of Claim Other Than for Security	B 2100A				
B 210B	Notice of Transfer of Claim Other Than for Security	B 2100B				
B 230A	Order Confirming Chapter 12 Plan	B 2300A				
B 230B	Order Confirming Chapter 13 Plan	B 2300B				
B 231A	Order Fixing Time to Object to Proposed Modification of Confirmed Chapter 12 Plan	B 2310A				
B 231B	Order Fixing Time to Object to Proposed Modification of Confirmed Chapter 13 Plan	B 2310B				

*1XX = Individual Fling Package 2XX = Non-Individual Filing Package 3XX = Orders and Court Notices
4XX = Add. Official Forms XXXX = director's forms

No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
B 240A	Reaffirmation Documents	B 2400A				
B 240B	Motion for Approval of Reaffirmation Agreement	B 2400B				
B 240C	Order on Reaffirmation Agreement	B 2400C				
B 240A/B ALT	Reaffirmation Agreement	B 2400A/B ALT				
B 240C ALT	Order on Reaffirmation Agreement	B 2400C ALT				
B 250A	Summons in an Adversary Proceeding	B 2500A				
B 250B	Summons and Notice of Pretrial Conference in an Adversary Proceeding	B 2500B				
B 250C	Summons and Notice of Trial in an Adversary Proceeding	B 2500C				
B 250D	Third-Party Summons	B 2500D				
B 250E	Summons to Debtor in Involuntary Case	B 2500E				
B 250F	Summons in a Chapter 15 Case Seeking Recognition of a Foreign Nonmain Proceeding	B 2500F				
B 253	Order for Relief in an Involuntary Case	B 2530				
B 254	Subpoena for Rule 2004 Examination	B 2540				
B 255	Subpoena in an Adversary Proceeding	B 2550				
B 256	Subpoena in a Case Under the Bankruptcy Code	B 2560				
B 260	Entry of Default	B 2600				

*1XX = Individual Fling Package 2XX = Non-Individual Filing Package 3XX = Orders and Court Notices
4XX = Add. Official Forms XXXX = director's forms

No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
B 261A	Judgment by Default	B 2610A				
B 261B	Judgment by Default	B 2610B				
B 261C	Judgment in an Adversary Proceeding	B 2610C				
B 262	Notice of Entry of Judgment	B 2620				
B 263	Bill of Costs	B 2630				
B 264	Writ of Execution to the United States Marshal	B 2640				
B 265	Certification of Judgment for Registration in Another District	B 2650				
B 270	Notice of Filing of Final Report of Trustee, of Hearing on Applications for Compensation [and of Hearing on Abandonment of Property by the Trustee]	B 2700				
B 271	Final Decree	B 2710				
B 280	Disclosure of Compensation of Bankruptcy Petition Preparer	B 2800	Disclosure of Compensation of Bankruptcy Petition Preparer			
B 281	Appearance of Child Support Creditor or Representative	B 2810				
B 283	Chapter 13 Debtor's Certifications Regarding Domestic Support Obligations and Section 522(q)	B 283				

*1XX = Individual Fling Package 2XX = Non-Individual Filing Package 3XX = Orders and Court Notices
4XX = Add. Official Forms XXXX = director's forms

Fill in this information to identify your case:

United States Bankruptcy Court for the:

____________________ District of ________________
(State)

Case number (*If known*): ________________________

Chapter you are filing under:
- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

❑ Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/15

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car," the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

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

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. **Your full name** Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	____________ First name ____________ Middle name ____________ Last name ____________ Suffix (Sr., Jr., II, III)	____________ First name ____________ Middle name ____________ Last name ____________ Suffix (Sr., Jr., II, III)
2. **All other names you have used in the last 8 years** Include your married or maiden names.	____________ First name ____________ Middle name ____________ Last name ____________ First name ____________ Middle name ____________ Last name	____________ First name ____________ Middle name ____________ Last name ____________ First name ____________ Middle name ____________ Last name
3. **Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number** (ITIN)	xxx – xx – ___ ___ ___ ___ OR 9 xx – xx – ___ ___ ___ ___	xxx – xx – ___ ___ ___ ___ OR 9 xx – xx – ___ ___ ___ ___

Debtor 1 ________________________________ Case number (*if known*)____________________
First Name Middle Name Last Name

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years Include trade names and *doing business as* names	❑ I have not used any business names or EINs. ____________________ Business name ____________________ Business name ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN	❑ I have not used any business names or EINs. ____________________ Business name ____________________ Business name ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN
5. Where you live	____________________ Number Street ____________________ ____________________ City State ZIP Code ____________________ County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. ____________________ Number Street ____________________ P.O. Box ____________________ City State ZIP Code	**If Debtor 2 lives at a different address:** ____________________ Number Street ____________________ ____________________ City State ZIP Code ____________________ County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. ____________________ Number Street ____________________ P.O. Box ____________________ City State ZIP Code
6. Why you are choosing *this district* to file for bankruptcy	*Check one:* ❑ Over the last 180 days before filing this bankruptcy filing package, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) ____________________ ____________________ ____________________ ____________________	*Check one:* ❑ Over the last 180 days before filing this bankruptcy filing package, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) ____________________ ____________________ ____________________ ____________________

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form B2010)). Also, go to the top of page 1 and check the appropriate box.

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

8. How you will pay the fee

If you file under Chapter …	Your total fee is…
7	$306
11	$1,213
12	$246
13	$281

❑ **I will pay the entire fee when I file my petition**. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.

❑ **I need to pay the fee in installments**. If you choose this option, sign and attach the *Application for Individuals to Pay Your Filing Fee in Installments* (Official Form 103A).

❑ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may waive your fee only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your bankruptcy filing package.

9. Have you filed for bankruptcy within the last 8 years?

❑ No

❑ Yes. District _______________ When _________ Case number _______________
MM / DD / YYYY

District _______________ When _________ Case number _______________
MM / DD / YYYY

District _______________ When _________ Case number _______________
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

❑ No

❑ Yes. Debtor ______________________________ Relationship to you _______________

District _______________ When _________ Case number, if known_______________
MM / DD / YYYY

Debtor ______________________________ Relationship to you _______________

District _______________ When _________ Case number, if known_______________
MM / DD / YYYY

11. Do you rent your residence?

❑ No. Go to line 12.

❑ Yes. Has your landlord obtained an eviction judgment against you and do you want to stay in your residence?

- ❑ No. Go to line 12.
- ❑ Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it with this bankruptcy petition.

Debtor 1 ______________________________ Case number (*if known*)______________________
First Name Middle Name Last Name

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you own as an individual, rather than a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this package.

- ❑ No. Go to Part 4.
- ❑ Yes. Name and location of business

____
Name of business, if any

____
Number Street

____

______________________ ______ __________
City State ZIP Code

Check the appropriate box to describe your business:

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a *small business debtor*?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines.

- ❑ No. I am not filing under Chapter 11.
- ❑ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
- ❑ Yes. I am filing under Chapter 11 and I am a small business debtor according to the definition in the Bankruptcy Code.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods or livestock that must be fed?

- ❑ No
- ❑ Yes. What is the hazard? ______________________________

____

If immediate attention is needed, why is it needed? ______________________________

____

Where is the property? ______________________________
Number Street

____

______________________ ______ __________
City State ZIP Code

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

- ❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

  Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

- ❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

  Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

- ❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

  To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

  Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you file this bankruptcy filing package.

  If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

  Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

- ❑ **I am not required to receive a briefing about credit counseling because of:**

  - ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
  - ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
  - ❑ **Active duty.** I am currently on active military duty in a military combat zone.

  If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

- ❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

  Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

- ❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

  Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

- ❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

  To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

  Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you file this bankruptcy filing package.

  If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

  Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

- ❑ **I am not required to receive a briefing about credit counseling because of:**

  - ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
  - ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
  - ❑ **Active duty.** I am currently on active military duty in a military combat zone.

  If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- ☐ No. Go to line 16b.
- ☐ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- ☐ No. Go to line 16c.
- ☐ Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

____

17. Are you filing under Chapter 7?

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

- ☐ No. I am not filing under Chapter 7. Go to line 18.
- ☐ Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
  - ☐ No
  - ☐ Yes

18. How many creditors do you estimate that you owe?

- ☐ 1-49
- ☐ 50-99
- ☐ 100-199
- ☐ 200-999
- ☐ 1,000-5,000
- ☐ 5,001-10,000
- ☐ 10,001-25,000
- ☐ 25,001-50,000
- ☐ 50,001-100,000
- ☐ More than 100,000

19. How much do you estimate your assets to be worth?

- ☐ $0-$50,000
- ☐ $50,001-$100,000
- ☐ $100,001-$500,000
- ☐ $500,001-$1 million
- ☐ $1,000,001-$10 million
- ☐ $10,000,001-$50 million
- ☐ $50,000,001-$100 million
- ☐ $100,000,001-$500 million
- ☐ $500,000,001-$1 billion
- ☐ $1,000,000,001-$10 billion
- ☐ $10,000,000,001-$50 billion
- ☐ More than $50 billion

20. How much do you estimate your liabilities to be?

- ☐ $0-$50,000
- ☐ $50,001-$100,000
- ☐ $100,001-$500,000
- ☐ $500,001-$1 million
- ☐ $1,000,001-$10 million
- ☐ $10,000,001-$50 million
- ☐ $50,000,001-$100 million
- ☐ $100,000,001-$500 million
- ☐ $500,000,001-$1 billion
- ☐ $1,000,000,001-$10 billion
- ☐ $10,000,000,001-$50 billion
- ☐ More than $50 billion

Part 7: Sign Below

For you

I declare under penalty of perjury that the information provided in this petition is true and correct. I understand that if I make a false statement, I could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

If I have chosen to file under Chapter 7, I am aware that I may proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

✘ ______________________________ Signature of Debtor 1

Date ________________ MM / DD / YYYY

✘ ______________________________ Signature of Debtor 2

Date ________________ MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

✘ ______________________________ Date ______________
Signature of Attorney for Debtor MM / DD / YYYY

____
Printed name

____
Firm name

____
Number Street

____

______________________________ ________ ______________
City State ZIP Code

Contact phone ______________ Email address ______________

______________________________ ________
Bar number State

For you if you are filing this bankruptcy filing package without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a misstep or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- ❑ No
- ❑ Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy filing package is inaccurate or incomplete, you could be fined or imprisoned?

- ❑ No
- ❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out this bankruptcy filing package?

- ❑ No
- ❑ Yes. Name of Person____.
  Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

✘ ________________________________	✘ ________________________________
Signature of Debtor 1	Signature of Debtor 2
Date ________________ MM / DD / YYYY	Date ________________ MM / DD / YYYY
Contact phone ________________________	Contact phone ________________________
Cell phone ________________________	Cell phone ________________________
Email address ________________________	Email address ________________________

COMMITTEE NOTE

Official Form 101, *Voluntary Petition for Individuals Filing for Bankruptcy*, applies only in cases of individual debtors. Form 101 replaces Official Form 1, Voluntary Petition. It is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations, and includes stylistic changes throughout the form. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. Because the goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions.

Official Form 101 has been substantially reorganized. References to Exhibits A, B, C, and D, and the exhibits themselves, have been eliminated because the requested information is now asked in the form or is not applicable to individual debtors.

Part 1, *Identify Yourself*, line 6, replaces the venue box from page 2 of Official Form 1 and deletes venue questions that pertain only to non-individuals.

Part 2, *Tell the Court About Your Bankruptcy Case*, line 7, removes choices for chapters 9 and 15 filings because they do not pertain to individuals. Additionally, Part 2 adds at line 8 a table that lists the applicable filing fees for chapters 7, 11, 12, and 13. The status of "being filed" is added to the question regarding bankruptcy cases pending or filed by a spouse, business partner, or affiliate (line 10). Lastly, the question "Do you rent your residence?" (line 11) and Official Forms 101A, *Initial Statement About an Eviction Judgment Against You*, and 101B, *Statement About Payment of an Eviction Judgment Against You,* replace "Certification By a Debtor Who Resides as a Tenant of Residential Property," on page 2 of Official Form 1.

Part 3, *Report About Any Businesses You Own as a Sole Proprietor*, line 12, incorporates options from the “nature of business” box from page 1 of Official Form 1 that would apply to individual debtors, thus eliminating checkboxes for railroads and clearing banks. Part 3, line 13, also eliminates a checkbox to report whether a plan was filed with the petition, or if plan acceptances were solicited prepetition. Additionally, line 13 rephrases the question relating to whether a debtor filing under Chapter 11 is a small business debtor.

Part 4, *Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention*, line 14, replaces Exhibit C from Official Form 1 and adds the category of “property that needs immediate attention.”

Part 5, *Explain Your Efforts to Receive a Briefing About Credit Counseling* (line 15), replaces Exhibit D from Official Form 1. Additionally, this part describes incapacity and disability using a simplified definition, tells the debtor of the ability to file a motion for a waiver, and eliminates statutory reference about districts where credit counseling does not apply because such districts are rare.

Part 6, *Answer These Questions for Reporting Purposes* (line 16c), provides a text field for the debtor to describe the type of debts owed if the debtor believes they are neither primarily consumer nor business debts.

Part 7, *Sign Below*, deletes from the debtor’s declaration the phrase “to the best of my knowledge, information, and belief” in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008. This part combines the two attorney signature blocks into one certification and eliminates signature lines for corporations/partnerships and chapter 15 Foreign Representatives. The declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has also been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 119. That form must be completed and signed by the BPP and filed with each document prepared by a BPP.

A warning is added about the difficulties of filing bankruptcy without an attorney and the possibility of losing property or rights if the debtor does not properly handle the case. Pro se debtors are required to acknowledge reading and understanding the warning and to disclose whether they have paid or agreed to pay someone who is not an attorney to help complete the bankruptcy filing. Debtors who are represented by an attorney do not need to file the page that sets out the warning and acknowledgement.

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)

Draft May 3, 2013

Official Form 101A

Initial Statement About an Eviction Judgment Against You

12/15

Fill out this form only if:

- **you rent your residence; and**
- **your landlord has obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding (called *eviction judgment*) against you to possess your residence; and**
- **you want to stay in your rented residence after you file your case for bankruptcy.**

See 11 U.S.C. §§ 362(b)(22) and 362(l)

File this form with the court when you first file your bankruptcy filing package.

You must serve your landlord with a copy of this form. Check the Bankruptcy Rules (www.uscourts.gov/rulesandpolicies/rules.aspx) and the court's local website (go to www.uscourts.gov/Court_Locator.aspx to find your court's website) for any specific requirements that you might have to meet to serve this statement.

Certification About Applicable Law and Deposit of Rent

Landlord's name ____

Landlord's address ____
Number Street

________________________ ________ __________
City State ZIP Code

I certify under penalty of perjury that:

- ☐ Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire amount I owe.
- ☐ I have given the bankruptcy court clerk a deposit for the rent that would be due during the 30 days after I file the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

✘ ____
Signature of Debtor 1

Date __________________
MM / DD / YYYY

✘ ____
Signature of Debtor 2

Date __________________
MM / DD / YYYY

If you checked both boxes above, signed the form to certify that both apply, and served your landlord a copy of this statement, the automatic stay under 11 U.S.C. § 362(a)(3) will apply to the continuation of the eviction against you for 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

You must serve your landlord with a copy of this form.

If you wish to stay in your residence after that 30-day period and continue to receive the protection of the automatic stay under 11 U.S.C. § 362(a)(3), you must pay the entire amount you owe to your landlord as stated in the eviction judgment before the 30-day period ends. You must also fill out Official Form 101B, file it with the bankruptcy court, and serve your landlord a copy of it before the 30-day period ends.

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)

Draft May 3, 2013

Official Form 101B

Statement About Payment of an Eviction Judgment Against You

12/15

Fill out this form only if:

- **you filed Official Form 101A; and**
- **you served a copy of Official Form 101A on your landlord; and**
- **you want to stay in your rented residence for more than 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).**

File this form within 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Also serve a copy on your landlord within that same time period.

Certification About Applicable Law and Payment of Eviction Judgment

I certify under penalty of perjury that (*Check all that apply*):

☐ Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire amount I owe.

☐ Within 30 days after I filed my *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101), I have paid my landlord the entire amount I owe as stated in the judgment for possession (*eviction judgment*).

✘ ____
Signature of Debtor 1

Date ____________________
MM / DD / YYYY

✘ ____
Signature of Debtor 2

Date ____________________
MM / DD / YYYY

You must serve your landlord with a copy of this form.

Check the Bankruptcy Rules (www.uscourts.gov/rulesandpolicies/rules.aspx) and the court's local website (go to http://www.uscourts.gov/Court_Locator.aspx to find your court's website) for any specific requirements that you might have to meet to serve this statement.

“Missing” Forms Modernization Project (FMP) Forms for Individuals

Nine FMP Official Bankruptcy Forms are not included in this publication package because they have already been published for public comment under the current two-digit forms numbering scheme. The forms will be updated with their projected three-digit number designations listed below when this publication package is approved for implementation.

Projected three digit form number	Form Title	Two digit form number and publication year(s)
103A	Application for Individuals to Pay the Filing Fee in Installments	3A (2012)
103B	Application to Have the Chapter 7 Filing Fee Waived	3B (2012)
106I	Schedule I: Your Income	6I (2012)
106J	Schedule J: Your Expenses	6J (2012)
108-1	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation	22A-1 (2012 and 2013)
108-1Supp	Statement of Exemption from Presumption of Abuse Under § 707(b)(2)	22A-1Supp (2013)
108-2	Chapter 7 Means Test Calculation	22A-2 (2012 and 2013)
109	Chapter 11 Statement of Your Current Monthly Income	22B (2012 and 2013)
110-2	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period	22C-1 (2012 and 2013)
110-2	Chapter 13 Calculation of Your Disposable Income	22C-2 (2012 and 2013)

COMMITTEE NOTE

Official Form 101A, *Initial Statement About an Eviction Judgment Against You*, and Official Form 101B, *Statement About Payment of an Eviction Judgment Against You*, are new forms promulgated as part of the Forms Modernization Project. They replace the "*Certification by a Debtor Who Resides as a Tenant of Residential Property*" section on Official Form 1, *Voluntary Petition*. The forms apply only in cases of individual debtors.

Official Form 101A explains that debtors need to complete and file the form only if their landlord has a judgment for possession or an eviction judgment against them and they wish to stay in their residence for 30 days after filing their bankruptcy petition. The form adds references to the provisions in the Bankruptcy Code that specify when debtor-tenants subject to eviction may remain in their residence after filing for bankruptcy.

The form eliminates the checkboxes that the debtor has served the landlord with the certification and paid the court the rent that would be due during the 30 days after the filing of the bankruptcy petition. Instead, debtors are required to certify under penalty of perjury that the rent has been paid to the court, and the instructions direct debtors to serve a copy of the statement on the landlord.

The form eliminates the checkbox that the debtor claims there are circumstances under applicable nonbankruptcy law under which the debtor would be permitted to cure the monetary default that gave rise to the judgment for possession (or eviction judgment) and remain in residence. Instead, debtors are required to certify under penalty of perjury that they have the right to stay in their residence under state law or other nonbankruptcy law by paying their landlord the entire amount they owe.

Official Form 101B is new. If debtors wish to stay in their residence for more than 30 days after filing the petition, they must complete, file, and serve the form within 30 days after the petition is filed. Under Official Form 101B, debtors certify under penalty of perjury that they have the right to stay in their residence under state law or other

nonbankruptcy law by paying their landlord the entire amount they owe and that they have paid their landlord the entire amount owed as stated in the judgment for possession or in the eviction judgment.

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 104

For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders

12/15

If you are an individual filing for bankruptcy under Chapter 11, you must fill out this form. If you are filing under Chapter 7, Chapter 12, or Chapter 13, do not fill out this form. Do not include claims by anyone who is an *insider*. Insiders include your relatives; any general partners; relatives of any general partners; partnerships of which you are a general partner; corporations of which you are an officer, director, person in control, or owner of 20 percent or more of their voting securities; and any managing agent, including one for a business you operate as a sole proprietor. 11 U.S.C. § 101. Also, do not include claims by secured creditors unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: List the 20 Unsecured Claims in Order from Largest to Smallest. Do Not Include Claims by Insiders.

Unsecured claim

1

Creditor's Name ______________________

Number Street ______________________

____

City State ZIP Code ______________________

Contact ______________________

Contact phone ______________________

What is the nature of the claim? ______________________ $______________

As of the date you file, the claim is: Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed
❑ None of the above apply

Does the creditor have a lien on your property?
❑ No
❑ Yes. Total claim (secured and unsecured): $__________
Value of security: - $__________
Unsecured claim $__________

2

Creditor's Name ______________________

Number Street ______________________

____

City State ZIP Code ______________________

Contact ______________________

Contact phone ______________________

What is the nature of the claim? ______________________ $______________

As of the date you file, the claim is: Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed
❑ None of the above apply

Does the creditor have a lien on your property?
❑ No
❑ Yes. Total claim (secured and unsecured): $__________
Value of security: - $__________
Unsecured claim $__________

Unsecured claim

3

____
Creditor's Name
____
Number Street
____
____
City State ZIP Code
____
Contact
____
Contact phone

What is the nature of the claim? ____________________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $____________
  Value of security: - $____________
  Unsecured claim $____________

$____________

4

____
Creditor's Name
____
Number Street
____
____
City State ZIP Code
____
Contact
____
Contact phone

What is the nature of the claim? ____________________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $____________
  Value of security: - $____________
  Unsecured claim $____________

$____________

5

____
Creditor's Name
____
Number Street
____
____
City State ZIP Code
____
Contact
____
Contact phone

What is the nature of the claim? ____________________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $____________
  Value of security: - $____________
  Unsecured claim $____________

$____________

6

____
Creditor's Name
____
Number Street
____
____
City State ZIP Code
____
Contact
____
Contact phone

What is the nature of the claim? ____________________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $____________
  Value of security: - $____________
  Unsecured claim $____________

$____________

7

____
Creditor's Name
____
Number Street
____
____
City State ZIP Code
____
Contact
____
Contact phone

What is the nature of the claim? ____________________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $____________
  Value of security: - $____________
  Unsecured claim $____________

$____________

Unsecured claim

8

______________________ Creditor's Name
______________________ Number Street
____
______________________ City State ZIP Code
______________________ Contact
______________________ Contact phone

What is the nature of the claim? ______________________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $______________
  Value of security: - $______________
  Unsecured claim $______________

Unsecured claim: $______________

9

______________________ Creditor's Name
______________________ Number Street
____
______________________ City State ZIP Code
______________________ Contact
______________________ Contact phone

What is the nature of the claim? ______________________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $______________
  Value of security: - $______________
  Unsecured claim $______________

Unsecured claim: $______________

10

______________________ Creditor's Name
______________________ Number Street
____
______________________ City State ZIP Code
______________________ Contact
______________________ Contact phone

What is the nature of the claim? ______________________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $______________
  Value of security: - $______________
  Unsecured claim $______________

Unsecured claim: $______________

11

______________________ Creditor's Name
______________________ Number Street
____
______________________ City State ZIP Code
______________________ Contact
______________________ Contact phone

What is the nature of the claim? ______________________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $______________
  Value of security: - $______________
  Unsecured claim $______________

Unsecured claim: $______________

12

______________________ Creditor's Name
______________________ Number Street
____
______________________ City State ZIP Code
______________________ Contact
______________________ Contact phone

What is the nature of the claim? ______________________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $______________
  Value of security: - $______________
  Unsecured claim $______________

Unsecured claim: $______________

Unsecured claim

13

____
Creditor's Name
____
Number Street
____
____
City State ZIP Code
____
Contact
____
Contact phone

What is the nature of the claim? ______________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $__________

Value of security: - $__________

Unsecured claim $__________

$__________

14

____
Creditor's Name
____
Number Street
____
____
City State ZIP Code
____
Contact
____
Contact phone

What is the nature of the claim? ______________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $__________

Value of security: - $__________

Unsecured claim $__________

$__________

15

____
Creditor's Name
____
Number Street
____
____
City State ZIP Code
____
Contact
____
Contact phone

What is the nature of the claim? ______________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $__________

Value of security: - $__________

Unsecured claim $__________

$__________

16

____
Creditor's Name
____
Number Street
____
____
City State ZIP Code
____
Contact
____
Contact phone

What is the nature of the claim? ______________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $__________

Value of security: - $__________

Unsecured claim $__________

$__________

17

____
Creditor's Name
____
Number Street
____
____
City State ZIP Code
____
Contact
____
Contact phone

What is the nature of the claim? ______________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $__________

Value of security: - $__________

Unsecured claim $__________

$__________

Unsecured claim

18

Creditor's Name

Number Street

City State ZIP Code

Contact

Contact phone

What is the nature of the claim? ______________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $__________
  - Value of security: - $__________
  - Unsecured claim $__________

$__________

19

Creditor's Name

Number Street

City State ZIP Code

Contact

Contact phone

What is the nature of the claim? ______________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $__________
  - Value of security: - $__________
  - Unsecured claim $__________

$__________

20

Creditor's Name

Number Street

City State ZIP Code

Contact

Contact phone

What is the nature of the claim? ______________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $__________
  - Value of security: - $__________
  - Unsecured claim $__________

$__________

Part 2: Sign Below

Under penalty of perjury, I declare that the information provided in this form is true and correct.

✘ ______________________________
Signature of Debtor 1

Date ______________
MM / DD / YYYY

✘ ______________________________
Signature of Debtor 2

Date ______________
MM / DD / YYYY

COMMITTEE NOTE

Official Form 104, *For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders*, is revised as part of the Forms Modernization Project. It replaces Official Form 4, *List of Creditors Holding 20 Largest Unsecured Claims*, in chapter 11 cases filed by individuals or joint debtors. The form is renumbered to distinguish it from the version to be used in chapter 11 cases filed by non-individuals, such as corporations and partnerships, and in chapter 9 cases.

Form 104 is reformatted to make it easier to complete and understand. Blanks and checkboxes are provided for specific information about each claim, replacing columns for listing information. A separate, numbered section is provided for each of the 20 claims.

The instruction not to include fully secured claims is restated in less technical terms. Debtors are instructed to include a secured creditor only if the creditor has an unsecured claim resulting from inadequate collateral value that is among the 20 largest unsecured claims. Blanks are provided to calculate the value of the unsecured portion of a partially secured claim.

Examples of "insiders" are provided in addition to the statutory reference. The form adds an explicit instruction not to file the form in a chapter 7, chapter 12, or chapter 13 case. An instruction to be as complete and accurate as possible is added, along with a warning that, if two married people are filing jointly, both are equally responsible for supplying correct information.

With respect to children who may be creditors, the direction to state only the initials of a minor child and the name and address of the child's parent or guardian, rather than the child's full name, is moved to the general instruction booklet for the forms because it applies to all of the forms.

Fill in this information to identify the case:

United States Bankruptcy Court for the:

____________________ District of ________________
(State)

Case number (*If known*): ________________________ Chapter _____

☐ Check if this is an amended filing

Official Form 105

Involuntary Petition Against an Individual

12/15

Use this form to begin a bankruptcy case against an individual you allege to be a debtor subject to an involuntary case. If you want to begin a case against a non-individual, use the *Involuntary Petition Against a Non-individual* (Official Form 205). 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 name and case number (if known).

Part 1: Identify the Chapter of the Bankruptcy Code Under Which Petition Is Filed

1. Chapter of the Bankruptcy Code

Check one:

☐ Chapter 7
☐ Chapter 11

Part 2: Identify the Debtor

2. Debtor's full name

____
First name

____
Middle name

____
Last name

____
Suffix (Sr., Jr., II, III)

3. Other names you know the debtor has used in the last 8 years

Include any assumed, married, maiden, or trade names, or *doing business as* names.

____
____
____

4. Only the last 4 digits of debtor's Social Security Number or federal Individual Taxpayer Identification Number (ITIN)

☐ Unknown

xxx – xx – ____ ____ ____ ____ OR 9 xx – xx – ____ ____ ____ ____

5. Any Employer Identification Numbers (EINs) used in the last 8 years

☐ Unknown

___ ___ – ___ ___ ___ ___ ___ ___ ___
EIN

___ ___ – ___ ___ ___ ___ ___ ___ ___
EIN

6. Debtor's address	**Principal residence**	**Mailing address, if different from residence**
	____ Number Street ____ ____ City State ZIP Code ____ County	____ Number Street ____ ____ City State ZIP Code
	Principal place of business	
	____ Number Street ____ ____ City State ZIP Code ____ County	

7. Type of business

- ❑ Debtor does not operate a business

Check one if the debtor operates a business:

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ None of the above

8. Type of debt

Each petitioner believes:

- ❑ **Debts are 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."
- ❑ **Debts are primarily business debts.** *Business debts* are debts that were incurred to obtain money for a business or investment or through the operation of the business or investment.

9. Do you know of any bankruptcy cases pending by or against any partner, spouse, or affiliate of this debtor?

- ❑ No
- ❑ Yes. Debtor ____ Relationship _________________________

District _________________________ Date filed _______________ Case number, if known__________________
MM / DD / YYYY

Debtor ____ Relationship _________________________

District _________________________ Date filed _______________ Case number, if known__________________
MM / DD / YYYY

Part 3: Report About the Case

10. Venue

Reason for filing in this court.

Check one:

- ❑ Over the last 180 days before the filing of this bankruptcy, the debtor has resided, had the principal place of business, or had principal assets in this district longer than in any other district.
- ❑ A bankruptcy case concerning debtor's affiliates, general partner, or partnership is pending in this district.
- ❑ Other reason. Explain. (See 28 U.S.C. § 1408.) ____

11. Allegations

Each petitioner is eligible to file this petition under 11 U.S.C. § 303(b).

The debtor may be the subject of an involuntary case under 11 U.S.C. § 303(a).

At least one box must be checked:

- ❑ The debtor is generally not paying such debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount.
- ❑ Within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

12. Has there been a transfer of any claim against the debtor by or to any petitioner?

- ❑ No
- ❑ Yes. Attach all documents that evidence the transfer and any statements required under Bankruptcy Rule 1003(a).

13. Each petitioner's claim

Name of petitioner	Nature of petitioner's claim	Amount of the claim above the value of any lien
		$ ________
		$ ________
		$ ________
	Total	$ ________

If more than 3 petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's (or representative's) signature under the statement, along with the signature of the petitioner's attorney, and the information on the petitioning creditor, the petitioner's claim, the petitioner's representative, and the attorney following the format on this form.

Part 4: Request for Relief

Petitioners request that an order for relief be entered against the debtor under the chapter specified in Part 1 of this petition. If a petitioning creditor is a corporation, attach the corporate ownership statement required by Bankruptcy Rule 1010(b). If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.

Petitioners declare under penalty of perjury that the information provided in this petition is true and correct to the best of their knowledge, information, and belief. Petitioners understand that if they make a false statement, they could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571. If relief is not ordered, the court may award attorneys' fees, costs, damages, and punitive damages. 11 U.S.C. § 303(i).

Petitioners or Petitioners' Representative

✘ ____
Signature of petitioner or representative, including representative's title

____
Printed name of petitioner

Date signed ______________
MM / DD / YYYY

Mailing address of petitioner

____
Number Street

____
City State ZIP Code

If petitioner is an individual and is not represented by an attorney:

Contact phone ____________________

Email ____________________

Name and mailing address of petitioner's representative, if any

____
Name

____
Number Street

____
City State ZIP Code

Attorneys

✘ ____
Signature of attorney

____
Printed name

____
Firm name, if any

____
Number Street

____
City State ZIP Code

Date signed ______________
MM / DD / YYYY

Contact phone ______________ Email ____________________

✘ ____
Signature of petitioner or representative, including representative's title

____
Printed name of petitioner

Date signed ______________
MM / DD / YYYY

Mailing address of petitioner

____
Number Street

____
City State ZIP Code

Name and mailing address of petitioner's representative, if any

____
Name

____
Number Street

____
City State ZIP Code

✘ ____
Signature of Attorney

____
Printed name

____
Firm name, if any

____
Number Street

____
City State ZIP Code

Date signed ______________
MM / DD / YYYY

Contact phone ______________ Email ______________________

✘ ____
Signature of petitioner or representative, including representative's title

____
Printed name of petitioner

Date signed ______________
MM / DD / YYYY

Mailing address of petitioner

____
Number Street

____
City State ZIP Code

Name and mailing address of petitioner's representative, if any

____
Name

____
Number Street

____
City State ZIP Code

✘ ____
Signature of Attorney

____
Printed name

____
Firm name, if any

____
Number Street

____
City State ZIP Code

Date signed ______________
MM / DD / YYYY

Contact phone ______________ Email ______________________

COMMITTEE NOTE

Official Form 105*, Involuntary Petition Against an Individual*, which is used only in cases of individual debtors, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered to distinguish it from the version to be used in non-individual cases, and stylistic changes were made throughout the form.

The form is derived from Official Form 5*, Involuntary Petition*. The new form separates questions into four parts likely to be more familiar to non-lawyers, groups questions of a similar nature together, and eliminates questions unrelated to individual debtors.

Part 1, *Identify the Chapter of the Bankruptcy Code Under Which Petition is Filed*, moves to the beginning of the form the question regarding the chapter of the Bankruptcy Code under which the petition is filed.

Part 2, *Identify the Debtor*, includes the questions regarding the debtor's name, prior names, Social Security Number, Individual Taxpayer Identification Number and Employer Identification Number. Petitioners must list the address for the debtor's principal residence, mailing address (if different), and principal place of business. Petitioners must indicate whether the debtor operates a business, and, if so, use checkboxes to indicate whether the business falls into certain categories. The statutory definition of "consumer debts" is provided, as well as a definition of "business debts."

Part 3, *Report About the Case*, amends the question regarding venue to advise that venue is the "Reason to file in this court" and amends the choices for venue. The first option is revised to read: "Over the last 180 days before the filing of this bankruptcy, the debtor has resided, had the principal place of business, or had principal assets in this district longer than any other district." Also, the form adds an option for "Other reason.

Explain," with a statutory reference. In the question for Allegations, the exact citation to the Bankruptcy Code is provided for the second allegation, and checkboxes are provided for the last allegation. Petitioners must check "yes" or "no" to answer whether there has been any transfer of any claim against the debtor by or to a petitioner. The information regarding the petitioner's claims is moved to this part of the form, and the portion listing the amount of the claim is amended to ask about the amount of the claim that exceeds the value of the lien, if any.

Part 4, *Request for Relief*, amends the instructions to include a warning about making a false statement, and adds a separate requirement for each petitioner's mailing address. Also, petitioners' attorneys must provide their email addresses, or if a petitioner is an individual and not represented by an attorney, the contact phone and email address of that petitioner must be provided.

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 106Sum

Summary of Your Assets and Liabilities and Certain Statistical Information 12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Fill out all of your schedules first; then complete the information on this form. If you are filing amended schedules after you file your original forms, you must fill out a new *Summary* and check the box at the top of this page.

Part 1: Summarize Your Assets

Your assets
Value of what you own

1. ***Schedule A/B: Property*** (Official Form 106A/B).
   1a. Copy line 55, Total real estate, from *Schedule A/B* .... $ ________
   1b. Copy line 62, Total personal property, from *Schedule A/B* .... $ ________
   1c. Copy line 63, Total of all property on *Schedule A/B* .... $ ________

Part 2: Summarize Your Liabilities

Your liabilities
Amount you owe

2. *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D)
   2a. Copy the total you listed in Column A, *Amount of claim,* at the bottom of the last page of Part 1 of *Schedule D* .... $ ________
3. *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F)
   3a. Copy the total claims from Part 1 (priority unsecured claims) from line 6e of *Schedule E/F* .... $ ________
   3b. Copy the total claims from Part 2 (nonpriority unsecured claims) from line 6j of *Schedule E/F* .... + $ ________

Your total liabilities $ ________

Part 3: Summarize Your Income and Expenses

4. *Schedule I: Your Income* (Official Form 106I)
   Copy your combined monthly income from line 12 of *Schedule I* .... $ ________
5. *Schedule J: Your Expenses* (Official Form 106J)
   Copy your monthly expenses from line 22, Column A, of *Schedule J* .... $ ________

Part 4: Answer These Questions for Administrative and Statistical Records

6. **Are you filing for bankruptcy under Chapters 7, 11, or 13?**

   ❑ No. You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.
   ❑ Yes

7. **What kind of debt do you have?**

   ❑ **Your debts are primarily consumer debts.** *Consumer debts* are those "incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). Fill out lines 8-10 for statistical purposes. 28 U.S.C. § 159.

   ❑ **Your debts are not primarily consumer debts**. You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.

8. **From the *Statement of Your Current Monthly Income*** (Official Form 108-1, 109, or 110-1):
   Copy your total current monthly income from line 11. $ ____________

9. **Copy the following special categories of claims from Part 4, line 6 of *Schedule E/F: Creditors Who Have Unsecured Claims*** (Official Form 106E/F):

From Part 4 on *Schedule E/F*, copy the following:	Total claim
9a. Domestic support obligations (Copy line 6a.)	$____________
9b. Taxes and certain other debts you owe the government. (Copy line 6b.)	$____________
9c. Claims for death or personal injury while you were intoxicated. (Copy line 6c.)	$____________
9d. Student loans. (Copy line 6f.)	$____________
9e. Obligations arising out of a separation agreement or divorce that you did not report as priority claims. (Copy line 6g.)	$____________
9f. Debts to pension or profit-sharing plans, and other similar debts. (Copy line 6h.)	+ $____________
9g. **Total.** Add lines 9a through 9f.	$____________

Fill in this information to identify your case and this filing:

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 ______________________________________

❑ Check if this is an amended filing

Official Form 106A/B

Schedule A/B: Property

12/15

In each category, separately list and describe items worth more than $500. List an asset only once. If an asset fits in more than one category, list the asset in the category where you think it fits best. 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 Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest In

1. **Do you own or have any legal or equitable interest in any residence, building, land, or similar property?**

❑ No
❑ Yes. Where is the property?

1.1. ______________________________________
Street address, if available, or other description

____

____
City State ZIP Code

____
County

What is the property? Check all that apply.
❑ Single-family home
❑ Duplex or multi-unit building
❑ Condominium or cooperative
❑ Manufactured or mobile home
❑ Land
❑ Investment property
❑ Timeshare
❑ Other ______________________________

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

Other information you wish to add about this item, such as local property identification number: ______________________________

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property?	Current value of the portion you own?
$________________	$________________

❑ **Check if this is community property** (see instructions)

If you own or have more than one, list here:

1.2. ______________________________________
Street address, if available, or other description

____

____
City State ZIP Code

____
County

What is the property? Check all that apply.
❑ Single-family home
❑ Duplex or multi-unit building
❑ Condominium or cooperative
❑ Manufactured or mobile home
❑ Land
❑ Investment property
❑ Timeshare
❑ Other ______________________________

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

Other information you wish to add about this item, such as local property identification number: ______________________________

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property?	Current value of the portion you own?
$________________	$________________

❑ **Check if this is community property** (see instructions)

1.3. ______________________________
Street address, if available, or other description

____

____
City State ZIP Code

____
County

What is the property? Check all that apply.

- ❑ Single-family home
- ❑ Duplex or multi-unit building
- ❑ Condominium or cooperative
- ❑ Manufactured or mobile home
- ❑ Land
- ❑ Investment property
- ❑ Timeshare
- ❑ Other ______________________

Who is an owner of the property? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

Other information you wish to add about this item, such as local property identification number: ______________________

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property?	**Current value of the portion you own?**
$______________	$______________

❑ **Check if this is community property** (see instructions)

2. **Add the dollar value of the portion you own for all of your entries from Part 1, including any entries for pages you have attached for Part 1. Write that number here.** .... ➔ $______________

Part 2: Describe Your Vehicles

Do you own or have legal or equitable interest in any vehicles, whether they are registered or not? Include any vehicles you own that someone else drives. Do not report leased vehicles here. If you lease a vehicle, fill out *Schedule G: Executory Contracts and Unexpired Leases.*

3. **Cars, vans, trucks, tractors, sport utility vehicles, motorcycles**

- ❑ No
- ❑ Yes

3.1. Make: ______________
Model: ______________
Year: __________
Mileage: ❑ 0-24,999 ❑ 25,000-49,999 ❑ 50,000-74,999 ❑ 75,000 or more
Other information:

Who is an owner of the property? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property?	**Current value of the portion you own?**
$______________	$______________

If you own or have more than one, describe here:

3.2. Make: ______________
Model: ______________
Year: __________
Mileage: ❑ 0-24,999 ❑ 25,000-49,999 ❑ 50,000-74,999 ❑ 75,000 or more
Other information:

Who is an owner of the property? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property?	**Current value of the portion you own?**
$______________	$______________

3.3. Make: ____________
Model: ____________
Year: ________
Mileage: ❑ 0-24,999
❑ 25,000-49,999
❑ 50,000-74,999
❑ 75,000 or more
Other information:

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another
❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property?	Current value of the portion you own?
$____________	$____________

3.4. Make: ____________
Model: ____________
Year: ________
Mileage: ❑ 0-24,999
❑ 25,000-49,999
❑ 50,000-74,999
❑ 75,000 or more
Other information:

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another
❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property?	Current value of the portion you own?
$____________	$____________

4. **Watercraft, aircraft, motor homes, ATVs and other recreational vehicles, other vehicles, and accessories**
Examples: Boats, trailers, motors, personal watercraft, fishing vessels, snowmobiles, motorcycle accessories
❑ No
❑ Yes

4.1. Make: ____________
Model: ____________
Year: ________
Other information:

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another
❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property?	Current value of the portion you own?
$____________	$____________

If you own or have more than one, list here:

4.2. Make: ____________
Model: ____________
Year: ________
Other information:

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another
❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property?	Current value of the portion you own?
$____________	$____________

5. **Add the dollar value of the portion you own for all of your entries from Part 2, including any entries for pages you have attached for Part 2. Write that number here** .... $____________

Part 3: Describe Your Personal and Household Items

Do you own or have any legal or equitable interest in any of the following items?

Current value of the portion you own?
Do not deduct secured claims or exemptions.

6. **Household goods and furnishings**
   Examples: Major appliances, furniture, linens, china, kitchenware
   - ❑ No
   - ❑ Yes. Describe......... $________

7. **Electronics**
   Examples: Televisions and radios; audio, video, stereo, and digital equipment; computers, printers, scanners; music collections; electronic devices including cell phones, cameras, media players, games
   - ❑ No
   - ❑ Yes. Describe......... $________

8. **Collectibles of value**
   Examples: Antiques and figurines; paintings, prints, or other artwork; books, pictures, or other art objects; stamp, coin, or baseball card collections; other collections, memorabilia, collectibles
   - ❑ No
   - ❑ Yes. Describe......... $________

9. **Equipment for sports and hobbies**
   Examples: Sports, photographic, exercise, and other hobby equipment; bicycles, pool tables, golf clubs, skis; canoes and kayaks; carpentry tools; musical instruments
   - ❑ No
   - ❑ Yes. Describe......... $________

10. **Firearms**
    Examples: Pistols, rifles, shotguns, ammunition, and related equipment
    - ❑ No
    - ❑ Yes. Describe......... $________

11. **Clothes**
    Examples: Everyday clothes, furs, leather coats, designer wear, shoes, accessories
    - ❑ No
    - ❑ Yes. Describe......... $________

12. **Jewelry**
    Examples: Everyday jewelry, costume jewelry, engagement rings, wedding rings, heirloom jewelry, watches, gems, gold, silver
    - ❑ No
    - ❑ Yes. Describe.......... $________

13. **Non-farm animals**
    Examples: Dogs, cats, birds, horses
    - ❑ No
    - ❑ Yes. Describe.......... $________

14. **Any other personal and household items you did not already list, including any health aids you did not list**
    - ❑ No
    - ❑ Yes. Give specific information. .... $________

15. **Add the dollar value of all of your entries from Part 3, including any entries for pages you have attached for Part 3. Write that number here** .... $________

Part 4: Describe Your Financial Assets

Do you own or have any legal or equitable interest in any of the following?	**Current value of the portion you own?** Do not deduct secured claims or exemptions.

16. **Cash**

Examples: Money you have in your wallet, in your home, in a safe deposit box, and on hand when you file your petition

❑ No
❑ Yes .... Cash: .... $____________

17. **Deposits of money**

Examples: Checking, savings, or other financial accounts; certificates of deposit; shares in credit unions, brokerage houses, and other similar institutions. If you have multiple accounts with the same institution, list each.

❑ No
❑ Yes .... Institution name:

	Institution name	
17.1. Checking account:	______________	$__________
17.2. Checking account:	______________	$__________
17.3. Savings account:	______________	$__________
17.4. Savings account:	______________	$__________
17.5. Certificates of deposit:	______________	$__________
17.6. Other financial account:	______________	$__________
17.7. Other financial account:	______________	$__________
17.8. Other financial account:	______________	$__________
17.9. Other financial account:	______________	$__________

18. **Bonds, mutual funds, or publicly traded stocks**

Examples: Bond funds, investment accounts with brokerage firms, money market accounts

❑ No
❑ Yes .... Institution name:

______________________________ $__________
______________________________ $__________
______________________________ $__________

19. **Non-publicly traded stock and interests in incorporated and unincorporated businesses, including an interest in an LLC, partnership, and joint venture**

❑ No
❑ Yes. Give specific information about them........................

Name of entity:	% of ownership:	
______________	________%	$__________
______________	________%	$__________
______________	________%	$__________

20. **Government and corporate bonds and other negotiable and non-negotiable instruments**

Negotiable instruments include personal checks, cashiers' checks, promissory notes, and money orders.
Non-negotiable instruments are those you cannot transfer to someone by signing or delivering them.

❑ No
❑ Yes. Give specific information about them...................... Issuer name:

______________________________ $__________
______________________________ $__________
______________________________ $__________

21. **Retirement or pension accounts**

Examples: Interests in IRA, ERISA, Keogh, 401(k), 403(b), thrift savings accounts, or other pension or profit-sharing plans

❑ No
❑ Yes. List each account separately.

Type of account:	Institution name:	
401(k) or similar plan:	______________________________	$__________
Pension plan:	______________________________	$__________
IRA:	______________________________	$__________
Retirement account:	______________________________	$__________
Keogh:	______________________________	$__________
Additional account:	______________________________	$__________
Additional account:	______________________________	$__________

22. **Security deposits and prepayments**

Your share of all unused deposits you have made so that you may continue service or use from a company
Examples: Agreements with landlords, prepaid rent, public utilities (electric, gas, water), telecommunications companies, or others

❑ No
❑ Yes.........................

	Institution name or individual:	
Electric:	______________________________	$__________
Gas:	______________________________	$__________
Heating oil:	______________________________	$__________
Security deposit on rental unit:	______________________________	$__________
Prepaid rent:	______________________________	$__________
Telephone:	______________________________	$__________
Water:	______________________________	$__________
Rented furniture:	______________________________	$__________
Other:	______________________________	$__________

23. **Annuities** (A contract for a periodic payment of money to you, either for life or for a number of years)

❑ No
❑ Yes......................... Issuer name and description:

______________________________ $__________
______________________________ $__________
______________________________ $__________

24. **Interests in an education IRA** as defined in 26 U.S.C. § 530(b)(1) or under a qualified state tuition plan as defined in 26 U.S.C. § 529(b)(1).

❑ No
❑ Yes .... Institution name and description. Separately file the records of any interests.11 U.S.C. § 521(c):

______________________________________ $__________
______________________________________ $__________
______________________________________ $__________

25. **Trusts, equitable or future interests in property (other than anything listed in line 1), and rights or powers exercisable for your benefit**

❑ No
❑ Yes. Give specific information about them.... $__________

26. **Patents, copyrights, trademarks, trade secrets, and other intellectual property**
Examples: Internet domain names, websites, proceeds from royalties and licensing agreements

❑ No
❑ Yes. Give specific information about them.... $__________

27. **Licenses, franchises, and other general intangibles**
Examples: Building permits, exclusive licenses, cooperative association holdings, liquor licenses, professional licenses

❑ No
❑ Yes. Give specific information about them.... $__________

Money or property owed to you?

Current value of the portion you own?
Do not deduct secured claims or exemptions.

28. **Tax refunds owed to you**

❑ No
❑ Yes. Give specific information about them, including whether you already filed the returns and the tax years. ....

Federal: $__________
State: $__________
Local: $__________

29. **Family support**
Examples: Past due or lump sum alimony, spousal support, child support, maintenance, divorce settlement, property settlement

❑ No
❑ Yes. Give specific information.............

Alimony: $__________
Maintenance: $__________
Support: $__________
Divorce settlement: $__________
Property settlement: $__________

30. **Other amounts someone owes you**
Examples: Unpaid wages, disability insurance payments, disability benefits, sick pay, vacation pay, workers' compensation, Social Security benefits; unpaid loans you made to someone else

❑ No
❑ Yes. Give specific information.............. $__________

31. **Interests in insurance policies**
Examples: Health, disability, or life insurance; health savings account (HSA); credit, homeowner's, or renter's insurance
❑ No
❑ Yes. Name the insurance company of each policy and list its value. ...

Company name:	Beneficiary:	Surrender or refund value:
______________	______________	$__________
______________	______________	$__________
______________	______________	$__________

32. **Any interest in property that is due you from someone who has died**
If you are the beneficiary of a living trust, expect proceeds from a life insurance policy, have inherited something from an existing estate
❑ No
❑ Yes. Give specific information............. $__________

33. **Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment**
Examples: Accidents, employment disputes, insurance claims, or rights to sue
❑ No
❑ Yes. Describe each claim. .... $__________

34. **Other contingent and unliquidated claims of every nature, including counterclaims of the debtor and rights to set off claims**
❑ No
❑ Yes. Describe each claim. .... $__________

35. **Any financial assets you did not already list**
❑ No
❑ Yes. Give specific information............ $__________

36. **Add the dollar value of all of your entries from Part 4, including any entries for pages you have attached for Part 4. Write that number here** .... ➔ $__________

Part 5: Describe Any Business-Related Property You Own or Have an Interest In. List any real estate in Part 1.

37. **Do you own or have any legal or equitable interest in any business-related property?**
❑ No. Go to Part 6.
❑ Yes. Go to line 38.

Current value of the portion you own?
Do not deduct secured claims or exemptions.

38. **Accounts receivable or commissions you already earned**
❑ No
❑ Yes. Describe....... $__________

39. **Office equipment, furnishings, and supplies**
Examples: Business-related computers, software, modems, printers, copiers, fax machines, rugs, telephones, desks, chairs, electronic devices
❑ No
❑ Yes. Describe....... $__________

40. **Machinery, fixtures, equipment, supplies you use in business, and tools of your trade**

❑ No
❑ Yes. Describe....... $__________________

41. **Inventory**

❑ No
❑ Yes. Describe....... $__________________

42. **Interests in partnerships or joint ventures**

❑ No
❑ Yes. Describe.......

Name of entity:	% of ownership:	
______________________	_______%	$__________________
______________________	_______%	$__________________
______________________	_______%	$__________________

43. **Customer lists, mailing lists, or other compilations**

❑ No
❑ Yes. **Do your lists include personally identifiable information** (as defined in 11 U.S.C. § 101(41A))**?**

❑ No
❑ Yes. Describe....... $__________________

44. **Any business-related property you did not already list**

❑ No
❑ Yes. Give specific information ....

______________________ $__________________
______________________ $__________________
______________________ $__________________
______________________ $__________________
______________________ $__________________
______________________ $__________________

45. **Add the dollar value of all of your entries from Part 5, including any entries for pages you have attached for Part 5. Write that number here** .... ➔ $__________________

Part 6: Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest In.
If you own or have an interest in farmland, list it in Part 1.

46. **Do you own or have any legal or equitable interest in any farm- or commercial fishing-related property?**

❑ No. Go to Part 7.
❑ Yes. Go to line 47.

Current value of the portion you own?
Do not deduct secured claims or exemptions.

47. **Farm animals**

Examples: Livestock, poultry, farm-raised fish

❑ No
❑ Yes......................... $__________________

48. **Crops—either growing or harvested**
- ❑ No
- ❑ Yes. Give specific information. .... $__________________

49. **Farm and fishing equipment and implements**
- ❑ No
- ❑ Yes .... $__________________

50. **Farm and fishing supplies, chemicals, and feed**
- ❑ No
- ❑ Yes .... $__________________

51. **Any farm- and commercial fishing-related property you did not already list**
- ❑ No
- ❑ Yes. Give specific information. .... $__________________

52. **Add the dollar value of all of your entries from Part 6, including any entries for pages you have attached for Part 6. Write that number here** .... ➔ $__________________

Part 7: Describe All Property You Own or Have an Interest in That You Did Not List Above

53. **Do you have other property of any kind you did not already list?**
Examples: Season tickets, country club membership
- ❑ No
- ❑ Yes. Give specific information. .... $________________ $________________ $________________

54. **Add the dollar value of all of your entries from Part 7. Write that number here** .... ➔ $________________

Part 8: List the Totals of Each Part of this Form

55. **Part 1: Total real estate, line 2** .... ➔ $________________

56. **Part 2: Total vehicles, line 5** $________________

57. **Part 3: Total personal and household items, line 15** $________________

58. **Part 4: Total financial assets, line 36** $________________

59. **Part 5: Total business-related property, line 45** $________________

60. **Part 6: Total farm- and fishing-related property, line 52** $________________

61. **Part 7: Total other property not listed, line 54** + $________________

62. **Total personal property.** Add lines 56 through 61. .... $________________ Copy personal property total ➔ + $________________

63. **Total of all property on Schedule A/B.** Add line 55 + line 62. .... $________________

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 106C

Schedule C: The Property You Claim as Exempt

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Using the property you listed on *Schedule A/B: Property* (Official Form 106A/B) as your source, list the property that you claim as exempt. If more space is needed, fill out and attach to this page as many copies of *Part 2: Additional Page* as necessary. On the top of any additional pages, write your name and case number (if known).

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. One way of doing so is to state a specific dollar amount as exempt. Alternatively, you may claim the full fair market value of the property being exempted up to the amount of any applicable statutory limit. Some exemptions—such as those for health aids, rights to receive certain benefits, and tax-exempt retirement funds—may be unlimited in dollar amount. However, if you claim an exemption of 100% of fair market value under a law that limits the exemption to a particular dollar amount and the value of the property is determined to exceed that amount, your exemption would be limited to the applicable statutory amount.

Part 1: Identify the Property You Claim as Exempt

1. **Which set of exemptions are you claiming?** *Check one only, even if your spouse is filing with you.*
   - ❑ You are claiming state and federal nonbankruptcy exemptions. 11 U.S.C. § 522(b)(3)
   - ❑ You are claiming federal exemptions. 11 U.S.C. § 522(b)(2)

2. **For any property you list on *Schedule A/B* that you claim as exempt, fill in the information below.**

Brief description of the property and line on *Schedule A/B* that lists this property	**Current value of the portion you own** Copy the value from *Schedule A/B*	**Amount of the exemption you claim** *Check only one box for each exemption.*	**Specific laws that allow exemption**
Brief description: ____________ Line from *Schedule A/B:* ______	$____________	❑ $ __________ ❑ 100% of fair market value, up to any applicable statutory limit	____________ ____________ ____________ ____________
Brief description: ____________ Line from *Schedule A/B:* ______	$____________	❑ $ __________ ❑ 100% of fair market value, up to any applicable statutory limit	____________ ____________ ____________ ____________
Brief description: ____________ Line from *Schedule A/B:* ______	$____________	❑ $ __________ ❑ 100% of fair market value, up to any applicable statutory limit	____________ ____________ ____________ ____________

3. **Are you claiming a homestead exemption of more than $155,675?**
   (Subject to adjustment on 4/01/16 and every 3 years after that for cases filed on or after the date of adjustment.)
   - ❑ No
   - ❑ Yes. Did you acquire the property covered by the exemption within 1,215 days before you filed this case?
     - ❑ No
     - ❑ Yes

Part 2: Additional Page

Brief description of the property and line on *Schedule A/B* that lists this property	**Current value of the portion you own** Copy the value from *Schedule A/B*	**Amount of the exemption you claim** *Check only one box for each exemption*	**Specific laws that allow exemption**
Brief description: ____ Line from *Schedule A/B:* ____	$________	❑ $ ________ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ____ Line from *Schedule A/B:* ____	$________	❑ $ ________ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ____ Line from *Schedule A/B:* ____	$________	❑ $ ________ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ____ Line from *Schedule A/B:* ____	$________	❑ $ ________ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ____ Line from *Schedule A/B:* ____	$________	❑ $ ________ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ____ Line from *Schedule A/B:* ____	$________	❑ $ ________ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ____ Line from *Schedule A/B:* ____	$________	❑ $ ________ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ____ Line from *Schedule A/B:* ____	$________	❑ $ ________ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ____ Line from *Schedule A/B:* ____	$________	❑ $ ________ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ____ Line from *Schedule A/B:* ____	$________	❑ $ ________ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ____ Line from *Schedule A/B:* ____	$________	❑ $ ________ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ____ Line from *Schedule A/B:* ____	$________	❑ $ ________ ❑ 100% of fair market value, up to any applicable statutory limit	________

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 106D

Schedule D: Creditors Who Hold Claims Secured by Property

12/15

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, copy the Additional Page, fill it out, number the entries, and attach it to this form. On the top of any additional pages, write your name and case number (if known).

1. **Do any creditors hold claims secured by your property?**
   ❑ No. Check this box and submit this form to the court with your other schedules. You have nothing else to report on this form.
   ❑ Yes. Fill in all of the information below.

Part 1: List Your Secured Claims

2. **List all of your secured claims in the alphabetical order of the major creditor who holds each claim.** If a creditor has more than one secured claim, list the creditor separately for each claim. If more than one creditor holds a particular claim, list the other creditors in Part 2.

	Column A **Amount of claim** Do not deduct the value of collateral.	*Column B* **Value of collateral that supports this claim**	*Column C* **Unsecured portion** If any

2.1

____
Creditor's Name

____
Number Street

____

____
City State ZIP Code

Who owes the debt? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is a community claim**

Date debt was incurred ____________

Describe the property that is collateral: $______________ $______________ $__________

As of the date you file, the claim is: Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed
❑ None of the above apply

Nature of lien. Check all that apply.
❑ An agreement you made (such as mortgage or secured car loan)
❑ Statutory lien (such as tax lien, mechanic's lien)
❑ Judgment lien from a lawsuit
❑ Other ______________________________

Last 4 digits of account number ___ ___ ___ ___

2.2

____
Creditor's Name

____
Number Street

____

____
City State ZIP Code

Who owes the debt? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is a community claim**

Date debt was incurred ____________

Describe the property that is collateral: $______________ $______________ $__________

As of the date you file, the claim is: Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed
❑ None of the above apply

Nature of lien. Check all that apply.
❑ An agreement you made (such as mortgage or secured car loan)
❑ Statutory lien (such as tax lien, mechanic's lien)
❑ Judgment lien from a lawsuit
❑ Other ______________________________

Last 4 digits of account number ___ ___ ___ ___

Add the dollar value of your entries in Column A on this page. Write that number here: $______________

Debtor 1 ______________________________ First Name Middle Name Last Name Case number (*if known*)______________________

Part 1: **Additional Page**

After listing any entries on this page, number them beginning with 2.3, followed by 2.4, and so forth.

	Column A **Amount of claim** Do not deduct the value of collateral.	Column B **Value of collateral that supports this claim**	Column C **Unsecured portion** If any
Describe the property that is collateral:	$______	$______	$______

Creditor's Name

Number Street

City State ZIP Code

Who owes the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community claim**

Date debt was incurred ____________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Nature of lien. Check all that apply.

- ❑ An agreement you made (such as mortgage or secured car loan)
- ❑ Statutory lien (such as tax lien, mechanic's lien)
- ❑ Judgment lien from a lawsuit
- ❑ Other ________________

Last 4 digits of account number ___ ___ ___ ___

	Column A	Column B	Column C
Describe the property that is collateral:	$______	$______	$______

Creditor's Name

Number Street

City State ZIP Code

Who owes the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community claim**

Date debt was incurred ____________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Nature of lien. Check all that apply.

- ❑ An agreement you made (such as mortgage or secured car loan)
- ❑ Statutory lien (such as tax lien, mechanic's lien)
- ❑ Judgment lien from a lawsuit
- ❑ Other ________________

Last 4 digits of account number ___ ___ ___ ___

	Column A	Column B	Column C
Describe the property that is collateral:	$______	$______	$______

Creditor's Name

Number Street

City State ZIP Code

Who owes the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community claim**

Date debt was incurred ____________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Nature of lien. Check all that apply.

- ❑ An agreement you made (such as mortgage or secured car loan)
- ❑ Statutory lien (such as tax lien, mechanic's lien)
- ❑ Judgment lien from a lawsuit
- ❑ Other ________________

Last 4 digits of account number ___ ___ ___ ___

Add the dollar value of your entries in Column A on this page. Write that number here: $__________

If this is the last page of your form, add the dollar value totals from all pages. Write that number here: $__________

Debtor 1 ______________________________ First Name Middle Name Last Name   Case number (*if known*)______________________

Part 2: List Others to Be Notified for a Debt That You Already Listed

Use this page only if you have others to be notified about your bankruptcy for a debt that you already listed in Part 1. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the creditor in Part 1, and then list the collection agency here. Similarly, if you have more than one creditor for any of the debts that you listed in Part 1, list the additional creditors here. If you do not have additional persons to be notified for any debts in Part 1, do not fill out or submit this page.

☐ ______________________________ Name ______________________________ Number Street ______________________________ ______________________________ City State ZIP Code	**On which line in Part 1 did you enter the creditor?** _____ **Last 4 digits of account number** ___ ___ ___ ___
☐ ______________________________ Name ______________________________ Number Street ______________________________ ______________________________ City State ZIP Code	**On which line in Part 1 did you enter the creditor?** _____ **Last 4 digits of account number** ___ ___ ___ ___
☐ ______________________________ Name ______________________________ Number Street ______________________________ ______________________________ City State ZIP Code	**On which line in Part 1 did you enter the creditor?** _____ **Last 4 digits of account number** ___ ___ ___ ___
☐ ______________________________ Name ______________________________ Number Street ______________________________ ______________________________ City State ZIP Code	**On which line in Part 1 did you enter the creditor?** _____ **Last 4 digits of account number** ___ ___ ___ ___
☐ ______________________________ Name ______________________________ Number Street ______________________________ ______________________________ City State ZIP Code	**On which line in Part 1 did you enter the creditor?** _____ **Last 4 digits of account number** ___ ___ ___ ___
☐ ______________________________ Name ______________________________ Number Street ______________________________ ______________________________ City State ZIP Code	**On which line in Part 1 did you enter the creditor?** _____ **Last 4 digits of account number** ___ ___ ___ ___

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)

Draft April 19, 2013

❑ Check if this is an amended filing

Official Form 106E/F

Schedule E/F: Creditors Who Have Unsecured Claims

12/15

Be as complete and accurate as possible. Use Part 1 for creditors with PRIORITY claims and Part 2 for creditors with NONPRIORITY claims. Do not include any creditors with partially secured claims that are listed in *Schedule D: Creditors Who Hold Claims Secured by Property*. If more space is needed, copy the Part you need, fill it out, number the entries in the boxes on the left. Attach the Continuation Page to this page. If you have no information to report in a Part, do not file that Part. On the top of any additional pages, write your name and case number (if known).

Part 1: List All of Your PRIORITY Unsecured Claims

1. **Do any creditors have priority unsecured claims against you?**

❑ No. Go to Part 2.
❑ Yes.

2. **List all of your priority unsecured claims in the alphabetical order of the creditor who holds each claim.** If a creditor has more than one priority unsecured claim, list the creditor separately for each claim. For each claim listed, identify what type of claim it is. If you have more than two priority unsecured claims, fill out the Continuation Page of Part 1. If more than one creditor holds a particular claim, list the other creditors in Part 3.

(For an explanation of each type of claim, see the instructions for this form in the instruction booklet.)

	Total claim	Priority amount	Nonpriority amount
2.1 Last 4 digits of account number ___ ___ ___ ___	$__________	$__________	$__________

2.1

____
Priority Creditor's Name

____
Number Street

____

____
City State ZIP Code

Who incurred the debt? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? __________

As of the date you file, the claim is: Check all that apply.

❑ Contingent
❑ Unliquidated
❑ Disputed
❑ None of the above apply

Type of PRIORITY unsecured claim:

❑ Domestic support obligations
❑ Taxes and certain other debts you owe the government
❑ Claims for death or personal injury while you were intoxicated
❑ Other. Specify ______________________________

2.2

____

Last 4 digits of account number ___ ___ ___ ___ $__________ $__________ $__________

Priority Creditor's Name

When was the debt incurred? ____________

Number Street

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify ______________________________

Part 1: Your PRIORITY Unsecured Claims – Continuation Page

After listing any entries on this page, number them beginning with 2.3, followed by 2.4, and so forth.

	Total claim	Priority amount	Nonpriority amount
Entry 1	$__________	$__________	$__________
Entry 2	$__________	$__________	$__________
Entry 3	$__________	$__________	$__________

____
Priority Creditor's Name

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? ____________

Number Street

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify ______________________________

____
Priority Creditor's Name

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? ____________

Number Street

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify ______________________________

____
Priority Creditor's Name

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? ____________

Number Street

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify ______________________________

Priority Creditor's Name

Number Street

City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

$____________ $__________ $____________

When was the debt incurred? ____________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify ________________________________

Part 2: List All of Your NONPRIORITY Unsecured Claims

3. Do any creditors have nonpriority unsecured claims against you?

- ❑ No. You have nothing to report in this part. Submit this form to the court with your other schedules.
- ❑ Yes

4. List all of your nonpriority unsecured claims in the alphabetical order of the creditor who holds each claim. If a creditor has more than one priority unsecured claim, list the creditor separately for each claim. For each claim listed, identify what type of claim it is. If you have more than four priority unsecured claims fill out the Continuation Page of Part 2. If more than one creditor holds a particular claim, list the other creditors in Part 3.

Total claim

4.1

Nonpriority Creditor's Name

Number Street

City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

$__________________

When was the debt incurred? ____________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify ______________________________________

4.2

Nonpriority Creditor's Name

Number Street

City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

$__________________

When was the debt incurred? ____________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify ______________________________________

4.3

Nonpriority Creditor's Name

Number Street

City State ZIP Code

Last 4 digits of account number ___ ___ ___ ___

$_________________

When was the debt incurred? ____________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated

Who incurred the debt? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:
- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify ______________________

4.4 ______________________
Nonpriority Creditor's Name
____
Number Street
____
City **State** **ZIP Code**

Who incurred the debt? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___ $__________

When was the debt incurred? ________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:
- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify ______________________

Part 2: Your NONPRIORITY Unsecured Claims — Continuation Page

After listing any entries on this page, number them beginning with 4.5, followed by 4.6, and so forth. **Total claim**

____
Nonpriority Creditor's Name
____
Number Street
____
City State ZIP Code

Who incurred the debt? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___ $__________

When was the debt incurred? ________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:
- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify______________________

____
Nonpriority Creditor's Name
____
Number Street
____
City State ZIP Code

Who incurred the debt? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___ $__________

When was the debt incurred? ________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:
- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify______________________

Last 4 digits of account number $

Nonpriority Creditor's Name

____
Number Street

____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

When was the debt incurred? ____________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify______________________________

____
Nonpriority Creditor's Name

____
Number Street

____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___ $___________

When was the debt incurred? ____________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify______________________________

Part 3: List Others to Be Notified for a Debt That You Already Listed

5. Use this page only if you have others to be notified about your bankruptcy, for a debt that you already listed in Parts 1 or 2. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the original creditor in Parts 1 or 2, then list the collection agency here. Similarly, if you have more than one creditor for any of the debts that you listed in Parts 1 or 2, list the additional creditors here. If you do not have additional persons to be notified for any debts in Parts 1 or 2, do not fill out or submit this page.

____
Name

____
Number Street

____

____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

____
Name

____
Number Street

____

____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

____
Name

____
Number Street

____

____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

____
Name

____

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Number Street

______________________________ **Last 4 digits of account number** ___ ___ ___ ___

City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Name

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Number Street

Last 4 digits of account number ___ ___ ___ ___

City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Name

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Number Street

Last 4 digits of account number ___ ___ ___ ___

City State ZIP Code

Name

On which entry in Part 1 or Part 2 did you list the original creditor?

Number Street

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

City State ZIP Code

Part 4: Add the Amounts for Each Type of Unsecured Claim

6. Total the amounts of certain types of unsecured claims for statistical reporting purposes. For reporting purposes, add the amounts for each type of unsecured claim.

			Total claim
Total claims from Part 1	6a. **Domestic support obligations**	6a.	$________________
	6b. **Taxes and certain other debts you owe the government**	6b.	$________________
	6c. **Claims for death or personal injury while you were intoxicated**	6c.	$________________
	6d. **Other.** Add all other priority unsecured claims. Write that amount here.	6d.	+ $________________
	6e. **Total.** Add lines 6a through 6d.	6e.	$________________

			Total claim
Total claims from Part 2	6f. **Student loans**	6f.	$________________
	6g. **Obligations arising out of a separation agreement or divorce that you did not report as priority claims**	6g.	$________________
	6h. **Debts to pension or profit-sharing plans, and other similar debts**	6h.	$________________

6i. **Other.** Add all other nonpriority unsecured claims. Write that amount here. 6i. + $______________________

6j. **Total.** Add lines 6f through 6i. 6j. $______________________

Fill in this information to identify your case:

Debtor ____
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 106G

Schedule G: Executory Contracts and Unexpired Leases

12/15

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, copy the additional page, fill it out, number the entries, and attach it to this page. On the top of any additional pages, write your name and case number (if known).

1. **Do you have any executory contracts or unexpired leases?**
   ❑ No. Check this box and file this form with the court with your other schedules. You have nothing else to report on this form.
   ❑ Yes. Fill in all of the information below even if the contracts or leases are listed on *Schedule A/B: Property* (Official Form 106A/B).

2. **List separately each person or company with whom you have the contract or lease. Then state what each contract or lease is for (for example, rent, vehicle lease, cell phone).** See the instructions for this form in the instruction booklet for more examples of executory contracts and unexpired leases.

	Person or company with whom you have the contract or lease	State what the contract or lease is for
1	Name Number Street City State ZIP Code	
2	Name Number Street City State ZIP Code	
3	Name Number Street City State ZIP Code	
4	Name Number Street City State ZIP Code	
5	Name Number Street City State ZIP Code	

Debtor 1 ______________________________ Case number (*if known*)______________________
First Name Middle Name Last Name

Additional Page if You Have More Contracts or Leases

Person or company with whom you have the contract or lease	What the contract or lease is for
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	

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 106H

Schedule H: Your Codebtors

12/15

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, copy the Additional Page, fill it out, and number the entries in the boxes on the left. Attach the Additional Page to this page. On the top of any Additional Pages, write your name and case number (if known). Answer every question.

1. **Do you have any codebtors?** (If you are filing a joint case, do not list either spouse as a codebtor.)
   - ❑ No
   - ❑ Yes

2. **Within the last 8 years, have you lived in a community property state or territory?** (*Community property states and territories* include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)
   - ❑ No. Go to line 3.
   - ❑ Yes. Did your spouse, former spouse, or legal equivalent live with you at the time?
     - ❑ No
     - ❑ Yes. In which community state or territory did you live? _______________. Fill in the name and current address of that person.

       ____
       Name of your spouse

       ____
       Number Street

       ____
       City State ZIP Code

3. **In Column 1, list as codebtors all of the people or entities who are also liable for any debts you may have. Include all guarantors and cosigners; do not include your spouse as a codebtor if your spouse is filing with you. List the person shown in line 2 again as a codebtor only if that person is a guarantor or cosigner. Make sure you have listed the creditor on *Schedule D* (Official Form 106D) or *Schedule E/F* (Official Form 106E/F). Use *Schedule D* or *Schedule E/F* to fill out Column 2.**

	Column 1: **Your codebtor**	*Column 2:* **The creditor to whom you owe the debt**
1	______________________ Name ______________________ Number Street ______________________ City State ZIP Code	Line from *Schedule D:* _______ OR Line from *Schedule E/F:* _______
2	______________________ Name ______________________ Number Street ______________________ City State ZIP Code	Line from *Schedule D:* _______ OR Line from *Schedule E/F:* _______
3	______________________ Name ______________________ Number Street ______________________ City State ZIP Code	Line from *Schedule D:* _______ OR Line from *Schedule E/F:* _______

Debtor 1 ______________________________ Case number (*if known*)______________________
First Name Middle Name Last Name

Additional Page to List More Codebtors

Column 1: **Your codebtor**	*Column 2:* **The creditor to whom you owe the debt**
______________________ Name ______________________ Number Street ______________________ City State ZIP Code	Line from *Schedule D:* _______ OR Line from *Schedule E/F:* _______
______________________ Name ______________________ Number Street ______________________ City State ZIP Code	Line from *Schedule D:* _______ OR Line from *Schedule E/F:* _______
______________________ Name ______________________ Number Street ______________________ City State ZIP Code	Line from *Schedule D:* _______ OR `Line from *Schedule E/F:* _______
______________________ Name ______________________ Number Street ______________________ City State ZIP Code	Line from *Schedule D:* _______ OR Line from *Schedule E/F:* _______
______________________ Name ______________________ Number Street ______________________ City State ZIP Code	Line from *Schedule D:* _______ OR Line from *Schedule E/F:* _______
______________________ Name ______________________ Number Street ______________________ City State ZIP Code	Line from *Schedule D:* _______ OR Line from *Schedule E/F:* _______
______________________ Name ______________________ Number Street ______________________ City State ZIP Code	Line from *Schedule D:* _______ OR Line from *Schedule E/F:* _______
______________________ Name ______________________ Number Street ______________________ City State ZIP Code	Line from *Schedule D:* _______ OR Line from *Schedule E/F:* _______

“Missing” Forms Modernization Project (FMP) Forms for Individuals

Nine FMP Official Bankruptcy Forms are not included in this publication package because they have already been published for public comment under the current two-digit forms numbering scheme. The forms will be updated with their projected three-digit number designations listed below when this publication package is approved for implementation.

Projected three digit form number	Form Title	Two digit form number and publication year(s)
103A	Application for Individuals to Pay the Filing Fee in Installments	3A (2012)
103B	Application to Have the Chapter 7 Filing Fee Waived	3B (2012)
106I	Schedule I: Your Income	6I (2012)
106J	Schedule J: Your Expenses	6J (2012)
108-1	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation	22A-1 (2012 and 2013)
108-1Supp	Statement of Exemption from Presumption of Abuse Under § 707(b)(2)	22A-1Supp (2013)
108-2	Chapter 7 Means Test Calculation	22A-2 (2012 and 2013)
109	Chapter 11 Statement of Your Current Monthly Income	22B (2012 and 2013)
110-2	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period	22C-1 (2012 and 2013)
110-2	Chapter 13 Calculation of Your Disposable Income	22C-2 (2012 and 2013)

Draft April 7, 2013

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 106Dec

Declaration About an Individual Debtor's Schedules

12/15

If two married people are filing together, both are equally responsible for supplying correct information.

You must file this form whenever you file bankruptcy schedules or amended schedules. If you make a false statement, you could be fined up to $500,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Sign Below

Did you pay or agree to pay someone who is NOT an attorney to help you fill out this bankruptcy filing package?

❑ No

❑ Yes. Name of person____.
Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

Under penalty of perjury, I declare that I have read the forms filed with this declaration and that they are true and correct.

✘ ______________________________________
Signature of Debtor 1

Date _________________
MM / DD / YYYY

✘ ______________________________________
Signature of Debtor 2

Date _________________
MM / DD / YYYY

COMMITTEE NOTE

The schedules to be used in cases of individual debtors are revised as part of the Forms Modernization Project, making them easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. The individual debtor schedules are also renumbered, starting with the number 106 and followed by the letter or name of the schedule to distinguish them from the versions to be used in non-individual cases.

Official Form 106Sum, *Summary of Your Assets and Liabilities and Certain Statistical Information*, replaces Official Form 6, *Summary of Schedules and Statistical Summary of Certain Liability and Related Data (28 U.S.C. § 159)*, in cases of individual debtors.

The form is reformatted and updated with cross-references indicating the line numbers of specific schedules from which the summary information is to be gathered. In addition, because most filings are now done electronically, the form no longer requires the debtor to indicate which schedules are attached or to state the number of sheets of paper used for the schedules.

Official Form 106A/B, *Schedule A/B: Property*, consolidates information about an individual debtor's real and personal property into a single form. It replaces Official Form 6A, *Real Property*, and Official Form 6B, *Personal Property*, in cases of individual debtors. In addition to specific questions about the assets, the form also includes open text fields for providing additional information regarding particular assets when appropriate.

The layout and categories of property on Official Form 106A/B have changed. Instead of dividing property interests into two categories (real or personal property), the new form uses seven categories likely to be more familiar to non-lawyers: real estate, vehicles, personal household items, financial assets, business-related property, farm- and commercial fishing-related property, and a catch-all category for property that was not listed elsewhere in the form. Although the new form categories and the examples provided in many of the categories are designed to prompt debtors to be thorough and list all of their interests in property, the prompts are not intended to require a detailed description of items of little value that are unlikely to be administered by the case trustee. For example, the debtor is directed to separately describe and list individual items of property only if they are worth more than $500. The debtor may describe generally items of minimal value (such as children's clothes) by adding the value of the items and reporting the total.

Although a particular item of property may fit into more than one category, the instructions for the form explain that it should be listed only once.

In addition, because property that falls within a particular category may not be specifically elicited by the particular line items on the form, the debtor is asked in Parts 3–6 (lines 14, 35, 44, and 51) to specifically identify and value any other property in the category.

Part 1, *Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest In*, avoids legal terms such as "life estate" or "joint tenancy," because many individual debtors do not fully understand the nature of their ownership interest in real property. Instead, the debtor is asked to state the "current value of the portion you own," and to also state whether ownership is shared with someone else. Furthermore, instead of asking an open-ended description of the property, the form guides the debtor in answering the description question by providing eight options from which to choose: single-family home, duplex or multi-unit building, condominium or cooperative, manufactured or mobile home, land, investment property, timeshare, and other.

Part 2, *Describe Your Vehicles*, also guides the debtor in answering the question, asking for the make, model, year, and mileage of the car or other vehicle. Because mileage is just a general indication of vehicle value, the debtor is not required to list the exact mileage, but instead is prompted to provide the approximate mileage by selecting from four checkboxes.

Part 3, *Describe Your Personal and Household Items*, simplifies wording, updates categories, and uses more common terms. For example, "Wearing apparel" is changed to "Clothes" and examples include furs, which were previously grouped with jewelry. Firearms, on the other hand, which were previously grouped with sports and other hobbies, are now set out as a separate category. Additionally, because a new Part 6 has been added to separately describe-farm related property, Part 3 includes a category for "Non-farm animals."

Part 4, *Describe Your Financial Assets*, prompts a listing of the debtor's financial assets through several questions providing separate space, after each listed type of account or deposit, for the institution name and the value of the debtor's interest in the asset. Two new categories of financial assets are added: "Bonds, mutual funds, or publicly traded stocks" and "Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment."

Part 5, *Describe Any Business-Related Property You Own or Have an Interest In*, provides prompts for listing business-related property such as accounts receivable, inventory, and machinery, and includes a direction to list business-related real estate in Part 1, to avoid listing real estate twice.

Part 6, *Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest In*, provides prompts for listing farm- or commercial fishing-related property, such as farm animals, crops, and feed. It also includes a direction to list any farm- or commercial fishing-related real estate in Part 1.

Part 7, *Describe All Property You Own or Have an Interest in That You Did Not List Above*, is a catch-all provision that allows the debtor to report property that is difficult to categorize.

Part 8, *List the Totals of Each Part of this Form*¸ tabulates the total value of the debtor's interest in the listed property. The tabulation includes two subtotals, one for real estate, which corresponds to the real property total that was reported on former Official Form 6A. The second subtotal is of Parts 2-7, which corresponds to the personal property total that was reported on former Official Form 6B.

Official Form 106C, *Schedule C: The Property You Claim as Exempt*, replaces Official Form 6C, *Property Claimed as Exempt*, in cases of individual debtors.

Part 1, *Identify the Property You Claim as Exempt*, includes a table to list the property the debtor seeks to exempt, the value of the property owned by the debtor, the amount of the claimed exemption, and the law that allows the exemption. The first column asks for a brief description of the exempt property, and it also asks for the line number where the property is listed on Schedule A/B. The second column asks for the value of the portion of the asset owned by the debtor, rather than the entire asset. The third column asks for the amount, rather than the value, of the exemption claim.

The form has also been changed in light of the Supreme Court's ruling in *Schwab v. Reilly,* 130 S. Ct. 2652 (2010). Entries in the "amount of the exemption you claim" column may now be listed as either a dollar limited amount or as 100% of fair market value, up to any applicable statutory limit. For example, a debtor might claim 100% of fair market value for a home covered by an exemption capped at $15,000, and that limit would be applicable. This choice would impose no dollar limit where the exemption is unlimited in dollar amount, such as some exemptions for health aids, certain governmental benefits, and tax-exempt retirement funds.

Official Form 106D, *Schedule D: Creditors Who Hold Claims Secured by Property*, replaces Official Form 6D, *Creditors Holding Secured Claims*, in cases of individual debtors.

Part 1, *List Your Secured Claims*, now directs the debtor to

list only the last four digits of the account number. Part 1 also adds four checkboxes with which to describe the nature of the lien: an agreement the debtor made (such as mortgage or secured car loan); statutory lien (such as tax lien, mechanic's lien); judgment lien from a lawsuit; and other.

The form adds Part 2, *List Others to Be Notified for a Debt That You Already Listed*. The debtor is instructed to use Part 2 if there is a need to notify someone about the bankruptcy filing other than the creditor for a debt listed in Part 1. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 2.

Official Form 106E/F, *Schedule E/F: Creditors Who Have Unsecured Claims*, consolidates information about priority and nonpriority unsecured claims into a single form. It replaces Official Form 6E, *Creditors Holding Unsecured Priority Claims*, and Official Form 6F, *Creditors Holding Unsecured Nonpriority Claims*, in cases of individual debtors.

Although both priority and nonpriority unsecured claims are reported in Official Form 106E/F, the two types of claims are separately grouped so that the total for each type can be reported for case administration and statistical purposes. The form eliminates the question "consideration for claim" and instructs debtors to list claims in the alphabetical order of creditors.

Part 1, *List All of Your PRIORITY Unsecured Claims*, includes four checkboxes for identifying the type of priority that applies to the claim: domestic support obligations; taxes and certain other debts owed to the government; claims for death or personal injury while intoxicated; and "other." The first three categories are required to be separately reported for statistical purposes. If the debtor selects "other," the debtor must specify the basis of the priority, *e.g.*, wages or employee benefit plan contribution.

Part 2, *List All of Your NONPRIORITY Unsecured Claims*, no longer asks whether the claim is subject to setoff. The form creates four checkboxes, including three for types of claims that must be separately reported for statistical purposes: student loans;

obligations arising out of a separation agreement or divorce not listed as priority claims; and debts to pension or profit-sharing plans and other similar debts. The remaining "other" checkbox treats claims not subject to separate reporting. If the debtor selects "other," the debtor must specify the basis of the claim.

Part 3, *List Others to Be Notified for a Debt That You Already Listed*, is new. The debtor is instructed to use Part 3 only if there is a need to give notice of the bankruptcy to someone other than a creditor listed in Parts 1 and 2. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 3.

Finally, Part 4, *Add the Amounts for Each Type of Unsecured Claim*, requires the debtor to provide the total amounts of particular types of unsecured claims for statistical reporting purposes and the overall totals of the priority and nonpriority unsecured claims reported in this form.

Official Form 106G*, Schedule G: Executory Contracts and Unexpired Leases*, replaces Official Form 6G, *Executory Contracts and Unexpired Leases*, in cases of individual debtors.

The form is simplified. Instead of requiring the debtor to make multiple assertions about each potential executory contract or unexpired lease, the form simply requires the debtor to identify the name and address of the other party to the contract or lease, and to state what the contract or lease deals with. Definitions and examples of executory contracts and unexpired leases are included in the separate instructions for the form.

An additional page is provided in case the debtor has so many executory contracts and unexpired leases that the available page is not adequate. If the debtor needs to use the additional page, the debtor is required to fill in the entry number.

Official Form 106H, *Schedule H: Your Codebtors*, replaces Official Form 6H, *Codebtors*, in cases of individual debtors.

The form breaks out the questions about whether there are any codebters, and whether the debtor has lived with a spouse or legal equivalent in a community property state in the prior eight years. It also removes Alaska from the listed community property states. Finally, it asks the debtor to indicate where the debt is listed on Schedule D or Schedule E/F, thereby eliminating the need to list the name and address of the creditor.

Official Form 106I, *Schedule I: Your Income*, replaces Official Form 6I, *Your Income*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

Official Form 106J, *Schedule J: Your Expenses*, replaces Official Form 6J, *Your Expenses*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

Official Form 106Dec, *Declaration About an Individual Debtor's Schedules*, replaces Official Form 6, *Declaration Concerning Debtor's Schedules*, in cases of individual debtors.

The form, which is to be signed by the debtor and filed with the debtor's schedules, deletes the Declaration and Signature of Bankruptcy Petition Preparer (BPP). Instead, the debtor is directed to complete and file Official Form 119, *Bankruptcy Petition Preparer's Notice, Declaration, and Signature*, if a BPP helped fill out the bankruptcy forms.

Because the form applies only to individual debtors, it no longer contains the Declaration Under Penalty of Perjury on Behalf of a Corporation or Partnership. It also deletes from the

declaration the phrase "to the best of my knowledge, information, and belief" in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008.

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 107

Statement of Financial Affairs for Individuals Filing for Bankruptcy

12/15

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: Give Details About Where You Lived Before

1. **During the last 3 years, have you lived anywhere other than where you live now?**

❑ No
❑ Yes. List all of the places you lived in the last 3 years. Do not include where you live now.

Debtor 1:	Dates Debtor 1 lived there	Debtor 2:	Dates Debtor 2 lived there
________ Number Street ________ ________ City State ZIP Code	From ____ To ____	❑ Same as Debtor 1 ________ Number Street ________ ________ City State ZIP Code	❑ Same as Debtor 1 From ____ To ____
________ Number Street ________ ________ City State ZIP Code	From ____ To ____	❑ Same as Debtor 1 ________ Number Street ________ ________ City State ZIP Code	❑ Same as Debtor 1 From ____ To ____

2. **Within the last 8 years, did you ever live with a spouse or legal equivalent in a community property state or territory?** (*Community property states and territories* include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)

❑ No
❑ Yes. Make sure you fill out Schedule H: *Your Codebtors* (Official Form 106H).

Part 2: Explain the Sources of Your Income

3. **Did you have any income from being employed or operating a business during this year or the two previous calendar years?**
Fill in a total amount for the income you received from all jobs and all businesses, including part-time activities. If you are filing a joint case and you have income that you receive together, list it only once under Debtor 1.

❑ No
❑ Yes. Fill in the details.

	Debtor 1		**Debtor 2**	
	Sources of income Check all that apply.	**Gross income** (before deductions and exclusions)	**Sources of income** Check all that apply.	**Gross income** (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$__________	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$__________
For last calendar year: (January 1 to December 31, ________) YYYY	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$__________	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$__________
For the calendar year before that: (January 1 to December 31, ________) YYYY	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$__________	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$__________

4. **Did you receive any other income during this year or the two previous calendar years?**
Include income regardless of whether that income is taxable. Examples of *other income* are alimony; child support; Social Security, unemployment, and other public benefit payments; pensions; rental income; interest; dividends; money collected from lawsuits; royalties; and gambling and lottery winnings. If you are filing a joint case and you have income that you received together, list it only once under Debtor 1.

List each source and the gross income from each source separately. Do not include income that you listed in line 3.

❑ No
❑ Yes. Fill in the details.

	Debtor 1		**Debtor 2**	
	Sources of income Describe below.	**Gross income from each source** (before deductions and exclusions)	**Sources of income** Describe below.	**Gross income from each source** (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	__________ __________ __________	$__________ $__________ $__________	__________ __________ __________	$__________ $__________ $__________
For last calendar year: (January 1 to December 31, ______) YYYY	__________ __________ __________	$__________ $__________ $__________	__________ __________ __________	$__________ $__________ $__________
For the calendar year before that: (January 1 to December 31, ______) YYYY	__________ __________ __________	$__________ $__________ $__________	__________ __________ __________	$__________ $__________ $__________

Part 3: List Certain Payments You Made Before You Filed for Bankruptcy

5. Are either Debtor 1's or Debtor 2's debts primarily consumer debts?

❑ No. **My debts are not 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."

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of $6,225* or more?

❑ No. Go to line 6.

❑ Yes. List below each creditor to whom you paid a total of $6,225* or more in one or more payments and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

* Subject to adjustment on 4/01/16 and every 3 years after that for cases filed on or after the date of adjustment.

❑ Yes. **My debts are primarily consumer debts.**

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of $600 or more?

❑ No. Go to line 6.

❑ Yes. List below each creditor to whom you paid a total of $600 or more and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

	Dates of payment	Total amount paid	Amount you still owe	Was this payment for…
______ Creditor's Name ______ Number Street ______ ______ City State ZIP Code	______ ______ ______	$______	$______	❑ Mortgage ❑ Car ❑ Credit card ❑ Loan repayment ❑ Suppliers or vendors ❑ Other ______
______ Creditor's Name ______ Number Street ______ ______ City State ZIP Code	______ ______ ______	$______	$______	❑ Mortgage ❑ Car ❑ Credit card ❑ Loan repayment ❑ Suppliers or vendors ❑ Other ______
______ Creditor's Name ______ Number Street ______ ______ City State ZIP Code	______ ______ ______	$______	$______	❑ Mortgage ❑ Car ❑ Credit card ❑ Loan repayment ❑ Suppliers or vendors ❑ Other ______

6. **Within 1 year before you filed for bankruptcy, did you make a payment on a debt you owed anyone who was an insider?**
Insiders include your relatives; any general partners; relatives of any general partners; partnerships of which you are a general partner; corporations of which you are an officer, director, person in control, or owner of 20 percent or more of their voting securities; and any managing agent, including one for a business you operate as a sole proprietor. 11 U.S.C. § 101. Include payments for domestic support obligations, such as child support and alimony.

❑ No
❑ Yes. List all payments to an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment
______________________ Insider's Name ______________________ Number Street ______________________ ______________________ City State ZIP Code	________ ________ ________	$__________	$__________	
______________________ Insider's Name ______________________ Number Street ______________________ ______________________ City State ZIP Code	________ ________ ________	$__________	$__________	

7. **Within 1 year before you filed for bankruptcy, did you make any payments or transfer any property on account of a debt that benefited an insider?**
Include payments on debts guaranteed or cosigned by an insider.

❑ No
❑ Yes. List all payments that benefited an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment Include creditor's name
______________________ Insider's Name ______________________ Number Street ______________________ ______________________ City State ZIP Code	________ ________ ________	$__________	$__________	
______________________ Insider's Name ______________________ Number Street ______________________ ______________________ City State ZIP Code	________ ________ ________	$__________	$__________	

Part 4: Identify Legal Actions, Repossessions, and Foreclosures

8. **Within 1 year before you filed for bankruptcy, were you a party in any lawsuit, court action, or administrative proceeding?**
List all such matters, including personal injury cases, small claims actions, divorces, collection suits, paternity actions, support or custody modifications, and contract disputes.

❑ No
❑ Yes. Fill in the details.

	Nature of the case	Court or agency	Status of the case
Case title______________________ ______________________ Case number ______________		______________________ Court Name ______________________ Number Street ______________________ City State ZIP Code	❑ Pending ❑ On appeal ❑ Concluded
Case title______________________ ______________________ Case number ______________		______________________ Court Name ______________________ Number Street ______________________ City State ZIP Code	❑ Pending ❑ On appeal ❑ Concluded

9. **Within 1 year before you filed for bankruptcy, was any of your property repossessed, foreclosed, garnished, attached, seized, or levied?**
Check all that apply and fill in the details below.

❑ No. Go to line 10.
❑ Yes. Fill in the information below.

	Describe the property	Date	Value of the property
______________________ Creditor's Name ______________________ Number Street ______________________ ______________________ City State ZIP Code	 **Explain what happened** ❑ Property was repossessed. ❑ Property was foreclosed. ❑ Property was garnished. ❑ Property was attached, seized, or levied.	________	$__________
______________________ Creditor's Name ______________________ Number Street ______________________ ______________________ City State ZIP Code	 **Explain what happened** ❑ Property was repossessed. ❑ Property was foreclosed. ❑ Property was garnished. ❑ Property was attached, seized, or levied.	________	$__________

Debtor 1 ____ Case number (*if known*)______________________________
First Name Middle Name Last Name

10. Within 90 days before you filed for bankruptcy, did any creditor, including a bank or financial institution, set off or otherwise take anything from your accounts without your permission or refuse to make a payment because you owed a debt?

❑ No
❑ Yes. Fill in the details.

	Describe the action the creditor took	Date action was taken	Amount
Creditor's Name Number Street City State ZIP Code	 Last 4 digits of account number: XXXX–___ ___ ___ ___	____________	$________________

11. **Within 1 year before you filed for bankruptcy, was any of your property in the possession of an assignee for the benefit of creditors, a court-appointed receiver, custodian, or other official?**

❑ No
❑ Yes. Fill in the details.

	Describe the property	Value
Custodian's Name Number Street City State ZIP Code	 Case title ________________ Case number ________________ Date of order or assignment ____________ MM / DD / YYYY	$______________________ Court Name Number Street City State ZIP Code

Part 5: List Certain Gifts and Contributions

12. **Within 2 years before you filed for bankruptcy, did you give any gifts with a total value of more than $600 per person?**

❑ No
❑ Yes. Fill in the details for each gift.

Gifts with a total value of more than $600 per person	Describe the gifts	Dates you gave the gifts	Value
Person to Whom You Gave the Gift Number Street City State ZIP Code Person's relationship to you ____________		__________ __________	$_____________ $_____________

Gifts with a total value of more than $600 per person	Describe the gifts	Dates you gave the gifts	Value
______________________ Person to Whom You Gave the Gift ______________________ ______________________ Number Street ______________________ City State ZIP Code Person's relationship to you ________		________ ________	$________ $________

13. **Within 2 years before you filed for bankruptcy, did you give any gifts or contributions with a total value of more than $600 to any charity?**

- ❑ No
- ❑ Yes. Fill in the details for each gift or contribution.

Gifts or contributions to charities that total more than $600	Describe what you contributed	Date you contributed	Value
______________________ Charity's Name ______________________ ______________________ Number Street ______________________ City State ZIP Code		________ ________	$________ $________

Part 6: List Certain Losses

14. **Within 1 year before you filed for bankruptcy or since you filed for bankruptcy, did you lose anything because of theft, fire, other disaster, or gambling?**

- ❑ No
- ❑ Yes. Fill in the details.

Describe the property you lost and how the loss occurred	Describe any insurance coverage for the loss Include the amount that insurance has paid. List pending insurance claims on line 33 of *Schedule A/B: Property.*	Date of your loss	Value of property lost
		________	$________

Debtor 1 ______________________________ Case number (*if known*)______________________
First Name Middle Name Last Name

Part 7: List Certain Payments or Transfers

15. **Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone you consulted about seeking bankruptcy or preparing a bankruptcy petition?**
Include any attorneys, bankruptcy petition preparers, or credit counseling agencies for services required in your bankruptcy.

❑ No
❑ Yes. Fill in the details.

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
________ Person Who Was Paid ________ Number Street ________ ________ City State ZIP Code ________ Email or website address ________ Person Who Made the Payment, if Not You		________ ________	$________ $________

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
________ Person Who Was Paid ________ Number Street ________ ________ City State ZIP Code ________ Email or website address ________ Person Who Made the Payment, if Not You		________ ________	$________ $________

16. **Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone who promised to help you deal with your creditors or to make payments to your creditors?**
Do not include any payment or transfer that you listed on line 15.

❑ No
❑ Yes. Fill in the details.

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
________ Person Who Was Paid ________ Number Street ________ ________ City State ZIP Code		________ ________	$________ $________

17. **Within 2 years before you filed for bankruptcy, did you sell, trade, or otherwise transfer any property to anyone, other than property transferred in the ordinary course of your business or financial affairs?**
Include both outright transfers and transfers made as security. Do not include gifts and transfers that you have already listed on this statement.

❑ No
❑ Yes. Fill in the details.

	Description and value of property transferred	Describe any property or payments received or debts paid in exchange	Date transfer was made
______ Person Who Received Transfer ______ Number Street ______ ______ City State ZIP Code Person's relationship to you ______			______
______ Person Who Received Transfer ______ Number Street ______ ______ City State ZIP Code Person's relationship to you ______			______

18. **Within 10 years before you filed for bankruptcy, did you transfer any property to a self-settled trust or similar device of which you are a beneficiary?** (These are often called *asset-protection devices.*)

❑ No
❑ Yes. Fill in the details.

	Description and value of the property transferred	Date transfer was made
Name of trust ______ ______		______

Part 8: List Certain Financial Accounts, Safety Deposit Boxes, and Storage Units

19. **Within 1 year before you filed for bankruptcy, were any financial accounts or instruments held in your name, or for your benefit, closed, sold, moved, or transferred?**
Include checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, pension funds, cooperatives, associations, and other financial institutions.

- ☐ No
- ☐ Yes. Fill in the details.

	Last 4 digits of account number	Type of account	Date account was closed, sold, moved, or transferred	Last balance before closing or transfer
______________________ Name of Financial Institution ______________________ Number Street ______________________ ______________________ City State ZIP Code	XXXX–___ ___ ___ ___	☐ Checking ☐ Savings ☐ Money market ☐ Brokerage ☐ Other_________	_________	$__________
______________________ Name of Financial Institution ______________________ Number Street ______________________ ______________________ City State ZIP Code	XXXX–___ ___ ___ ___	☐ Checking ☐ Savings ☐ Money market ☐ Brokerage ☐ Other_________	_________	$__________

20. **Do you now have, or did you have within 1 year before you filed for bankruptcy, any safe deposit box or other depository for securities, cash, or other valuables?**

- ☐ No
- ☐ Yes. Fill in the details.

	Who else had access to it?	Describe the contents	Do you still have it?
______________________ Name of Financial Institution ______________________ Number Street ______________________ ______________________ City State ZIP Code	______________________ Name ______________________ Number Street ______________________ City State ZIP Code		☐ No ☐ Yes

21. **Do you store property in a storage unit, or have you stored property in a storage unit within 1 year before you filed for bankruptcy?**
Do not include storage units that are part of the building in which you live.

- ☐ No
- ☐ Yes. Fill in the details.

	Who else has or had access to it?	Describe the contents	Do you still have it?
______________________ Name of Storage Facility ______________________ Number Street ______________________ ______________________ City State ZIP Code	______________________ Name ______________________ Number Street ______________________ City State ZIP Code		☐ No ☐ Yes

Part 9: Identify Property You Hold or Control for Someone Else

22. **Do you hold or control any property that someone else owns?** Include any property you borrowed from, are storing for, or hold in trust for someone.

❑ No
❑ Yes. Fill in the details.

	Where is the property?	Describe the property	Value
Owner's Name Number Street City State ZIP Code	Number Street City State ZIP Code		$__________

Part 10: Give Details About Environmental Information

For the purpose of Part 10, the following definitions apply:

- *Environmental law* means any federal, state, or local statute or regulation concerning pollution, contamination, releases of hazardous or toxic substances, wastes, or material into the air, land, soil, surface water, groundwater, or other medium, including statutes or regulations controlling the cleanup of these substances, wastes, or material.
- *Site* means any location, facility, or property as defined under any environmental law, whether you now own, operate, or utilize it or used to own, operate, or utilize it, including disposal sites.
- *Hazardous material* means anything an environmental law defines as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, contaminant, or similar term.

Report all notices, releases, and proceedings that you know about, regardless of when they occurred.

23. **Has any governmental unit notified you that you may be liable or potentially liable under or in violation of an environmental law?**

❑ No
❑ Yes. Fill in the details.

	Governmental unit	Environmental law, if you know it	Date of notice
Name of site Number Street City State ZIP Code	Governmental unit Number Street City State ZIP Code		__________

24. **Have you notified any governmental unit of any release of hazardous material?**

❑ No
❑ Yes. Fill in the details.

	Governmental unit	Environmental law, if you know it	Date of notice
Name of site Number Street City State ZIP Code	Governmental unit Number Street City State ZIP Code		__________

Debtor 1 ______________________________ Case number (*if known*)______________________
First Name Middle Name Last Name

25. **Have you been a party in any judicial or administrative proceeding under any environmental law?** Include settlements and orders.

- ❑ No
- ❑ Yes. Fill in the details.

	Court or agency	Nature of the case	Status of the case
Case title______________________ ______________________ ______________________ Case number	______________________ Court Name ______________________ Number Street ______________________ City State ZIP Code		❑ Pending ❑ On appeal ❑ Concluded

Part 11: Give Details About Your Business or Connections to Any Business

26. **Within 4 years before you filed for bankruptcy, did you own a business or have any of the following connections to any business?**

- ❑ A sole proprietor or self-employed in a trade, profession, or other activity, either full-time or part-time
- ❑ Member of a limited liability company (LLC) or limited liability partnership (LLP)
- ❑ A partner in a partnership
- ❑ An officer, director, or managing executive of a corporation
- ❑ Owner of at least 5% of the voting or equity securities of a corporation

- ❑ No. None of the above applies. Go to Part 12.
- ❑ Yes. Check all that apply above and fill in the details below for each business.

	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
______________________ Business Name ______________________ Number Street		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
	Name of accountant or bookkeeper	**Dates business existed**
______________________ ______________________ City State ZIP Code		From _______ To _______

	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
______________________ Business Name ______________________ Number Street		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
	Name of accountant or bookkeeper	**Dates business existed**
______________________ ______________________ City State ZIP Code		From _______ To _______

	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
______________________ Business Name ______________________ Number Street		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
	Name of accountant or bookkeeper	**Dates business existed**
______________________ ______________________ City State ZIP Code		From _______ To _______

27. **Within 2 years before you filed for bankruptcy, did you give a financial statement to anyone about your business?** Include all financial institutions, creditors, or other parties.

❑ No
❑ Yes. Fill in the details below.

	Date issued
____________________ Name	________ MM / DD / YYYY
____________________ Number Street	
____________________	
____________________ City State ZIP Code	

Part 12: Sign Below

I declare under penalty of perjury that I have read the answers on this *Statement of Financial Affairs* and any attachments and that the answers are true and correct.

✘ ______________________________ ✘ ______________________________
Signature of Debtor 1 Signature of Debtor 2

Date ______________ Date ______________

Did you attach additional pages to ***Your Statement of Financial Affairs for Individuals Filing for Bankruptcy*** **(Official Form 107)?**

❑ No
❑ Yes

COMMITTEE NOTE

Official Form 107*, Statement of Financial Affairs for Individuals Filing for Bankruptcy*, which applies only in cases of individual debtors, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. In addition, the form is renumbered to distinguish it from the version to be used in non-individual cases, and stylistic changes were made throughout the form.

The form is derived from former Official Form 7*, Statement of Financial Affairs*. The new form uses eleven sections likely to be more understandable to non-lawyers, groups questions of a similar nature together, and eliminates questions unrelated to individual debtors. The new form deletes the instruction, previously found in many questions, that married debtors filing under chapter 12 or chapter 13 must include information applicable to their spouse, even if their spouse is not filing with them, unless the spouses are separated. This change was made because a non-filing spouse's general financial affairs are not relevant to the debtor's bankruptcy case.

Part 1, *Give Details About Where You Lived Before*, moves the questions regarding the debtor's prior addresses, as well as residences in a community property state, to the beginning of the form. The form eliminates the "name used" question in reference to prior addresses. Also, the debtor is no longer required to list the name of a spouse or former spouse who lived with the debtor in a community property state since that information will be provided in Official Form 106F.

Part 2, *Explain the Sources of Your Income*, consolidates the questions regarding income, adding "wages, commissions, bonuses, tips" as a category for sources of income, and it

eliminates the option to report income on a fiscal year basis. In addition, the form provides examples of types of "other income." The time period is clarified to indicate that the prior two years means two calendar years, plus the portion of the calendar year in which the bankruptcy is filed.

Part 3, *List Certain Payments You Made Before You Filed for Bankruptcy*, includes questions related to payments made in the 90 days prior to bankruptcy, with a separate question for payments made to insiders within one year before filing for bankruptcy. The statutory definition of consumer debt is provided. The question regarding the nature of the debtor's debts requires the debtor to use checkboxes to indicate whether or not they are primarily consumer debts. The form instructs debtors not to include payments for domestic support obligations in the section regarding insider payments. The form provides a separate question regarding payments or transfers on account of a debt that benefited an insider. For both questions regarding payments to insiders, the debtor is required to provide a reason for the payment. Partnerships of which the debtor is a general partner have been added to the examples of "insiders."

Part 4, *Identify Legal Actions, Repossessions, and Foreclosures*, consolidates questions regarding actions against the debtor's property. The form provides examples of types of legal actions, and requires the debtor to indicate the status of any action. The form adds the requirements that a debtor include any property levied on within a year of filing for bankruptcy and that the debtor provide the last four digits of any account number for any setoffs. Also, a debtor must list any assignment for the benefit of creditors made within one year of filing for bankruptcy.

Part 5, *List Certain Gifts and Contributions*, changes the reporting threshold to $600 per person or charity and increases the look-back period from one to two years.

Part 6, *List Certain Losses*, clarifies how to report insurance coverage for losses. It provides that the debtor must include on this form amounts of insurance that have been paid, but must list pending insurance claims on Official Form 106A/B.

Part 7, *List Certain Payments or Transfers*, includes questions regarding payments or transfers of property by the debtor. The question regarding payments or transfers to anyone who was consulted about seeking bankruptcy or preparing a bankruptcy petition requires the email or website address of the person who was paid, as well as the name of the person who made the payment if it was not the debtor. There is a separate question asked about payments or transfers to anyone who promised to help the debtor deal with creditors or make payments to creditors, reminding the debtor not to include any payments or transfers already listed. Also, the debtor must list any transfers of property, outright or for security purposes, made within two years of filing for bankruptcy, unless the transfer was made in the ordinary course of the debtor's business. There is a reminder not to list gifts or other transfers already included elsewhere on the form. The question regarding self-settled trusts adds an explanation that such trusts are often referred to as asset-protection devices.

Part 8, *List Certain Financial Accounts, Safety Deposit Boxes, and Storage Units*, adds money market accounts to the examples provided for the question regarding financial accounts or instruments and removes "other instruments" from the examples. Also, the form adds a question about whether the debtor has or had property stored in a storage unit within one year of filing for bankruptcy. The debtor must provide the name and address of the storage facility and anyone who has or had access to the unit, as well as a description of the contents and whether the debtor still has access to the storage unit. Storage units that are part of the building in which the debtor resides are excluded.

Part 9, *Identify Property You Hold or Control for Someone Else*, instructs that the debtor should include any property that the debtor borrowed from, is storing for, or is holding in trust for someone.

Part 10, *Give Details About Environmental Information*, requires the debtor to list the case title and nature of the case for any judicial or administrative proceeding under any environmental law and to indicate the status of the case.

Part 11, *Give Details About Your Business or Connections to Any Business*, eliminates instructions that apply only to corporations and partnerships. The debtor must indicate if, within four years (previously six years) before filing for bankruptcy, the debtor owned a business or had certain connections to a business, with five categories of businesses provided as checkboxes. If the debtor has a connection to a business, the debtor must list the name, address, nature, and Employer Identification number of the business, the dates the business existed, and the name of an accountant or bookkeeper for the business. Accounting information requested is truncated; the debtor is simply required to provide the name of the business bookkeeper or accountant.

Part 12, *Sign Below*, eliminates the signature boxes for a partnership or corporation and a non-attorney bankruptcy petition preparer. Also, the debtor is asked to indicate through checkboxes whether additional pages are attached to the form.

"Missing" Forms Modernization Project (FMP) Forms for Individuals

Nine FMP Official Bankruptcy Forms are not included in this publication package because they have already been published for public comment under the current two-digit forms numbering scheme. The forms will be updated with their projected three-digit number designations listed below when this publication package is approved for implementation.

Projected three digit form number	Form Title	Two digit form number and publication year(s)
103A	Application for Individuals to Pay the Filing Fee in Installments	3A (2012)
103B	Application to Have the Chapter 7 Filing Fee Waived	3B (2012)
106I	Schedule I: Your Income	6I (2012)
106J	Schedule J: Your Expenses	6J (2012)
108-1	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation	22A-1 (2012 and 2013)
108-1Supp	Statement of Exemption from Presumption of Abuse Under § 707(b)(2)	22A-1Supp (2013)
108-2	Chapter 7 Means Test Calculation	22A-2 (2012 and 2013)
109	Chapter 11 Statement of Your Current Monthly Income	22B (2012 and 2013)
110-2	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period	22C-1 (2012 and 2013)
110-2	Chapter 13 Calculation of Your Disposable Income	22C-2 (2012 and 2013)

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 112

Statement of Intention for Individuals Filing Under Chapter 7

12/15

If you are an individual filing under Chapter 7 and creditors have claims secured by your property or you have leased personal property and the lease has not expired, you must fill out this form. You must file this form with the court within 30 days after you file your bankruptcy petition or by the date set for the meeting of creditors, whichever is earlier, unless the court extends the time for cause. You must also deliver copies to the creditors and lessors you list on the form.

If two married people are filing together in a joint case, both are equally responsible for supplying correct information. Both debtors must sign and date the 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).

Part 1: List Your Creditors Who Hold Secured Claims

1. **For any creditors that you listed in Part 1 of *Schedule D*, fill in the information below.**

Identify the creditor and the property that is collateral	What do you intend to do with the property that secures a debt?	Did you claim the property as exempt on Schedule C?
Creditor's name: ____________ Description of property securing debt:	❑ Give the property to the creditor. ❑ Keep the property. *Check one*: ❑ I will redeem the property. ❑ I will sign a *Reaffirmation Agreement*. ❑ Other. Explain: ____________________ ________________________________	❑ No ❑ Yes
Creditor's name: ____________ Description of property securing debt:	❑ Give the property to the creditor. ❑ Keep the property. *Check one*: ❑ I will redeem the property. ❑ I will sign a *Reaffirmation Agreement*. ❑ Other. Explain: ____________________ ________________________________	❑ No ❑ Yes
Creditor's name: ____________ Description of property securing debt:	❑ Give the property to the creditor. ❑ Keep the property. *Check one*: ❑ I will redeem the property. ❑ I will sign a *Reaffirmation Agreement*. ❑ Other. Explain: ____________________ ________________________________	❑ No ❑ Yes
Creditor's name: ____________ Description of property securing debt:	❑ Give the property to the creditor. ❑ Keep the property. *Check one*: ❑ I will redeem the property. ❑ I will sign a *Reaffirmation Agreement*. ❑ Other. Explain: ____________________ ________________________________	❑ No ❑ Yes

Your name ____ Case number (*If known*)______________________________
First Name Middle Name Last Name

Part 2: List Your Unexpired Personal Property Leases

For any unexpired personal property lease that you listed in *Schedule G*, fill in the information below. *Unexpired leases* are leases that are still in effect; the lease period has not yet ended. You may assume an unexpired personal property lease if the trustee does not assume it. 11 U.S.C. § 365(p)(2).

Describe your unexpired personal property leases	Will the lease be assumed?
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes

Part 3: Sign Below

Under penalty of perjury, I declare that I have indicated my intention about any property of my estate that secures a debt and any personal property that is subject to an unexpired lease.

✘ ______________________________ ✘ ______________________________
Signature of Debtor 1 Signature of Debtor 2

Date __________________ Date __________________
MM / DD / YYYY MM / DD / YYYY

COMMITTEE NOTE

Official Form 112*, Statement of Intention for Individuals Filing Under Chapter* 7, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes are made throughout the form.

The form is derived from former Official Form 8, *Chapter 7 Individual Debtor's Statement of Intention*. The new form uses language likely to be understandable to non-lawyers. In addition, the instructions are more extensive, advising an individual Chapter 7 debtor that the form must be completed and filed within 30 days and that the debtor must deliver copies of the form to creditors and lessors listed on the form.

Part 1, *Your Creditors Who Hold Secured Claims*, refers to signing a "Reaffirmation Agreement" rather than asking whether the debtor intends to "reaffirm the debt." In addition, the debtor is asked if the property is claimed as exempt on Schedule C (Official Form 106C).

Part 2, *List Your Unexpired Personal Property Leases*, defines unexpired leases and explains that a debtor may assume an unexpired personal property lease if the trustee does not assume it.

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 ____ Chapter ____________
(If known)

Draft May 3, 2013

Official Form 119

Bankruptcy Petition Preparer's Notice, Declaration, and Signature

12/15

Bankruptcy petition preparers as defined in 11 U.S.C. § 110 must fill out this form every time they help prepare documents that are filed in the case. If more than one bankruptcy petition preparer helps with the documents, each must sign in Part 3. A bankruptcy petition preparer who does not comply with the provisions of title 11 of the United States Code and the Federal Rules of Bankruptcy Procedure may be fined and imprisoned. 11 U.S.C. § 110; 18 U.S.C. § 156.

Part 1: Notice to Debtor

Bankruptcy petition preparers must give the debtor a copy of this form and have the debtor sign it before they prepare any documents for filing or accept any compensation. A signed copy of this form must be filed with any document prepared.

Bankruptcy petition preparers are not attorneys and may not practice law or give you legal advice, including the following:

whether to file a petition under the Bankruptcy Code (11 U.S.C. § 101 et seq.);

whether filing a case under Chapter 7, 11, 12, or 13 is appropriate;

whether your debts will be eliminated or discharged in a case under the Bankruptcy Code;

whether you will be able to keep your home, car, or other property after filing a case under the Bankruptcy Code;

what tax consequences may arise because a case is filed under the Bankruptcy Code;

whether any tax claims may be discharged;

whether you may or should promise to repay debts to a creditor or enter into a reaffirmation agreement;

how to characterize the nature of your interests in property or your debts; or

what procedures and rights apply in a bankruptcy case.

The bankruptcy petition preparer ____ **has notified me of**
Name

any maximum allowable fee before preparing any document for filing or accepting any fee.

____ Date ________________
Signature of Debtor 1 acknowledging receipt of this notice MM / DD / YYYY

____ Date ________________
Signature of Debtor 2, acknowledging receipt of this notice MM / DD / YYYY

Debtor 1 ____ Case number (*if known*)________________________
First Name Middle Name Last Name

Part 2: Declaration of the Bankruptcy Petition Preparer

Under penalty of perjury, I declare that:

I am a bankruptcy petition preparer or the officer, principal, responsible person, or partner of a bankruptcy petition preparer;

I or my firm prepared the documents listed below and gave the debtor a copy of them and the *Notice to Debtor by Bankruptcy Petition Preparer* as required by 11 U.S.C. §§ 110(b), 110(h), and 342(b); and

if rules or guidelines are established according to 11 U.S.C. § 110(h) setting a maximum fee for services that bankruptcy petition preparers may charge, I or my firm notified the debtor of the maximum amount before preparing any document for filing or before accepting any fee from the debtor.

______________________________ ____________________ ____
Printed name Title, if any Firm name, if it applies

____
Number Street

______________________________ ________ ____________ ________________________
City State ZIP Code Contact phone

I or my firm prepared the documents listed below:

- ❑ Voluntary Petition (Form 101)
- ❑ Statement About Your Social Security Numbers (Form 121)
- ❑ Your Assets and Liabilities and Certain Statistical Information (Form 106Sum)
- ❑ Schedule A/B (Form 106A/B)
- ❑ Schedule C (Form 106C)
- ❑ Schedule D (Form 106D)
- ❑ Schedule E/F (Form 106E/F)
- ❑ Schedule G (Form 106G)
- ❑ Schedule H (Form 106H)
- ❑ Schedule I (Form 106I)
- ❑ Schedule J (Form 106J)
- ❑ Declaration About an Individual Debtor's Schedules (Form 106Dec)
- ❑ Statement of Financial Affairs (Form 107)
- ❑ Statement of Intention for Individuals Filing Under Chapter 7 (Form 112)
- ❑ Chapter 7 Statement of Your Current Monthly Income (Form 108-1)
- ❑ Statement of Exemption from Presumption of Abuse Under § 707(b)(2) (Form 108-1Supp)
- ❑ Chapter 7 Means Test Calculation (Form 108-2)
- ❑ Chapter 11 Statement of Your Current Monthly Income (Form 109)
- ❑ Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period (Form 110-1)
- ❑ Chapter 13 Calculation of Your Disposable Income (Form 110-2)
- ❑ Application to Pay Filing Fee in Installments (Form 103A)
- ❑ Application to Have Chapter 7 Filing Fee Waived (Form 103B)
- ❑ A list of names and addresses of all creditors (*creditor or mailing matrix*)
- ❑ Other ___________________________

Part 3: Sign Below

Bankruptcy petition preparers must sign and give their Social Security numbers. If more than one bankruptcy petition preparer prepared the documents to which this declaration applies, the signature and Social Security number of each preparer must be provided. 11 U.S.C. § 110.

____ ___ ___ ___ -- ___ ___ -- ___ ___ ___ ___ Date ____________
Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner Social Security number of person who signed MM / DD / YYYY

____
Printed name

____ ___ ___ ___ -- ___ ___ -- ___ ___ ___ ___ Date ____________
Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner Social Security number of person who signed MM / DD / YYYY

____
Printed name

COMMITTEE NOTE

Official Form 119*, Bankruptcy Petition Preparer's Notice, Declaration, and Signature*, applies only in cases of individual debtors. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes are made throughout the form.

The form is derived from former Official Form 19*, Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer*. An instruction is added to the form that provides statutory citations. Filers are advised that if more than one bankruptcy petition preparer helped with the documents, each must sign the form.

Part 1, *Notice to Debtor*, is moved to the beginning of the form and revised. An instruction is added that bankruptcy petition preparers must give the debtor a copy of the form and have the debtor sign it before they prepare any documents for filing or accept compensation, and that the form must be filed with any document prepared. It warns the debtor that bankruptcy petition preparers are not attorneys and may not practice law or give legal advice, with a list of examples of advice that may not be provided by a bankruptcy petition preparer. The signature line of this part includes a statement that the debtor acknowledges receipt of the notice.

Part 2, *Declaration of the Bankruptcy Petition Preparer*, revises the declaration by the bankruptcy petition preparer to include an officer, principal, responsible person, or partner of a bankruptcy petition preparer. The bankruptcy petition preparer must provide a firm name, if applicable, as well as a contact phone, and must indicate which documents the bankruptcy petition preparer prepared from a list of documents. An "other" option is provided for any additional documents.

Part 3, *Sign Below*, provides spaces for the bankruptcy petition preparer to enter a social security number, and it adds language regarding an officer, principal, responsible person, or partner of the bankruptcy petition preparer on the signature line.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

____________________ District of ________________
State

Case number (*If known*): ________________________

Draft May 3, 2013

Official Form 121

Statement About Your Social Security Numbers

12/15

Use this form to tell the court about any Social Security or federal Individual Taxpayer Identification numbers you have used. 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.

To protect your privacy, the court will not make this form available to the public. You should not include a full Social Security Number or Individual Taxpayer Number on any other document filed with the court. The court will make only the last four digits of your numbers known to the public. However, the full numbers will be available to your creditors, the U.S. Trustee or bankruptcy administrator, and the trustee assigned to your case. To help creditors correctly identify a case, full Social Security Numbers may appear on an electronic version of some notices. Please consult local court procedures for submission requirements.

If you do not tell the truth on this form, you may be fined up to $250,000, you may be imprisoned for up to 5 years, or both.

Part 1: Tell the Court About Yourself and Your spouse if Your Spouse is Filing With You

	For Debtor 1:	For Debtor 2 (Only If Spouse Is Filing):
1. Your name	______________________ First name	______________________ First name
	______________________ Middle name	______________________ Middle name
	______________________ Last name	______________________ Last name

Part 2: Tell the Court About all of Your Social Security or Federal Individual Taxpayer Identification Numbers

	For Debtor 1	For Debtor 2
2. All Social Security Numbers you have used	__ __ __ – __ __ – __ __ __ __	__ __ __ – __ __ – __ __ __ __
	__ __ __ – __ __ – __ __ __ __	__ __ __ – __ __ – __ __ __ __
	❑ You do not have a Social Security number.	❑ You do not have a Social Security number.
3. All federal Individual Taxpayer Identification Numbers (ITIN) you have used	9 __ __ – __ __ – __ __ __ __	9 __ __ – __ __ – __ __ __ __
	9 __ __ – __ __ – __ __ __ __	9 __ __ – __ __ – __ __ __ __
	❑ You do not have an ITIN.	❑ You do not have an ITIN.

Part 3: Sign Below

Debtor 1	Debtor 2
Under penalty of perjury, I declare that the information I have provided in this form is true and correct.	Under penalty of perjury, I declare that the information I have provided in this form is true and correct.
✘ ______________________ Signature of Debtor 1	✘ ______________________ Signature of Debtor 2
Date ________________ MM / DD / YYYY	Date ________________ MM / DD / YYYY

COMMITTEE NOTE

Official Form 121, *Statement About Your Social Security Numbers*, is revised as part of the Forms Modernization Project. The form, which applies only in cases of individual debtors, replaces former Official Form 21, *Statement of Social Security Number(s)*. It is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations and partnerships.

To make Form 121 easier to understand and complete, the form is divided into three sections, and directions on the form are simplified. The debtors' Employer Tax-Identification number (EIN) is eliminated from the form, and the debtor's name is moved from the caption to the body of the form.

Information to identify the case:

Debtor 1 ______________________________ (First Name, Middle Name, Last Name)

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

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

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

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

Case number: ______________________________

Order of Discharge

IT IS ORDERED: A discharge under 11 U.S.C. § 727 is granted to:

____________________ [____________________]

______________ MM / DD / YYYY

By the court: ______________________________ United States Bankruptcy Judge

Notice to the creditors:

This order means that no one may make any attempt to collect a discharged debt from the debtors personally. For example, creditors cannot sue, garnish wages, assert a deficiency, or otherwise try to collect from the debtors personally on discharged debts. Creditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the debt personally. Creditors who violate this order can be required to pay debtors damages and attorney's fees.

However, a creditor with a lien may enforce a claim against the debtors' property subject to that lien.

This order does not prevent debtors from paying any debt voluntarily or from paying reaffirmed debts according to the reaffirmation agreement. 11 U.S.C. § 524(c), (f).

This order does not close or dismiss the case, and it does not determine how much money, if any, the trustee will pay creditors.

Notice to the debtor:

This court order grants you (the debtor) a discharge. Most debts are covered by the discharge, but not all. Generally a discharge removes your personal liability for debts that you owed before you filed your bankruptcy case.

Also, if this case began under a different chapter of the Bankruptcy Code and was later converted to chapter 7, debts that existed before the conversion are discharged.

This order does not close or dismiss the case, and it does not determine how much money, if any, the trustee will pay creditors.

In a case involving community property: Special rules protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.

For more information, see page 2 ►

Creditors cannot collect discharged debts from you

This order means that no one can make any attempt to collect from you personally a debt that has been discharged. For example, creditors cannot sue you, garnish your wages, assert a deficiency claim against you, or otherwise try to collect from you personally on discharged debts. They cannot contact you by mail, phone, or otherwise in any attempt to collect the debt as your personal liability.

A creditor who violates this order can be required to pay you damages and attorney's fees.

However, you may voluntarily pay any debt that has been discharged.

But creditors might collect for some debts

This discharge does not stop creditors from collecting debts that you reaffirmed or from any property in which they have a valid lien.

Debts covered by a valid reaffirmation agreement are not discharged. When you signed a reaffirmation agreement, you chose to give up your discharge for that particular debt.

In addition, the creditor may have a right to enforce a lien against your property unless the lien was avoided or eliminated. For example, the creditor may have the right to foreclose a home mortgage or repossess an automobile.

Also, this discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as your insurance company or a relative who cosigned or guaranteed a loan.

Some debts are not discharged

Examples of some debts that are not discharged are:

debts that are domestic support obligations;

debts for most student loans;

debts for most taxes;

debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case;

debts for most fines, penalties, forfeitures, or criminal restitution obligations;

some debts which you did not properly list;

debts for certain types of loans owed to pension, profit sharing, stock bonus, or retirement plans; and

debts for death or personal injury caused by your operating a vehicle while intoxicated.

This information is only a general summary of the bankruptcy discharge; some exceptions exist. Because the law is complicated, you should consult an attorney to determine the exact effect of this discharge.

COMMITTEE NOTE

Official Form 318, *Order of Discharge*, is revised and renumbered as part of the Forms Modernization Project. The form is used to issue a discharge in chapter 7 cases filed by individuals or joint debtors. It replaces former Official Form 18, *Discharge of Debtor*, Director's Procedural Form 18J, *Discharge of Joint Debtors*, and Director's Procedural Form 18JO, *Discharge of One Joint Debtor*.

To make the discharge order and the explanation of it easier to read and understand, legal terms are explained more fully or replaced with commonly understood terms, and the form is reformatted.

Reaffirmed debts are explained more fully, and debtors are informed that a discharge will not stop creditors from collecting debts from any property in which they have a valid lien. In addition, debtors are advised that the discharge does not stop creditors from collecting from anyone else who is liable on the debt, such as a cosigner on the loan or an insurance company.

Director's Procedural Forms 18J and 18JO are no longer needed because Form 318 specifies the names of the debtors, or debtor, to whom the discharge is issued.

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)

Draft April 19, 2013

Official Form 423

Certification About a Financial Management Course

12/15

If you are an individual and you filed for bankruptcy under chapter 7 or 13, or under chapter 11 and § 1141 (d)(3) applies, you must take an approved course about personal financial management. In a joint case, each debtor must take the course. 11 U.S.C. §§ 727(a)(11) and 1328(g).

After you finish the course, the provider will give you a certificate. The provider may notify the court that you have completed the course. If the provider does not do so, then Debtor 1 and Debtor 2 must each file this form with the certificate number before your debts will be discharged.

If you filed under chapter 7 and you need to file this form, file it within 60 days after the first date set for the meeting of creditors under § 341 of the Bankruptcy Code.

If you filed under chapter 11 or 13 and you need to file this form, file it before you make the last payment that your plan requires or before you file a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Bankruptcy Code. Fed. R. Bankr. P. 1007(c).

In some cases, the court can waive the requirement to take the financial management course. To have the requirement waived, you must file a motion with the court and obtain a court order.

Part 1: Tell the Court About the Required Course

You must check one:

☐ **I completed an approved course in personal financial management:**

Date I took the course ________________
MM / DD / YYYY

Name of approved provider ____

Certificate number ____

☐ **I am not required to complete a course in personal financial management because the court has granted my motion for a waiver of the requirement based on** *(check one)***:**

☐ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

☐ **Disability.** My physical disability causes me to be unable to complete a course in personal financial management in person, by phone, or through the internet, even after I reasonably tried to do so.

☐ **Active duty.** I am currently on active military duty in a military combat zone.

☐ **Residence.** I live in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses cannot adequately meet my needs.

Part 2: Sign Here

I certify that the information I have provided is true and correct.

______________________________ ______________________________ Date ______________
Signature of debtor named on certificate Printed name of debtor MM / DD / YYYY

COMMITTEE NOTE

Official Form 423, *Certification About a Financial Management Course*, is revised as part of the Forms Modernization Project. The form replaces former Official Form 23, *Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management*. Form 423 is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations and partnerships.

To make Form 423 easier to understand, legal terms are explained more fully or replaced with commonly understood terms, and the form is reformatted. Part 1, *Tell the Court About the Required Course*, provides definitions for "incapacity" and "disability," rather than providing statutory citations.

A statement is added that, in some cases, the court can waive the requirement to complete the financial management course. To have the requirement waived, the debtor must file a motion with the court and obtain a court order.

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)

Draft May 3, 2013

Official Form 427

Cover Sheet for Reaffirmation Agreement

12/15

Anyone who is a party to a reaffirmation agreement may fill out and file this form. Fill it out completely, attach it to the reaffirmation agreement, and file the documents within the time set under Bankruptcy Rule 4008.

Part 1: Explain the Repayment Terms of the Reaffirmation Agreement

1. **Who is the creditor?**

   ____
   Name of the creditor

2. **How much is the debt?**

   On the date that the bankruptcy case was filed $________

   To be paid under the reaffirmation agreement $________

   $________ per month for ____ months (if fixed interest rate)

3. **What is the annual percentage rate (APR) of interest?**

   Before the bankruptcy case was filed ________%

   Under the reaffirmation agreement ________% ❑ Fixed rate ❑ Adjustable rate

4. **Does collateral secure the debt?**

   ❑ No
   ❑ Yes. Describe the collateral. ______________________________

   Current market value $________

5. **Does the creditor assert that the debt is nondischargeable?**

   ❑ No
   ❑ Yes. Attach an explanation of the nature of the debt and the basis for contending that the debt is nondischargeable.

6. **Using information from *Schedule I: Your Income*** (Official Form 106I) **and *Schedule J: Your Expenses*** (Official Form 106J)**, fill in the amounts.**

Income and expenses reported on Schedules I and J		Income and expenses stated on the reaffirmation agreement	
6a. Combined monthly income from line 12 of Schedule I	$ ________	6e. Monthly income from all sources after payroll deductions	$ ________
6b. Monthly expenses from line 22 of Schedule J	– $ ________	6f. Monthly expenses	– $ ________
6c. Monthly payments on all reaffirmed debts not listed on Schedule J	– $ ________	6g. Monthly payments on all reaffirmed debts not included in monthly expenses	– $ ________
6d. **Scheduled net monthly income** Subtract lines 6b and 6c from 6a. If the total is less than 0, put the number in brackets.	$ ________	6h. **Present net monthly income** Subtract lines 6f and 6g from 6e. If the total is less than 0, put the number in brackets.	$ ________

7. **Are the income amounts on lines 6a and 6e different?**
   - ❑ No
   - ❑ Yes. Explain why they are different, and complete line 10.______________________

8. **Are the expense amounts on lines 6b and 6f different?**
   - ❑ No
   - ❑ Yes. Explain why they are different, and complete line 10.______________________

9. **Is the net monthly income on line 6h less than 0?**
   - ❑ No
   - ❑ Yes. A presumption of hardship arises (unless the creditor is a credit union).
     Explain how the debtor will make monthly payments on the reaffirmed debt and pay other living expenses.
     Complete line 10.

10. **Debtor's certification about lines 7-9**

    If any answer on lines 7-9 is *Yes*, the debtor must sign here.

    If all the answers on lines 7-9 are *No*, go to line 11.

    I certify that each explanation on lines 7-9 is true and correct.

    ✘ ______________________ Signature of Debtor 1

    ✘ ______________________ Signature of Debtor 2 (Spouse Only in a Joint Case)

11. **Did counsel represent the debtor in negotiating the reaffirmation agreement?**
    - ❑ No
    - ❑ Yes. Has counsel executed a declaration or an affidavit to support the reaffirmation agreement?
      - ❑ No
      - ❑ Yes

Part 2: Sign Below

Whoever fills out this form must sign here.

I certify that the attached agreement is a true and correct copy of the reaffirmation agreement between the parties identified on this *Cover Sheet for Reaffirmation Agreement*.

✘ ______________________ Date ____________
Signature MM / DD / YYYY

____
Printed Name

Check one:

- ❑ Debtor or Debtor's Attorney
- ❑ Creditor or Creditor's Attorney

COMMITTEE NOTE

Official Form 427, *Cover Sheet for Reaffirmation Agreement*, is revised and renumbered as part of the Forms Modernization Project. The form replaces former Official Form 27, *Reaffirmation Agreement Cover Sheet*. To make it easier to understand, the form is reformatted, and legal terms are explained more fully or replaced with commonly understood terms.

The calculation of the debtor's net monthly income is expanded to include the debtor's net monthly income at the time the bankruptcy petition is filed, as well as the debtor's net monthly income at the time of the reaffirmation agreement. Rather than requiring filers to state their relationship to the case, checkboxes are provided for the debtor or the debtor's attorney and for the creditor or the creditor's attorney.

Instructions

Bankruptcy Forms for Individuals

U.S. Bankruptcy Court | December 2015

About this Booklet of Instructions 2

About the bankruptcy forms and filing bankruptcy 3
Understand the terms used in the forms 3
Things to remember when filling out these forms 3
On what date was a debt incurred? 4

About the Process for Filing a Bankruptcy Case for Individuals 5

Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy (Form 2010) 9

The types of bankruptcy that are available to individuals 9
Bankruptcy crimes have serious consequences 11
Make sure the court has your mailing address 12
Understand which services you could receive from credit counseling agencies 12

Instructions for Selected Forms 13

Schedule A/B: Property (Official Form 106A/B) 14

Schedule C: The Property You Claim as Exempt (Official Form 106C) 16

Schedule D: Creditors Who Hold Claims Secured by Property (Official Form 106D) 17

Schedule E/F: Creditors Who Have Unsecured Claims (Official Form 106E/F) 20

Schedule G: Executory Contracts and Unexpired Leases (Official Form 106G) 24

Schedule H: Your Codebtors (Official Form 106H) 25

Schedule I: Your Income (Official Form 106I) 26

Schedule J: Your Expenses (Official Form 106J) 28

Summary of Your Assets and Liabilities and Certain Statistical Information (Official Form 106Sum) 29

Statement of Financial Affairs for Individuals Filing for Bankruptcy (Official Form 107) 30

Chapter 7 Statement of Your Current Monthly Income and Means Test Calculation (Official Forms 108-1 and 108-2) 31

Chapter 11 Statement of Your Current Monthly Income (Official Form 109) 32

Chapter 13 Statement of Your Current Monthly Income, Calculation of Commitment Period and Chapter 13 Calculation of Your Disposable Income (Official Forms 110–1 and 110–2) 33

Statement of Intention for Individuals Filing Under Chapter 7 (Official Form 112) 34

Application for Individuals to Pay the Filing Fee in Installments (Official Form 103A) 36

Application to Have the Chapter 7 Filing Fee Waived (Official Form 103B) 37

For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders (Official Form 104) 38

Glossary 40

Definitions Used in the Forms for Individuals Filing for Bankruptcy 41

About this Booklet of Instructions

This booklet provides instructions for completing selected forms that individuals filing for bankruptcy must submit to the U.S. Bankruptcy Court. You can download all of the required forms without charge from:

http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx.

The instructions are designed to accompany the forms and are intended to help you understand what information is required to properly file.

Completing the forms is only a part of the bankruptcy process. You are strongly encouraged to hire a qualified attorney not only to help you complete the forms but also to give you general advice about bankruptcy and to represent you in your bankruptcy case. If you cannot afford to pay an attorney, you might qualify for free legal services if they are provided in your area. Contact your state or local bar association for help in obtaining free legal services or in hiring an attorney. **Note: It is particularly difficult to succeed in a chapter 11, 12, or 13 case without an attorney.**

If an attorney represents you, you must provide information so the attorney can prepare your forms. Once the attorney prepares the forms, you must make sure that the forms are accurate and complete. These instructions may help you perform those tasks. If you are filing for bankruptcy without the help of an attorney, this booklet tells you which forms must be filed and provides information about them.

You should carefully read this booklet and keep it with your records. Review the individual forms as you read the instructions for each.

Although bankruptcy petition preparers can help you type the bankruptcy forms, they cannot file the documents for you and cannot give you legal advice. Court employees cannot give you legal advice either.

Read This Important Warning

Because bankruptcy can have serious long-term financial and legal consequences, including loss of your property, you should hire an attorney and carefully consider all of your options before you file. Only an attorney can give you legal advice about what can happen as a result of filing for bankruptcy and what your options are. If you do file for bankruptcy, an attorney can help you fill out the forms properly and protect you, your family, your home, and your possessions.

Although the law allows you to represent yourself in bankruptcy court, you should understand that many people find it difficult to represent themselves successfully. The rules are technical, and a misstep or inaction may harm you. If you file without an attorney, you are still responsible for knowing and following all of the legal requirements.

You may not file bankruptcy if you are not eligible to file or if you do not intend to file the documents necessary to complete the bankruptcy.

Bankruptcy fraud is a serious crime; you could be fined and imprisoned if you commit fraud in your bankruptcy case. If you deliberately make a false statement, you could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

About the bankruptcy forms and filing bankruptcy

Use the forms that are numbered in the 100 series to file bankruptcy for individuals or married couples. Use the forms that are numbered in the 200 series if you are preparing a bankruptcy on behalf of a non-individual, such as a corporation, partnership, or limited liability company (LLC). Sole proprietors must use the forms that are numbered in the 100 series.

When a bankruptcy is filed, the U.S. Bankruptcy Court opens a case. It is important that the answers to the questions on the forms be complete and accurate so that the case proceeds smoothly. A person filing bankruptcy who gives false information could be charged with a federal crime or could lose all the benefits of filing for bankruptcy.

You should understand that filing a bankruptcy case is not private. Anyone has a right to see your bankruptcy forms after you file them. However, in some circumstances, if a court issues a protective order to keep your address, telephone number, or other information from being disclosed to the public, it may be possible to protect your information under 11 U.S.C. § 107 and Bankruptcy Rule 9037.

Understand the terms used in the forms

The forms for individuals use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car?" the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the 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.

To understand other terms used in the forms and the instructions, see the *Glossary* at the end of this booklet.

Things to remember when filling out these forms

- Do not file these instructions with the bankruptcy forms that you file with the court.
- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to the form. On the top of any additional pages, write your name and case number (if known). Also identify the form and line number to which the additional information applies.
- 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; Bankruptcy Rule 1007(m) and 9037.
- For your records, be sure to keep a copy of your bankruptcy documents and all attachments that you file.

On what date was a debt incurred?

When a debt was incurred on a single date, fill in the actual date that the debt was incurred.

When a debt was incurred on multiple dates, fill in the range of dates. For example, if the debt is from a credit card, fill in the month and year of the first and last transaction, if known.

About the Process for Filing a Bankruptcy Case for Individuals

Before you file your bankruptcy case

Before you file for bankruptcy, you must do several things:

- **Receive a briefing about credit counseling from an approved agency** within 180 days before you file. (If you and your spouse are filing together, each of you must receive a briefing before you file. Failure to do so will almost certainly result in the dismissal of your case.) You may have a briefing about credit counseling one-on-one or in a group, by telephone, or by internet.

  For a list of approved providers, go to: http://www.justice.gov/ust/eo/bapcpa/ccde/cc_approved.htm

  In Alabama and North Carolina, go to: http://www.uscourts.gov.

  After you finish the briefing, you will receive a certificate that you will need to file in your bankruptcy case.

- **Find out in which bankruptcy court you must file your bankruptcy case**. It is important that you file in the correct district within your state. To find out which district you are in, go to: http://www.uscourts.gov/courtlinks

- **Check the court's local website** for any specific local requirements that you might have to meet. Go to: http://www.uscourts.gov/courtlinks

- **Find out which chapters of the Bankruptcy Code you are eligible for**. For descriptions of each chapter, review the information contained in the notice, *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form B2010), which is included in this booklet.

Note: **It is particularly difficult to succeed in a chapter 11, 12, or 13 case without an attorney.**

To file for bankruptcy, you must give the court several forms and documents. Some must be filed at the time you file the case. Others may be filed up to 14 days later.

When you file your bankruptcy case

You must file the forms listed below on the date you open your bankruptcy case. For copies of the forms listed here, go to http://www.uscourts.gov. (The list continues on the next page.):

- ❑ *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). This form opens the case. Directions for filling it out are included in the form itself.
- ❑ *Statement About Your Social Security Numbers* (Official Form 121). This form gives the court your full Social Security number or federal Individual Taxpayer Identification number. To protect your privacy, the court will make only the last four digits of your number known to the general public. However, the court will make your full number available to your creditors, the U.S. trustee or bankruptcy administrator, and the trustee assigned to your case. This form has no separate instructions.
- ❑ Your filing fee. If you cannot pay the entire filing fee, you must also include:
  - ❑ *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 103A), or
  - ❑ *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B). Use this form only if you are filing under chapter 7 and you meet the criteria to have the chapter 7 filing fee waived.
- ❑ A list of names and addresses of all of your creditors, formatted as a mailing list according to instructions from the bankruptcy court in which you file. (Your court may call this a *creditor matrix* or *mailing matrix*.)
- ❑ Your credit counseling certificate from an approved credit counseling agency. (See *Before you file your bankruptcy case*, above). If you have received the briefing about credit counseling but have not yet received the certificate, file it when you receive it. If you have not already received the briefing and believe you are entitled to a temporary waiver from receiving it or that you are not required to receive the briefing, see line 15 of the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Waivers are rare and if you do not qualify for a waiver, your case will be dismissed.
- ❑ *For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders* (Official Form 104). Fill out this form only if you file under chapter 11.
- ❑ *Initial Statement About an Eviction Judgment Against You* (Official Form 101A) and *Statement About Payment of an Eviction Judgment Against You* (Official Form 101B). Use these forms if your landlord has an eviction judgment against you and you want to stay in your residence after you file your forms to open your bankruptcy case.
- ❑ *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119) and *Disclosure of Compensation of Bankruptcy Petition Preparer* (Form 2800). Use these forms if a bankruptcy petition preparer helped you fill out your forms.

When you file your bankruptcy case or within 14 days after you file

You must file the forms listed below either when you file your bankruptcy case or within 14 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). If you do not do so, your case may be dismissed. Although it is possible to open your case by submitting only the documents that are listed under *When you file your bankruptcy case*, you should file the entire set of forms at one time to help your case proceed smoothly.

Although some forms may ask you similar questions, you must fill out all of the forms completely to protect your legal rights.

The list below shows the forms that all individuals must file as well as the forms that are specific to each chapter. For copies of the official forms listed here, go to http://www.uscourts.gov.

All individuals who file for bankruptcy must file these forms and the forms for the specific chapter:

- ❑ *Schedules of Assets and Liabilities* (Official Form 106) which includes these forms:
  - ❑ *Schedule A/B: Property* (Official Form 106A/B)
  - ❑ *Schedule C: The Property You Claim as Exempt* (Official Form 106C)
  - ❑ *Schedule D: Creditors Who Hold Claims Secured by Your Property* (Official Form 106D)
  - ❑ *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F)
  - ❑ *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 106G)
  - ❑ *Schedule H: Your Codebtors* (Official Form 106H)
  - ❑ *Schedule I: Your Income* (Official Form 106I)
  - ❑ *Schedule J: Your Expenses* (Official Form 106J)
  - ❑ *Summary of Your Assets and Liabilities and Certain Statistical Information* (Official Form 106Sum). This form gives an overview of the totals on the schedules
  - ❑ *Declaration About an Individual Debtor's Schedules* (Official Form 106Dec)
- ❑ *Statement of Financial Affairs for Individuals Filing for Bankruptcy* (Official Form 107)
- ❑ *Disclosure of Compensation to Debtor's Attorney* — Unless local rules provide otherwise, Director's Form 2030 may be used.
- ❑ Credit counseling certificate that you received from an approved credit counseling agency
- ❑ Copies of all payment advices (*pay stubs*) or other evidence of payment that you received within 60 days before you filed your bankruptcy case. Some local courts may require that you submit these documents to the trustee assigned to your case rather than filing them with the court. Check the court's local website to find out if local requirements apply. Go to http://www.uscourts.gov/courtlinks.

If you file under chapter 7, you must also file:

- ❑ *Statement of Intention for Individuals Filing Under Chapter 7* (Official Form 112)
- ❑ *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108-1)
- ❑ If necessary, *Chapter 7 Means Test Calculation* (Official Form 108-2).

If you file under chapter 11, you must also file:

- ❑ *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109)

If you file under chapter 11 and are a small business debtor (that is, if you are self-employed and your debts are less than $2,490,925*), within 7 days after you file your bankruptcy forms to open your case, you must also file your most recent:

- ❑ Balance sheet
- ❑ Statement of operations
- ❑ Cash-flow statement
- ❑ Federal income tax return

If you do not have these documents, you must file a statement made under penalty of perjury that you have not prepared either a balance sheet, statement of operations, or cash-flow statement or you have not filed a federal tax return.

If you file under chapter 11, you must also file additional documents.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

If you file under chapter 12, you must also file:

- ❑ Chapter 12 Plan (within 90 days after you file your bankruptcy forms to open your case)

If you file under chapter 13, you must also file:

- ❑ *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110-1)
- ❑ If necessary, *Chapter 13 Calculation of Your Disposable Income* (Official Form 110-2)
- ❑ Chapter 13 Plan (Many bankruptcy courts require you to use a local form plan. Check the court's local website for any specific form that you might have to use. Go to http://www.uscourts.gov/courtlinks.)

Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy (Form 2010)

This notice is for you if:

You are an individual filing for bankruptcy, and

Your debts are 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."

The types of bankruptcy that are available to individuals

Individuals who meet the qualifications may file under one of four different chapters of the Bankruptcy Code:

- Chapter 7 — Liquidation
- Chapter 11 — Reorganization
- Chapter 12 — Voluntary repayment plan for family farmers or fishermen
- Chapter 13 — Voluntary repayment plan for individuals with regular income

You should have an attorney review your decision to file for bankruptcy and the choice of chapter.

Chapter 7: Liquidation

	Amount	Fee
	$245	filing fee
	$46	administrative fee
+	$15	trustee surcharge
	$306	total fee

Chapter 7 is for individuals who have financial difficulty and cannot pay their debts. The primary purpose for a debtor to file under chapter 7 is to have your debts discharged. The bankruptcy discharge relieves you from having to pay any of your pre-bankruptcy debts unless an exception to discharge applies to particular debts.

However, if the court finds that you have committed certain kinds of improper conduct described in the Bankruptcy Code, the court may deny your discharge.

You should know that even if you receive a discharge, some debts are not discharged under the law. Therefore, you may still be responsible to pay:

- most taxes;
- most student loans;
- domestic support and property settlement obligations;
- most fines, penalties, forfeitures, and criminal restitution obligations; and
- certain debts that are not properly listed in your bankruptcy papers.

You may also be required to pay debts arising from:

- fraud or theft;
- breach of fiduciary duty;
- intentional injuries that you inflicted; and
- death or personal injury caused by operating a motor vehicle, vessel, or aircraft while intoxicated from alcohol or drugs.

If your debts are primarily consumer debts, the court can dismiss your chapter 7 case if it finds that you have income to repay creditors a certain amount. You must file *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108–1) 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 that applies in your state.

If your income is not above the median for your state, you will not have to fill out the second form *Chapter 7 Means Test Calculation* (Official Form 108–2).

If your income is above the median for your state, you must file that form. The calculations on the form—sometimes called the *Means Test*—deduct from your income living expenses and payments on certain debts to determine any amount available to pay unsecured creditors. If your income is more than the median income for your state of residence and family size, depending on the results of the *Means Test*, the U.S. trustee, bankruptcy administrator, or creditors can file a motion to dismiss your case under § 707(b) of the Bankruptcy Code. If a motion is filed, the court will decide if your case should be dismissed. To avoid dismissal, you may choose to proceed under another chapter of the Bankruptcy Code.

If you are an individual filing for bankruptcy, the law may allow you to keep some property, or it may entitle you to part of the proceeds if the property is sold after your case is filed. Property that the law permits you to keep is called *exempt property*. For example, exemptions may enable you to keep your home, a car, clothing, and household items.

Exemptions are not automatic. To be considered exempt, you must list the property on *Schedule C: The Property You Claim as Exempt* (Official Form 106C). If you do not list the property, the trustee may sell it and pay all of the proceeds to your creditors.

Chapter 11: Reorganization

	$1,167	filing fee
+	$46	administrative fee
	$1,213	total fee

Chapter 11 is for reorganizing a business but is also available to individuals. The provisions of chapter 11 are too complicated to summarize briefly.

Chapter 12: Repayment plan for family farmers or fishermen

	$200	filing fee
+	$46	administrative fee
	$246	total fee

Similar to chapter 13, chapter 12 permits family farmers and fishermen to repay their debts over a period of time using future earnings.

Chapter 13: Repayment plan for individuals with regular income

	$235	filing fee
+	$46	administrative fee
	$281	total fee

Chapter 13 is for individuals who have regular income and would like to pay all or part of their debts in installments over a period of time. You are only eligible for chapter 13 if your debts are not more than certain dollar amounts set in 11 U.S.C. § 109.

Under chapter 13, you must file with the court a plan to repay your creditors all or part of the money that you owe them, using your future earnings. The court must approve your plan and may allow you to repay your debts within 3 years or 5 years, depending on your income and other factors.

After you make the payments under your plan, your debts are generally discharged. However, you may still be responsible to pay:

- domestic support obligations,
- most student loans,
- certain taxes,
- most criminal fines and restitution obligations,
- certain debts that are not properly listed in your bankruptcy papers,
- certain debts for acts that caused death or personal injury, and
- certain long-term secured obligations.

Bankruptcy crimes have serious consequences

- If you knowingly and fraudulently conceal assets or make a false oath or statement under penalty of perjury—either orally or in writing—in connection with a bankruptcy case, you may be fined, imprisoned, or both.
- All information you supply in connection with a bankruptcy case is subject to examination by the Attorney General acting through the Office of the U.S. Trustee, the Office of the U.S. Attorney, and other offices and employees of the U.S. Department of Justice.

Warning: File Your Forms on Time

Section 521(a)(1) of the Bankruptcy Code requires that you promptly file detailed information about your creditors, assets, liabilities, income, expenses and general financial condition. The court may dismiss your bankruptcy case if you do not file this information within the deadlines set by the Bankruptcy Code, the Bankruptcy Rules, and the local rules of the court.

For more information about the documents and their deadlines, go to: http://www.uscourts.gov/bkforms/bankruptcy_forms.html#procedure.

Make sure the court has your mailing address

The bankruptcy court sends notices to the mailing address you list on *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). To ensure that you receive information about your case, Bankruptcy Rule 4002 requires that you notify the court of any changes in your address.

A married couple may file a bankruptcy case together—called a *joint case*. If you file a joint case and each spouse lists the same mailing address on the bankruptcy petition, the bankruptcy court generally will mail you and your spouse one copy of each notice, unless you file a statement with the court asking that each spouse receive separate copies.

Understand which services you could receive from credit counseling agencies

The law generally requires that you receive a credit counseling briefing from an approved credit counseling agency. 11 U.S.C. § 109(h). With limited exceptions, you must receive it within the 180 days ***before*** you file your bankruptcy petition. This briefing is usually conducted by telephone or on the Internet.

The clerk of the bankruptcy court has a list of approved agencies. If you are filing a joint case, both spouses must receive the briefing.

In addition, after filing a bankruptcy case, you generally must complete a financial management instructional course before you can receive a discharge. The clerk also has a list of approved financial management instructional courses. If you are filing a joint case, both spouses must complete the course.

Read This Warning

Because bankruptcy can have serious long-term financial and legal consequences, including loss of your property, you should hire an attorney and carefully consider all of your options before you file. An attorney can explain to you what can happen as a result of filing for bankruptcy and what your options are. If you do file for bankruptcy, an attorney can help you fill out the forms properly and protect you, your family, your home, and your possessions. Bankruptcy petition preparers can only help you type the forms required; they cannot give you legal advice of any kind.

Although the law allows you to represent yourself in bankruptcy court, you should understand that many people find it extremely difficult to represent themselves successfully. The rules are very technical, and a misstep or inaction may affect your rights. If you file without an attorney, you are still responsible for knowing and following all of the legal requirements.

You may not file bankruptcy if you are not eligible to file or if you do not intend to file the documents necessary to complete the bankruptcy.

Bankruptcy fraud is a serious crime; you could be fined and imprisoned if you commit fraud in your bankruptcy case. If you make a false statement, you could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Instructions for Selected Forms

Schedule A/B: Property (Official Form 106A/B)

Schedule A/B: Property (Official Form 106A/B) lists property interests that are involved in a bankruptcy case. All individuals filing for bankruptcy must honestly list everything they own or have a legal or equitable interest in. *Legal or equitable interest* is a broad term and includes all kinds of property interests in both tangible and intangible property, whether or not anyone else has an interest in that property.

The information in this form is grouped by category and includes several examples for many items. Note that those examples are meant to give you an idea of what to include in the categories. They are not intended to be complete lists of everything within that category. Make sure you list everything you own or have an interest in.

You must verify under penalty of perjury that the information you provide is complete and accurate. If you fail to list any property, you may lose the property, lose your bankruptcy discharge, be fined up to $250,000, and be imprisoned for up to 5 years. 11 U.S.C. §§ 554, 727; 18 U.S.C. §§ 152, 157, 3559, 3571, and 3581.

Understand the terms used in this form

Community property — Type of property ownership available in certain states for property owned by spouses and, in some instances, legal equivalents of spouses. Community property states and territories include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.

Current value — In this form, report the *current value* of the property that you own in each category. *Current value* is sometimes called *fair market value* and, for this form, is the fair market value as of the date of the filing of the petition. *Current value* is how much the property is worth, which may be more or less than when you purchased the property. *Property you own* includes property you have purchased, even if you owe money on it, such as a home with a mortgage or an automobile with a lien.

Report the current value of the portion you own

For each question, report the current value of the portion of the property that you own. To do this, you would usually determine the current value of the entire property and the percentage of the property that you own. Multiply the current value of the property by the percentage that you own. Report the result where the form asks for *Current value of the portion you own*. For example:

- If you own a house by yourself, you own 100% of that house. Report the entire current value of the house.
- If you and a sister own the house equally, report 50% of the value of the house (or half of the value of the house).

In certain categories, current value may be difficult to figure out. When you cannot find the value from a reputable source (such as a pricing guide for your car), estimate the value and be prepared to explain how you determined it.

List items once on this form

List items only once on this form; do not list them in more than one category. List all real estate in Part 1 and other property in the other parts of the form.

Where you list similar items of minimal value (such as clothing), add the value of the items and report a total.

Be specific when you describe each item. If you have an item that you think could fit into more than one category, select the most suitable category and list the item there.

Separately describe and list individual items worth more than $500.

Match the values to the other schedules

Make sure that the values you report on this form match the values you report on *Schedule D: Creditors Who Hold Claims Secured by Your Property* (Official Form 106D) and *Schedule C: The Property You Claim as Exempt* (Official Form 106C).

On this form, do not list any interests you may have in executory contracts (for example, an unexpired lease for your apartment, a contract for improvements or repairs for your home, a real estate listing agreement, or a lease for your car). List those contracts or leases on *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 106G).

Schedule C: The Property You Claim as Exempt
(Official Form 106C)

How exemptions work

If you are an individual filing for bankruptcy, the law may allow you to keep some property, or it may entitle you to part of the proceeds if the property is sold after your case is filed. Property that the law permits you to keep is called *exempt* property. For example, exemptions may enable you to keep your home, a car, clothing, and household items.

Exemptions are not automatic. To be considered exempt, you must list the property on *Schedule C: The Property You Claim as Exempt* (Official Form 106C). If you do not list the property, the trustee may sell it and pay all of the proceeds to your creditors.

You may unnecessarily lose property if you do not claim exemptions to which you are entitled. You are strongly encouraged to hire a qualified attorney to advise you.

Determine which set of exemptions you will use

Before you fill out this form, you must learn which set of exemptions you can use. In general, exemptions are determined on a state-by-state basis. Some states permit you to use the exemptions provided by the Bankruptcy Code. 11 U.S.C. § 522.

The Bankruptcy Code provides that you use the exemptions in the law of the state where you had your legal home for 730 days before you file for bankruptcy. Special rules may apply if you did not have the same home state for 730 days before you file.

You may lose property if you do not use the best set of exemptions for your situation.

If your spouse is filing with you and you are filing in a state in which you may choose between state and federal sets of bankruptcy exemptions, you both must use the same set of exemptions.

Claiming exemptions

Using the property and values that you listed on *Schedule A/B: Property* (Official Form 106A/B) as your source, list on this form the property that you claim as exempt.

Listing the amount of each exemption

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. Usually, a specific dollar amount is claimed as exempt, but in some circumstances, the amount of the exemption claimed might be indicated as 100% of fair market value. For example, a debtor might claim 100% of fair market value for an exemption that is unlimited in dollar amount, such as some exemptions for health aids.

Listing which laws apply

In the last column of the form, you must identify the laws that allow you to claim the property as exempt. If you have questions about exemptions, consult a qualified attorney.

Schedule D: Creditors Who Hold Claims Secured by Property (Official Form 106D)

The people or organizations to whom you owe money are called your *creditors*. A *claim* is a creditor's right to payment. When you file for bankruptcy, the court needs to know who all your creditors are and what types of claims they have against you.

Typically in bankruptcy cases, there are more debts than assets to pay those debts. The court must know as much as possible about your creditors to make sure that their claims are properly treated according to the rules.

Creditors may have different types of claims:

- **Secured claims**. Report these on *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D).
- **Unsecured claims**. Report these on *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F).

If your debts are not paid, creditors with secured claims may be able to get paid from specific property in which that creditor has an interest, such as a mortgage or a lien. That property is sometimes called *collateral* for your debt and could include items such as your house, your car, or your furniture. Creditors with unsecured claims do not have rights against specific property.

Many claims have a specific amount, and you clearly owe them. However, some claims are uncertain when you file for bankruptcy, or they become due only after you file. You must list all claims in your schedules, even if the claims are contingent, unliquidated, or disputed.

Claims may be contingent, unliquidated, or disputed

Claims may be:

- Contingent claims,
- Unliquidated claims, or
- Disputed claims.

A claim is *contingent* if you are not obligated to pay it unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the value has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

A claim is *disputed* if you disagree about whether you owe the debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

A single claim can have one, more than one, or none of these characteristics.

On *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D), list all creditors who have a claim that is secured by your property.

Do not leave out any secured creditors

In alphabetical order, list anyone who has judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests against your property. When listing creditors who hold secured claims, be sure to include all of them. For example, include the following:

- Your relatives or friends who hold a lien or security interest in your property;
- Car or truck lenders, stores, banks, credit unions, and others who made loans to enable you to finance the purchase of property and who have a lien against that property;
- Anyone who holds a mortgage or deed of trust on real estate that you own;
- Contractors or mechanics who have liens on property you own because they did work on the property and were not paid;
- Someone who won a lawsuit against you and has a judgment lien;
- Another parent or a government agency that has a lien for unpaid child support;
- Doctors or attorneys who have liens on the outcome of a lawsuit;
- Federal, state, or local government agencies such as the IRS that have tax liens against property for unpaid taxes; and
- Anyone who is trying to collect a secured debt from you, such as collection agencies and attorneys.

List the debt in Part 1 only once and list any others that should be notified about that debt in Part 2. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the person to whom you owe the debt in Part 1, and list the collection agency in Part 2. If you are not sure who the creditor is, list the person you are paying in Part 1 and list anyone else who has contacted you about this debt in Part 2.

If a creditor's full claim is more than the value of your property securing that claim—for instance, a car loan in an amount greater than the value of the car—the creditor's claim may be partly secured and partly unsecured. In that situation, list the claim only once on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 106D). Do not repeat it on *Schedule E/F: Creditors Who Hold Unsecured Claims* (Official Form 106E/F). List a creditor in *Schedule D* even if it appears that there is no value to support that creditor's secured claim.

Determine the unsecured portion of secured claims

To determine the amount of a secured claim, compare the amount of the claim to the value of your portion of the property that supports the claim. If that value is greater than the amount of the claim, then the entire amount of the claim is secured. But if that value is less than the amount of the claim, the difference is an *unsecured portion*. For example, if the outstanding balance of a car loan is $10,000 and the car is worth $8,000, the car loan has a $2,000 unsecured portion.

If there is more than one secured claim against the same property, the claim that is entitled to be paid first must be subtracted from the property value to determine how much value remains for the next claim. For example, if a home worth $300,000 has a first mortgage of $200,000 and a second mortgage of $150,000, the first mortgage would be fully secured, and there would be $100,000 of property value for the second mortgage, which would have an unsecured portion of $50,000.

	$300,000	value of a home
-	$200,000	first mortgage
	$100,000	remaining property value
	$150,000	second mortgage
-	$100,000	remaining property value
	$ 50,000	unsecured portion of second mortgage

Schedule E/F: Creditors Who Have Unsecured Claims (Official Form 106E/F)

The people or organizations to whom you owe money are called your *creditors*. A *claim* is a creditor's right to payment. When you file for bankruptcy, the court needs to know who all your creditors are and what types of claims they have against you.

Typically in bankruptcy cases, there are more debts than assets to pay those debts. The court must know as much as possible about your creditors to make sure that their claims are properly treated according to the rules.

Use *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F) to identify everyone who holds an unsecured claim against you when you file your bankruptcy petition, unless you have already listed them on *Schedule D: Creditors Who Hold Claims Secured by Your Property* (Official Form 106D).

Creditors may have different types of claims:

- **Secured claims**. Report these on *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D).

- **Unsecured claims**. Report these on *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F).

If your debts are not paid, creditors with secured claims may be able to get paid from specific property in which that creditor has an interest, such as a mortgage or a lien. That property is sometimes called *collateral* for your debt and could include items such as your house, your car, or your furniture. Creditors with unsecured claims do not have rights against specific property.

Many claims have a specific amount, and you clearly owe them. However, some claims are uncertain when you file for bankruptcy, or they become due only after you file. You must list all claims in your schedules, even if the claims are contingent, unliquidated, or disputed.

Claims may be contingent, unliquidated, or disputed

Claims may be:

- Contingent claims,
- Unliquidated claims, or
- Disputed claims.

A claim is *contingent* if you are not obligated to pay it unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the value has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

A claim is *disputed* if you disagree about whether you owe the debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

A single claim can have one, more than one, or none of these characteristics.

Creditors with unsecured claims do not have liens on or other security interests in your property. Secured creditors have a right to take property if you do not pay them. Common examples are lenders for your car, your home, or your furniture.

Do not leave out any unsecured creditors

List all unsecured creditors in each part of the form in alphabetical order. Even if you plan to pay a creditor, you must list that creditor. When listing creditors who hold unsecured claims, be sure to include all of them. For instance, include the following:

- Your relatives or friends to whom you owe money;
- Your ex-spouse, if you are still obligated under a divorce decree or settlement agreement to pay joint debts;
- A credit card company, even if you intend to fully pay your credit card bill;
- A lender, even if the loan is cosigned;
- Anyone who holds a loan or promissory note that you cosigned for someone else;
- Anyone who has sued or may sue you because of an accident, dispute, or similar event that has occurred; or
- Anyone who is trying to collect a debt from you such as a bill collector or attorney.

Unsecured claims could be priority or nonpriority claims

What are priority unsecured claims?

In bankruptcy cases, *priority unsecured claims* are those debts that the Bankruptcy Code requires to be paid before most other unsecured claims are paid. The most common priority unsecured claims are certain income tax debts and past due alimony or child support. Priority unsecured claims include those you owe for:

- **Domestic support obligations**—If you owe domestic support to a spouse or former spouse; a child or the parent, legal guardian, or responsible relative of a child; or a governmental unit to whom such a domestic support claim has been assigned.
  11 U.S.C. § 507(a)(1).
- **Taxes and certain other debts you owe the government**—If you owe certain federal, state, or local government taxes, customs duties, or penalties.
  11 U.S.C. § 507(a)(8).
- **Claims for death or personal injury that you caused while you were intoxicated**—If you have a claim against you for death or personal injury that resulted from your unlawfully operating a motor vehicle or vessel while you were unlawfully intoxicated from alcohol, drugs, or another substance. This priority does not apply to claims for property damage.
  11 U.S.C. § 507(a)(10).

- **Other:**
  - **Deposits by individuals**—If you took money from someone who planned to purchase, lease, or rent your property or use your services but you never delivered or performed. For the debt to have priority, the property or services must have been intended for personal, family, or household use (only the first $2,775* per person is a priority debt). 11 U.S.C. § 507(a)(7).
  - **Wages, salaries, and commissions**—If you owe wages, salaries, and commissions, including vacation, severance, and sick leave pay and those amounts were earned within 180 days before you open your bankruptcy case or ceased business. In either instance, only the first $12,475* per claim is a priority debt. 11 U.S.C. § 507(a)(4).
  - **Contributions to employee benefit plans**—If you owe contributions to an employee benefit plan for services an employee rendered within 180 days before you file your bankruptcy petition, or within 180 days before your business ends. Count only the first $12,475* per employee, less any amounts owed for wages, salaries, and commissions. 11 U.S.C. § 507(a)(5).
  - **Certain claims of farmers and fishermen**—Only the first $6,150* per farmer or fisherman is a priority debt. 11 U.S.C. § 507(a)(6).

  * Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

What are nonpriority unsecured claims?

Nonpriority unsecured claims are those debts that generally will be paid after priority unsecured claims are paid. The most common examples of nonpriority unsecured claims are credit card bills, medical bills, and educational loans.

What if a claim has both priority and nonpriority amounts?

If a claim has both priority and nonpriority amounts, list that claim in Part 2 and show both priority and nonpriority amounts. Do not list it again in Part 3.

In Part 3, list all of the creditors you have not listed before. You must list every creditor that you owe, regardless of the amount you owe and even if you plan to pay a particular debt. If you do not list a debt, it may not be discharged.

What is needed for statistical purposes?

For statistical reasons, the court must collect information about some specific categories of unsecured claims.

The categories for priority unsecured claims are:

- **Domestic support obligations**
- **Taxes and certain other debts you owe the government**
- **Claims for death or personal injury that you caused while you were intoxicated**

The categories for nonpriority unsecured claims are:

- **Student loans**—If you owe money for any loans that you used to pay for your education;

- **Obligations arising out of a separation agreement or divorce that you did not report as priority claims**—If you owe debts for separation or divorce agreements or for domestic support and you did not report those debts in Part 2; and

- **Debts to pension or profit-sharing plans and other similar debts**—If you owe money to a pension or profit-sharing plan.

Schedule G: Executory Contracts and Unexpired Leases (Official Form 106G)

Use *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 106G) to identify your ongoing leases and certain contracts. List all of your executory contracts and unexpired leases.

Executory contracts are contracts between you and someone else in which neither you nor the other party has performed all of the requirements by the time you file for bankruptcy. *Unexpired leases* are leases that are still in effect; the lease period has not yet ended.

You must list all agreements that may be executory contracts or unexpired leases, even if they are listed on *Schedule A/B: Property* (Official Form 106A/B), including the following:

- Residential leases (for example, a rental agreement for a place where you live or vacation, even if it is only a verbal or month-to-month arrangement);
- Service provider agreements (for example, contracts for cell phones and personal electronic devices);
- Internet and cable contracts;
- Vehicle leases;
- Supplier or service contracts (for example, contracts for lawn care or home alarm or security systems);
- Timeshare contracts or leases;
- Rent-to-own contracts;
- Employment contracts;
- Real estate listing agreements;
- Contracts to sell a residence, building, land, or other real property;
- Equipment leases;
- Leases for business or investment property;
- Supplier and service contracts for your business;
- Copyright and patent license agreements; and
- Development contracts.

Schedule H: Your Codebtors (Official Form 106H)

If you have any debts that someone else may also be responsible for paying, these people or entities are called *codebtors*. Use *Schedule H: Your Codebtors* (Official Form 106H) to list any codebtors who are responsible for any debts you have listed on the other schedules.

To help fill out this form, use both *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D) and *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F).

List all of your codebtors and the creditors to whom you owe the debt. For example, if someone cosigned for the car loan that you owe, you must list that person on this form.

If you are filing a joint case, do not list either spouse as a codebtor.

Other codebtors could include the following:

- Cosigner;
- Guarantor;
- Former spouse;
- Unmarried partner;
- Joint contractor; or
- Nonfiling spouse—even if not the spouse a cosigner—where the debt is for necessities (such as food or medical care) if state law makes the nonfiling spouse legally responsible for debts for necessities.

Schedule I: Your Income (Official Form 106I)

In *Schedule I: Your Income* (Official Form 106I), 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 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 seasonally, you would simply divide the amount you expect to earn in a year by 12 to get the monthly amount

Below are other examples of how to calculate monthly amount.

Example for weekly payments:

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*) / 12 (number of months in year) = $4,333 monthly income

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) / 12 (number of months in year) = $5,417 monthly income

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

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 (number of months in year)
12 monthly income

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)

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 pay all household expenses together 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. Do not list on line 11 contributions that you already disclosed elsewhere on the form.

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 108-1), *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109), and the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110-1) 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.

If, after filing Schedule I, you need to file an estimate of income in a chapter 13 case for a date after your bankruptcy, you may complete a supplemental Schedule I. To do so you must check the "supplement" box at the top of the form and fill in the date.

Schedule J: Your Expenses (Official Form 106J)

Schedule J: Your Expenses (Official Form 106J) provides an 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 106I). On your initial filing in Part 2 select "Initial estimate at the beginning of the case".

If you are married and are filing individually, include your non-filing spouse's expenses unless you are separated.

If you are filing jointly and Debtor 1 and Debtor 2 keep separate households, fill out a separate *Schedule J* for each debtor. Check the box at the top of page 1 of the form for Debtor 2 to show that a separate form is being filed.

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.

If, after filing *Schedule J*, you need to file an estimate of expenses in a chapter 13 case for a date after your bankruptcy, you may complete a supplemental *Schedule J*. To do so you must check the "supplement" box at the top of the form and fill in the date.

Summary of Your Assets and Liabilities and Certain Statistical Information (Official Form 106Sum)

When you file for bankruptcy, you must summarize certain information from the following forms:

- *Schedule A/B: Property* (Official Form 106A/B)
- *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 106D)
- *Schedule E/F: Creditors Who Hold Unsecured Claims* (Official Form 106E/F)
- *Schedule I: Your Income* (Official Form 106I)
- *Schedule J: Your Expenses* (Official Form 106J)
- *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108-1), *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109), or *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110-1)

After you fill out all of the forms, complete *Summary of Your Assets and Liabilities and Certain Statistical Information* (Official Form 106Sum) to report the totals of certain information that you listed in the forms.

If you are filing an amended version of any of these forms at some time after you file your original forms, you must fill out a new *Summary* to ensure that your information is up to date and you must check the box at the top.

Statement of Financial Affairs for Individuals Filing for Bankruptcy (Official Form 107)

Your Statement of Financial Affairs for Individuals Filing for Bankruptcy, provides a summary of your financial history over certain periods of time before you file for bankruptcy. If you are an individual in a bankruptcy case, you must fill out this statement.
11 U.S.C. § 521(a) and Bankruptcy Rule 1007(b)(1).

If you are married and your spouse is not filing this case with you, you need only provide information on this form about your spouse if you are filing under chapter 12 or chapter 13 and are not separated from your spouse.

If you are in business as a sole proprietor, partner, family farmer, or self-employed professional, you must provide the information about all of your business and personal financial activities.

Although this statement may ask you questions that are similar to some questions on the schedules, you must fill out all of the forms completely to protect your legal rights.

Understand the terms used in this form

Legal equivalent of a spouse — A person whom applicable nonfederal law recognizes as having a relationship with the debtor that grants legal rights and responsibilities equivalent, in whole or in part, to those granted to a spouse.

Chapter 7 Statement of Your Current Monthly Income and Means Test Calculation (Official Forms 108–1 and 108–2)

If you are filing under chapter 11, 12, or 13, do not fill out this form.

Official Forms 108–1 and 108–2 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 according to a formula set out in the Bankruptcy Code.

You must file Official Form 108–1, the *Chapter 7 Statement of Your Current Monthly Income* 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, Official Form 108 –2, *Chapter 7 Means Test Calculation*. 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 are presumed to 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).

Chapter 11 Statement of Your Current Monthly Income (Official Form 109)

If you are filing under chapter 7, 12, or 13, do not fill out this form.

You must file the *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109) if you are an individual filing for bankruptcy under chapter 11.

If you have nothing to report for a line, write $0.

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

(Official Forms 110–1 and 110–2)

If you are filing under chapter 7, 11, or 12, do not fill out this form.

Official Forms 110—1 and 110—2 determine the commitment 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 110—1, the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110—1) if you are an individual and you are filing under chapter 13. This form will report your current monthly income and determine whether your income is at or below the median income for households of the same size in your state. If your income is equal to or less than the median, you will not have to fill out the second form. Form 110-1 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, 110—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.

Generally, if you and your spouse are filing together, you should file one statement together.

Statement of Intention for Individuals Filing Under Chapter 7 (Official Form 112)

If you are filing under chapter 11, 12, or 13, do not fill out this form.

You must fill out the *Statement of Intention for Individuals Filing Under Chapter 7* (Official Form 112) if you are an individual filing under chapter 7 or if your case has been converted to chapter 7 and creditors have claims secured by your property or you have any unexpired leases of personal property. The Bankruptcy Code requires you to state your intentions about such claims and provides for early termination of the automatic stay as to personal property if the statement is not timely filed. The same early termination of the automatic stay applies to any unexpired lease of personal property unless you state that you intend to assume the unexpired lease if the trustee does not do so.

To help fill out this form, use the information you have already provided on the following forms:

- *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D),
- *Schedule C: The Property You Claim as Exempt* (Official Form 106C), and
- *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 106G).

Explain what you intend to do with your property that is collateral for a claim

If you have property that is collateral (or security) for a claim, you must state what you intend to do with that property.

You may choose to either give the property to the creditor, or keep the property. Below is more information about each of these options.

You may give the property to the creditor. If you give the property to the creditor (*you surrender the property*), your bankruptcy discharge will protect you from any claim for a deficiency if the property is worth less than what you owe the creditor, unless the court determines that the debt is non-dischargeable.

You may want to keep the property. If you want to keep your secured personal property, you may be able to reaffirm the debt, redeem the property, or take other action (for example, avoid a lien using 11 U.S.C. 522(f)).

- **You may be able to reaffirm the debt.** You may decide to remain legally obligated to pay a debt so that you can keep the property securing the debt. This is called *reaffirming a debt*. You may reaffirm the debt in full on its original terms or you and the creditor may agree to change the terms. For example, if you want to keep your car, you may reaffirm a car loan, stating that you will continue to make monthly payments for it. **Only reaffirm those debts that you are confident you can repay.** You may seek to reaffirm the debt if you sign a *Reaffirmation Agreement*, which is a contract between you and a creditor and you follow the proper

procedure for the *Reaffirmation Agreement.* 11 U.S.C. § 524. The procedure is explained in greater detail in the Disclosures that are part of the reaffirmation documents.

- **You may be able to redeem your property.** 11 U.S.C. § 722. You can redeem property only if all of the following apply:
  - ❑ The property secures a debt that is a *consumer debt* — you incurred the debt primarily for personal, family, or household use.
  - ❑ The property is *tangible personal property* — the property is physical, such as furniture, appliances, and cars.
  - ❑ You are either claiming the property as exempt or the trustee has abandoned it.

To obtain court authorization to redeem your property, you must file a motion to redeem. If the court grants your motion, you pay the creditor the value of the property or the amount of the claim, whichever is less. The payment will be a single lump-sum payment.

Explain what you intend to do with your leased personal property

If you lease personal property such as your car, you may be able to continue your lease if the trustee does not assume the lease. To continue your lease, you can write to the lessor that you want to assume your lease. The creditor may respond by telling you whether it agrees that you may assume the lease and may require you to pay any past-due amounts before you can do so. If the lessor agrees to your request to assume the lease, you must write to the lessor within 30 days stating that you assume the lease. 11 U.S.C. § 365(p)(2).

File the *Statement of Intention* before the deadline

You must file this form either within 30 days after you file your bankruptcy petition or by the date set for the meeting of creditors, whichever is earlier. You must also deliver copies of this statement to the creditors and lessors you listed on the form. Bankruptcy Rule 1007(b)(2).

If two married people are filing together in a joint case, both are equally responsible for supplying correct information. Both debtors must sign and date the form.

Application for Individuals to Pay the Filing Fee in Installments (Official Form 103A)

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 103B).

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out the *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119); include a copy of it when you file this application.

Application to Have the Chapter 7 Filing Fee Waived (Official Form 103B)

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 103A).

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.)
- You cannot afford to pay the fee in installments.

Your family includes you, your spouse, and any dependents listed on *Schedule I.* 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 *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119); include a copy of it when you file this application.

If you have already completed the following forms, the information on them may help you when you fill out this application:

- *Schedule A/B: Property* (Official Form 106A/B)
- *Schedule I: Your Income* (Official Form 106I)
- *Schedule J: Your Expenses* (Official Form 106J)

For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders (Official Form 104)

If you are filing under chapter 7, 12, or 13, do not fill out this form.

The people or organizations to whom you owe money are called your *creditors*. A *claim* is a creditor's right to payment. If you are an individual filing for bankruptcy under chapter 11, you must fill out *For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders* (Official Form 104).

Creditors may have different types of claims:

- Secured claims, or
- Unsecured claims.

If your debts are not paid, creditors with secured claims may be able to get paid from specific property in which that creditor has an interest, such as a mortgage or a lien. If a creditor has security in your property, but the value of the security available to pay the creditor is less than the amount you owe the creditor, the creditor has both a secured and unsecured claim against you. The amount of the unsecured claim is the total claim minus the value of the security that is available to pay the creditor.

Generally, creditors with unsecured claims do not have rights against specific property, or the specific property in which the creditor has rights is not worth enough to pay the creditor in full. For example, if you owe a creditor $30,000 for your car and the creditor has a security interest in your car but the car is worth only $20,000, the creditor has a $20,000 secured claim and a $10,000 unsecured claim.

	$30,000	Total amount you owe creditor
–	$20,000	Amount your car is worth (amount of secured claim)
	$10,000	Amount of unsecured claim

Many claims have a specific amount, and you clearly owe them. However, some claims are uncertain when you file for bankruptcy, or they become due only after you file. You must include such claims when listing your 20 largest unsecured claims on this list.

Claims may be contingent, unliquidated, or disputed.

The form asks you to identify claims that are:

- Contingent claims,
- Unliquidated claims, or
- Disputed claims.

A claim is *contingent* if you are not obligated to pay it unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the amount has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

A claim is *disputed* if you do not agree that you owe the debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

A single claim can have one, more than one, or none of these characteristics.

On this form, list the creditors with the 20 largest unsecured claims who are not insiders

You must file this form when you file your chapter 11 bankruptcy case with the court.

When you list the 20 largest unsecured creditors, include all unsecured creditors, except for the following two types of creditors, even if you plan to pay them. Do not include:

- Anyone who is an *insider. Insiders* include relatives; general partners of you or your relatives; corporations of which you are an officer, director, or person in control; and any managing agent. 11 U.S.C. § 101(31).
- Secured creditors, unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

Make sure that all of the creditors listed on this form are also listed on either *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D) or *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F).

On the form, you will fill in what the claim is for. Examples include trade debts, bank loans, professional services, and government contracts.

Glossary

Definitions Used in the Forms for Individuals Filing for Bankruptcy

Here are definitions for some of the important terms used in the forms for individuals who are filing for bankruptcy. See *Bankruptcy Basics* (http://www.uscourts.gov/FederalCourts) for more information about filing for bankruptcy and other important terms you should know.

Annuity — A contract for the periodic payment of money to you, either for life or for a number of years.

Bankruptcy petition preparer — Any person or business, other than a lawyer or someone who works for a lawyer, that charges a fee to prepare bankruptcy documents. Under your direction and control, the bankruptcy petition preparer generates bankruptcy forms for you to file by typing them. Because they are not attorneys, they cannot give legal advice or represent you in bankruptcy court. Also called *typing services*.

Business debt — Debt that you incurred to obtain money for a business or investment or through the operation of the business or investment.

Claim — A creditor's right to payment, even if contingent, disputed, unliquidated, or unmatured.

Codebtor — A person or entity that may also be responsible for paying a claim against the debtor.

Collateral for your debt — If your debts are not paid, creditors with secured claims such as a mortgage or a lien may be able to get paid from specific property in which that creditor has an interest.

Community property — Type of property ownership available in certain states for property owned by spouses and, in some instances, legal equivalents of spouses. Community property states and territories include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.

Consumer debt — Debt incurred by an individual primarily for a personal, family, or household purpose.

Contingent claim — Debt you are not obligated to pay unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

Creditor matrix or mailing matrix — A list of names and addresses of all of your creditors, formatted as a mailing list according to instructions from the bankruptcy court in which you file.

Creditor — The person or organization to whom you owe money.

Creditor with secured claims — Creditors who have a right to take property if you do not pay them. Common examples are lenders for your car, your home, or your furniture.

Creditor with unsecured claims — Creditor who does not have lien on or other security interest in your property.

Current value, fair market value, or value — Generally, the fair market value as of the date of the filing of the petition. It is how much the property is worth, which may be more or less than when you purchased the property. See the instructions for specific forms regarding whether the value requested is as of the date of the filing of the petition, the date you complete the form, or some other date.

Debtor 1 — A debtor filing alone or one person in married couple who is filing a bankruptcy case with a spouse.

Debtor 2 — The second person in a married couple who is filing a bankruptcy case with a spouse.

Dependent — The term *dependent* generally means people who are economically dependent on the debtor regardless of whether they can be claimed as a dependent on the debtor's federal tax return. However, *Chapter 7 Means Test Calculation*, (Official Form 108-2) and *Chapter 13 Calculation of Your Disposable Income*, (Official Form 110-2) use the term in a more limited way. See the instructions on those forms.

Discharge — A discharge in bankruptcy relieves you from having to pay debts that you owed before you filed your bankruptcy case. Most debts are covered by the discharge, but not all. (The instruction booklet explains more about common debts that are excepted from discharge.)

Only your personal liability is removed by the discharge; creditors with discharged debts cannot sue you, garnish your wages, assert a deficiency against you, or otherwise try to collect from you personally.

But a discharge does not stop creditors from collecting debts from any property in which they have a security interest—such as foreclosing a home mortgage or repossessing an automobile. Similarly, a discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as a relative who cosigned or guaranteed a loan.

Even if a debt has been discharged, you can choose to repay it by either *reaffirming the debt* (see the definition below) or by voluntarily paying the debt. The creditor may negotiate a reaffirmation agreement with you, but may not suggest that you make voluntary payments.

Disputed claim — If you disagree about whether you owe a debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

Eviction judgment — Your landlord has obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding.

Executory contract — Contract between you and someone else in which neither you nor the other party has performed all of the requirements by the time you file for bankruptcy.

Exempt property — Property that the law permits you to keep.

Individual debtor — You are a person who is filing for bankruptcy by yourself or with your spouse.

Joint case — A single case filed by a married couple.

Legal equivalent of a spouse — A person whom applicable nonfederal law recognizes as having a relationship with the debtor that grants legal rights and responsibilities equivalent, in whole or in part, to those granted to a spouse.

Legal or equitable interest — A broad term that includes all kinds of property interests in both tangible and intangible property, whether or not anyone else has an interest in that property.

Negotiable instrument — Include personal checks, cashiers' checks, promissory notes, and money orders.

Non-individual debtor — You are filing for bankruptcy on behalf of a non-individual, such as a corporation, partnership, or limited liability company (LLC).

Non-negotiable instrument — Financial instrument that you cannot transfer to someone by signing or delivering it.

Nonpriority unsecured claim — Debt that generally will be paid after priority unsecured claims are paid. The most common examples are credit card bills, medical bills, and educational loans.

Payment advice — A statement such as a pay stub or earnings statement from your employer that shows all earnings and deductions from your pay.

Presumption of abuse — A legal determination meaning you may have too much income to be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

Priority unsecured claim — Debt that the Bankruptcy Code requires to be paid before most other unsecured claims are paid. The most common examples are certain income tax debts and past due alimony or child support.

Property you own — Includes property you have purchased, even if you owe money on it, such as a home with a mortgage or an automobile with a lien.

Reaffirming a debt — You may agree to repay a debt that would otherwise be discharged by entering into a reaffirmation agreement with the creditor. A reaffirmation agreement may allow you to keep property that a creditor has the right to take from you because it secures the debt being reaffirmed. For a reaffirmation agreement to be effective, you must enter into it before discharge. You may ask the court to delay your discharge if you need more time to complete your reaffirmation agreement. The court may have to find that the agreement is not an undue burden on you before it can become effective.

Secured claim — A claim that may be satisfied in whole or in part either

- through a charge against or an interest in the debtor's property, or
- through a right of setoff.

Sole proprietorship — A business you own as an individual, rather than a separate legal entity such as a corporation, partnership, or LLC. Sole proprietors must use the bankruptcy forms that are numbered in the 100 series.

Unexpired lease —Unexpired leases are leases that are in effect at the time of the bankruptcy filing.

Unliquidated claim — If the amount of a debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the value has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

You — A debtor filing alone or one person in married couple who is filing a bankruptcy case with a spouse.

APPENDIX B.4

THIS PAGE INTENTIONALLY BLANK

United States Bankruptcy Court for the ________________ District of _____________

Debtor(s): ____

Case No.: ______________

Date: _____________

❑ Check if this is an amended plan

Official Form 113

Chapter 13 Plan

12/15

Part 1: Notice to Interested Parties

Check all that apply:

❑ **The plan seeks to limit the amount of a secured claim, as set out in Part 3, Section 3.2, which may result in a partial payment or no payment at all to the secured creditor.**

❑ **The plan requests the avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest as set out in Part 3, Section 3.4.**

❑ **The plan sets out nonstandard provisions in Part 9.**

Important Notice: Your rights may be affected. Your claim may be reduced, modified, or eliminated.

You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you oppose the plan's treatment of your claim or any provision of this plan, you or your attorney must file an objection to confirmation at least 7 days before the hearing on confirmation, unless otherwise ordered by the Bankruptcy Court. The Bankruptcy Court may confirm this plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015. In addition, you must file a proof of claim—or one must be filed on your behalf—in order for you to be paid under any plan that may be confirmed.

Part 2: Plan Payments and Length of Plan

2.1 Debtor(s) will pay to the trustee $ ___________ per_____ for _____ months, and

$ ___________ per _____ for _____ months.

2.2 Payments to the trustee will be made from future earnings in the following manner:

Check all that apply:

❑ Debtor(s) will make payments pursuant to a payroll deduction order.

❑ Debtor(s) will make payments directly to the trustee.

2.3 Additional payments to the trustee will be made as follows:

Check all that apply:

❑ Debtor(s) will turn over to the trustee:

- ❑ any tax refunds received during the plan term.
- ❑ any tax refunds in excess of $ ___________ received during the plan term.

  On or before April 20 of the year following the filing of this case and each year thereafter, Debtor(s) will submit to the trustee a copy of the federal tax return filed for the prior year.

❑ Other sources of funding, including the sale of property. Describe the source, amount, and date when available:

____

____

2.4 The estimated total amount of plan payments is $ _________________.

2.5 The applicable commitment period is:

❑ 36 months

❑ 60 months

Part 3: Treatment of Secured Claims

3.1 Maintenance of payments and cure of any default

❑ **None** [If "none" is checked, the rest of § 3.1 need not be completed or reproduced]

The debtor(s) will maintain the contractual installment payments and cure any default in payments on the secured claims listed below. The allowed claim for any arrearage amount will be paid under the plan, with interest, if any, at the rate stated. Unless otherwise ordered by the court, (1) the amounts listed on the proof of claim control over any contrary amounts listed below as to the current installment payment and arrearage, and (2) if relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, all payments under this plan as to that collateral will cease and all claims as to that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Collateral	Current installment payment (including escrow payment)	Estimated amount of arrearage	Interest rate on arrearage (if applicable)	Monthly plan payment on arrearage or other payment arrangement	Estimated total payments by trustee
________________ ________________ ________________ ________________	____________ ____________ ____________ ____________	$__________ Disbursed by: ❑ Trustee ❑ Debtor(s)	$__________	_________	$__________	$________
________________ ________________ ________________ ________________	____________ ____________ ____________ ____________	$__________ Disbursed by: ❑ Trustee ❑ Debtor(s)	$__________	_________	$__________	$________

3.2 Request for valuation of security and claim modification

❑ **None** [If checked, the rest of § 3.2 need not be completed or reproduced]

This paragraph will be effective only if the applicable box in Part 1 of this plan is checked.

The debtor(s) request that the court determine the value of the secured claims listed below, except for the claims of governmental units. For each non-governmental secured claim as to which a proof of claim has been filed in accordance with Bankruptcy Rule 3002, the debtors state that the value of the secured claim should be as stated below in the column headed "Amount of secured claim." For secured claims of governmental units, unless otherwise ordered by the court, the amounts listed in proofs of claim filed in accordance with Bankruptcy Rule 3002 control over any contrary amounts listed below. For each listed secured claim, the controlling amount of the claim will be paid in full under the plan with interest at the rate stated below.

The portion of any allowed claim that exceeds the amount of the secured claim will be treated as an unsecured claim under Part 5 of this plan. If the amount of a creditor's secured claim is listed below as having no value, the creditor's allowed claim will be treated in its entirety as an unsecured claim under Part 5 of this plan. Unless otherwise ordered by the court, the amount of the creditor's claim listed on the proof of claim controls over any contrary amounts listed under Part 5 as to the unsecured portion, if any, of the claim.

The holder of any claim listed below as having value in the column headed "Amount of secured claim" will retain the lien until the earlier of:

(a) payment of the underlying debt determined under nonbankruptcy law, or

(b) discharge under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor. See Bankruptcy Rule 3015.

❑ Debtor(s) will be eligible to receive a discharge in this case.

❑ Debtor(s) will not be eligible to receive a discharge in this case.

Name of creditor	Estimated amount of creditor's claim	Collateral	Value of collateral	Amount of claims senior to creditor's claim	Amount of secured claim	Interest rate	Monthly payment to creditor	Estimated total of monthly payments
________________ ________________	$______	____________ ____________	$______	$______	$______	_____	$______	$______
________________ ________________	$______	____________ ____________	$______	$______	$______	_____	$______	$______
________________ ________________	$______	____________ ____________	$______	$______	$______	_____	$______	$______

3.3 Secured claims excluded from 11 U.S.C. § 506

❑ **None** [If checked, the rest of § 3.3 need not be completed or reproduced]

The claims listed below were either:

(1) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor(s), or

(2) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value.

These claims will be paid in full under the plan with interest at the rate stated below. Unless otherwise ordered by the court, the claim amount listed on the proof of claim controls over any contrary amounts listed below. The final column includes only payments disbursed by trustee rather than by the debtor.

Name of creditor	Collateral	Amount of claim	Interest rate	Monthly plan payment	Estimated total payments by trustee
____________ ____________ ____________	____________ ____________ ____________	$__________	________	$________ Disbursed by: ❑ Trustee ❑ Debtor(s)	$________________
____________ ____________ ____________	____________ ____________ ____________	$__________	________	$________ Disbursed by: ❑ Trustee ❑ Debtor(s)	$________________

3.4 Lien avoidance

❑ **None** [If "None" is checked, the rest of Section § 3.4 need not be completed or reproduced]

This paragraph will be effective only if the applicable box on Part 1 of this plan is checked.

The judicial liens or nonpossessory, nonpurchase-money security interests securing the claims listed below impair exemptions to which the debtor(s) would have been entitled under 11 U.S.C. § 522(b). A judicial lien or security interest securing a claim listed below will be avoided to the extent that it impairs such exemptions upon entry of the order confirming the plan. The amount of the judicial lien or security interest that is avoided will be treated as an unsecured claim in Part 5. The calculation of the amount of the judicial lien or security interest that is avoided is shown on Exhibit A, which is attached to this plan and incorporated herein by reference. The amount, if any, of the judicial lien or security interest that is not avoided will be paid in full as a secured claim under the plan. See 11 U.S.C. § 522(f) and Bankruptcy Rule 4003(d).

Name of creditor	Collateral	Amount of secured claim after avoidance	Interest rate (if applicable)	Monthly plan payment (if applicable)	Estimated total amount of secured claim
____________ ____________	____________ ____________	$__________	________	$__________	$__________
____________ ____________	____________ ____________	$__________	________	$__________	$__________

3.5 Surrender of collateral

❑ **None** [if "None" is checked, the rest of § 3.5 need not be completed or reproduced]

The debtor(s) elect to surrender to the creditors listed below the personal or real property that is collateral for the claim. The debtor(s) consent to termination of the stay under 11 U.S.C. § 362(a) and § 1301 with respect to the collateral upon confirmation of the plan. Any allowed unsecured claim resulting from the disposition of the collateral will be treated in Part 5 below.

Name of creditor	Collateral
______________________________	______________________________
______________________________	______________________________

Part 4: Treatment of Trustee's Fees and Administrative and Other Priority Claims

4.1 General

All allowed priority claims other than those treated in § 4.5 will be paid in full without interest, unless otherwise stated.

4.2 Trustee's fees

These fees are estimated to be ________% of plan payments; and during the plan term, they are estimated to total $___________.

4.3 Attorney's fees

The balance of the fees owed to the attorney of the debtor(s) is estimated to be $___________.

4.4 Other priority claims

❑ **None** [If "None" is checked, the rest of § 4.4 need not be completed or reproduced]

The following are the debtor's estimates of the amount of such claims.

Name of creditor	Basis for priority treatment	Estimated amount of claim to be paid	Interest rate (if applicable)	Estimated total amount of payments
____________________ ____________________	____________ ____________	$_________	______	$____________
____________________ ____________________	____________ ____________	$_________	______	$____________

4.5 Domestic support obligations assigned to a governmental unit and paid less than full amount

❑ **None** [If "None" is checked, the rest of § 4.5 need not be completed or reproduced]

The allowed priority claims listed below are based on a domestic support obligation that has been assigned to a governmental unit and will be paid less than the full amount of the claim under 11 U.S.C. § 1322(a)(4).

Name of creditor	Amount of claim to be paid	Interest rate (if applicable)	Estimated total amount of payments
______________________________	$_________	______	$____________
______________________________	$_________	______	$____________

Part 5: Treatment of Nonpriority Unsecured Claims

5.1 Maintenance of payments and cure of any default

❑ **None** [If "None" is checked, the rest of § 5.1 need not be completed or reproduced]

The debtor(s) will maintain the contractual installment payments and cure any default in payments on the unsecured claims listed below on which the last payment is due after the final plan payment. The allowed claim for the arrearage amount will be paid under the plan.

Name of creditor	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
____________________ ____________________ ____________________	$___________ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____________	$___________
____________________ ____________________ ____________________	$___________ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____________	$___________

5.2 Separately classified nonpriority unsecured claims

❑ **None** [If "None" is checked, the rest of § 5.2 need not be completed or reproduced]

The nonpriority unsecured allowed claims listed below are separately classified and will be treated as follows:

Name of creditor	Basis for separate classification and treatment	Amount of claim to be paid	Interest rate (if applicable)	Estimated total amount of payments
______________________ ______________________	______________________ ______________________	$__________	_______	$__________
______________________ ______________________	______________________ ______________________	$__________	_______	$__________

5.3 Nonpriority unsecured claims

Allowed nonpriority unsecured claims that are not separately classified will be paid, pro rata, up to the full amount of the claims, as follows:

Check all that apply:

❑ the sum of $___________, unless a greater amount is required under another checked option;

❑ _______% of the total amount of these claims;

❑ the funds remaining after disbursements have been made to all other creditors provided for in this plan.

If the estate of the debtor(s) were liquidated under chapter 7 nonpriority unsecured claims would be paid approximately $___________. Payments on allowed nonpriority unsecured claims will not be less than this amount.

5.4 Interest

Interest on allowed unsecured claims, other than separately classified nonpriority unsecured claims, will (*Check the applicable box*):

❑ not be paid.

❑ be paid at an annual percentage rate of _______ % under 11 U.S.C. § 1325(a)(4), and is estimated to total $ ____________.

Part 6: Executory Contracts and Unexpired Leases

6.1 All executory contracts and unexpired leases are rejected, except those listed below, which are assumed and will be treated as provided for below or under another specified provision of the plan.

❑ **None to be assumed** [If checked, the rest of § 6.1 need not be completed or reproduced]

The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Property description	Treatment (Refer to other plan section if applicable)	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
________________ ________________	______________ ______________	______________ ______________	$___________ Disbursed by: ❑ Trustee ❑ Debtor(s)	$__________	$__________
________________ ________________	______________ ______________	______________ ______________	$___________ Disbursed by: ❑ Trustee ❑ Debtor(s)	$__________	$__________

Part 7: Order of Distribution of Trustee Payments

7.1 The trustee will make payments in the estimated amounts shown on Exhibit B, in the following order:

a. Trustee's fees

b. Monthly payments on secured claims

c. ______________________________

d. ______________________________

e. ______________________________

f. ______________________________

g. ______________________________

h. ______________________________

Part 8: Vesting of Property of the Estate

8.1 Property of the estate shall revest in the debtor(s) upon

Check the applicable box:

❑ Plan confirmation

❑ Closing of case

❑ Other: ______________________________

Part 9: Nonstandard Plan Provisions

Under Bankruptcy Rule 3015(c), nonstandard provisions are required to be set forth below. ***These plan provisions will be effective only if the applicable box in Part 1 of this plan is checked.***

____

____

____

____

____

Part 10: Signatures

The debtor's attorney (or debtor, if not represented by an attorney) certifies that all provisions of this plan are identical to the Official Form 113, except for language contained in Part 9: Nonstandard Plan Provisions.

Debtors
(Sign if not represented by an attorney)

✘ ______________________________ Date ____________
Signature of debtor MM / DD / YYYY

✘ ______________________________ Date ____________
Signature of debtor MM / DD / YYYY

Debtors' Attorney

✘ ______________________________ Date____________
Signature of debtor's attorney MM / DD / YYYY

Exhibit A Calculation of lien avoidance

A.1 The judicial lien or nonpossessory, nonpurchase-money security interest provided for in Section 3.4 is avoided to the extent listed below:
Do not complete if the plan involves no lien avoidance; if more than one lien is to be avoided, provide the information for each lien.

Name of creditor	Collateral	Judgment lien information (such as judgment date, date of lien recording, book and page number)	Calculation of lien avoidance	
			a. Amount of lien	$_______________
			b. Amount of all other liens	$_______________
			c. Value of claimed exemptions	$_______________
			d. Total: Lines a + b + c = line d	$_______________
			e. Value of debtor's interest in property	$_______________
			f. Subtract line e from line d	$_______________
			Extent of exemption impairment (*Check applicable box*): ❑ **Line f is equal to or greater than line a.** The entire lien is avoided. ❑ **Line f is less than line a.** A portion of the lien is avoided.	
			Amount of lien not avoided Subtract line f from line a	$_______________

Exhibit B Estimated amounts of trustee payments

B.1 The trustee will make the following estimated payments on allowed claims in the order set forth in Section 7.1:

a. **Current installment and arrearage payments on secured claims** (*Part 3, Section 3.1 total*): $______________

b. **Allowed secured claims** (*Part 3, Section 3.2 total*): $______________

c. **Secured claims not subject to 11 U.S.C. § 506** (*Part 3, Section 3.3 total*): $______________

d. **Judicial liens or security interests not avoided** (*Part 3, Section 3.4 total*): $______________

e. **Administrative and other priority claims** (*Part 4 total*): $______________

f. **Current installment payments and arrearage payments on unsecured debts** (*Part 5, Section 5.1 total*): $______________

g. **Separately classified unsecured claims** (*Part 5, Section 5.2 total*): $______________

h. **Nonpriority unsecured claims** (*Part 5, Section 5.3 total*): $______________

i. **Interest on allowed unsecured claims** (*Part 5, Section 5.4 total*): $______________

j. **Arrearage payments on executory contracts and unexpired leases** *(Part 6, Section 6.1 total*): $______________

Total of lines a through j .... $______________

COMMITTEE NOTE

Official Form 113 is new and is the required plan form in all chapter 13 cases. See Bankruptcy Rule 3015. Alterations to the text of the form or the order of its provisions, except as indicated on the form itself, are prohibited. See Bankruptcy Rule 9009. As the form explains, spaces for responses may be expanded or collapsed as appropriate, and sections that are inapplicable do not need to be reproduced.

Part 1. This part is intended to highlight some provisions of the plan for the benefit of interested parties and the court. For that reason, if the plan includes one or more of the provisions listed in this part, the appropriate boxes must be checked. For example, if Part 9 of the plan proposes a provision not included in, or contrary to, the Official Form, then that nonstandard provision will be ineffective if the appropriate check box is not selected.

Part 2. This part states the proposed periodic plan payments, plan length, the estimated total plan payments, and sources of funding for the plan. Section 2.1 allows the debtor or debtors to propose periodic payments in other than monthly intervals. For example, if the debtor receives a paycheck every week and wishes to make plan payments accordingly, that should be indicated in § 2.1. Section 2.2 provides for the manner in which the debtor will make payments. The debtor may also make payments through a designated third party, such as an electronic funds transfer program.

Part 3. This part provides for the treatment of secured claims.

Section 3.1 provides for the treatment of claims under Code §1322(b)(5) (maintaining current payments and curing any arrearage). For the claim of a secured creditor listed in § 3.1, an estimated arrearage amount should be given. A contrary arrearage amount listed on the creditor's proof of claim, unless contested by objection or motion, will control over the amount given in the plan.

In § 3.2, the plan may propose to determine under Code § 506(a) the value of a secured claim for which a proof of claim has been filed. For example, the plan could seek to reduce the secured portion of a creditor's claim to the value of the collateral securing it. For the secured claim of a nongovernmental creditor, that determination would be binding upon confirmation of the plan. For the secured claim of a governmental unit, however, a contrary valuation listed on the creditor's proof of claim, unless contested by objection or motion, would control over the valuation given in the plan. See Bankruptcy Rule 3012. Although § 3.2 applies to secured claims for which a proof of claim has been filed in accordance with Bankruptcy Rule 3002, that rule contemplates that a debtor, the trustee, or another entity may file a proof of claim if the creditor does not do so in a timely manner. See Bankruptcy Rules 3004 and 3005. Section 3.2 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.3 deals with secured claims that may not be bifurcated into secured and unsecured portions under Code § 506(a), but it allows for an interest rate other than the contract rate to be applied to payments on such a claim.

In § 3.4, the plan may propose to avoid certain judicial liens or security interests encumbering exempt property in accordance with Code § 522(f). A separate exhibit shows the calculation of the amount of the judicial lien or

security interest that is avoided. A plan proposing avoidance in § 3.4 must be served in the manner provided by Bankruptcy Rule 7004 for service of a summons and complaint. See Bankruptcy Rule 4003. Section 3.4 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.5 provides for elections to surrender collateral and consent to termination of the stay under § 362(a) and § 1301 with respect to the collateral surrendered. Termination will be effective upon confirmation of the plan.

Part 4. This part provides for the treatment of claims entitled to priority status. In § 4.4, the plan calls for an estimated amount of each such claim. A contrary amount listed on the creditor's proof of claim, unless changed by court order in response to an objection or motion, will control over the amount given in the plan.

Part 5. This part provides for the treatment of unsecured claims that are not entitled to priority status. In § 5.3, the plan may propose to pay nonpriority unsecured claims in accordance with several options. One or more options may be selected. For example, the plan could propose simply to pay unsecured creditors any funds remaining after disbursements to other creditors, or also provide that a defined percentage of the total amount of unsecured claims will be paid.

Part 6. This part provides for executory contracts and unexpired leases. An executory contract or unexpired lease is rejected unless it is listed in this part.

Part 7. This part provides an order of distribution of payments under the plan. Other than the trustee's fees and monthly payments to secured creditors, the order of distribution is left to be completed by the debtor in keeping with the requirements of the Code. A separate exhibit lists the estimated amounts of these distributions.

Part 8. This part defines when property of the estate will revest in the debtor or debtors. One choice must be selected—upon plan confirmation, upon closing the case, or upon some other specified event. This plan provision is subject to a contrary court order under Code § 1327(b).

Part 9. This part gives the debtor or debtors the opportunity to propose provisions that are not otherwise in, or are contrary to, the Official Form. All such nonstandard provisions must be set forth in this part and nowhere else in the plan. This part will not be effective unless the appropriate check box in Part 1 is selected. See Bankruptcy Rule 3015.

Part 10. The plan must be signed by the attorney for the debtor or debtors, unless the debtor or debtors are not represented by an attorney, in which case the plan must be signed by the debtor or debtors. The signature in this part is a certification to the court that the plan's provisions are identical to the Official Form, except for any nonstandard provisions contained in Part 9.

THIS PAGE INTENTIONALLY BLANK

APPENDIX B.5

THIS PAGE INTENTIONALLY BLANK

[Caption as in Form 16A, 16B, or 16D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s):
   ____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

   For appeals in an adversary proceeding.
   - ❑ Plaintiff
   - ❑ Defendant
   - ❑ Other (describe) ________________________

   For appeals in a bankruptcy case and not in an adversary proceeding.
   - ❑ Debtor
   - ❑ Creditor
   - ❑ Trustee
   - ❑ Other (describe) ________________________

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: ____________________________

2. State the date on which the judgment, order, or decree was entered: ____________________

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: __________________ Attorney: ________________________________
   ____
   ____
   ____

2. Party: __________________ Attorney: ________________________________
   ____
   ____
   ____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- ☐ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

____ Date: ________________________

Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Name, address, and telephone number of attorney (or appellant(s) if not represented by an attorney):

____
____
____
____

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

COMMITTEE NOTE

The form is amended and renumbered. It is amended to add to the Notice of Appeal an optional Statement of Election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. Current Rule 8005(a) eliminates the requirement, imposed by former Rule 8001(e), that a separate document be used in making an election to have an appeal heard by the district court rather than the bankruptcy appellate panel. It instead requires a statement that conforms substantially to the Official Form for such an election. Form 17A effectuates Rule 8005(a)'s requirement for election by an appellant by combining the notice of appeal and statement of election. It thereby facilitates compliance with the statutory requirement that an appellant wishing to make an election do so at the time of filing the appeal. 28 U.S.C. § 158(c)(1)(A).

The statement of election in Part 4 is applicable only in districts for which appeals to a bankruptcy appellate panel have been authorized. If an appeal is being taken from a bankruptcy court located in a circuit that does not have a bankruptcy appellate panel or in a district that has not authorized appeals to be heard by the circuit's bankruptcy appellate panel, the appellant should not complete Part 4.

When a bankruptcy appellate panel is available to hear an appeal, completion of Part 4 is optional. An appellant that wants its appeal heard by the bankruptcy appellate panel should not complete this part.

The form is renumbered as Official Form 17A because a new companion form—Optional Appellee Statement of Election to Proceed in the District Court—is designated as Official Form 17B, and another bankruptcy appellate form—Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)—is designated as Official Form 17C.

The fixed caption has been deleted because the short title caption on the current form is not appropriate if the debtor is the appellant or if the appeal is in an adversary proceeding. *See* 11 U.S.C. § 342(c); Rule 7008; Rule 9004(b). The form should be captioned as in Official Form 16A, Caption (Full); Official Form 16B, Caption (Short Title); or Official Form 16D, Caption for Use in Adversary proceeding, as appropriate.

[Caption as in Form 16A, 16B, or 16D, as appropriate]

OPTIONAL APPELLEE STATEMENT OF ELECTION TO PROCEED IN DISTRICT COURT

This form should be filed only if all of the following are true:

- this appeal is pending in a district served by a Bankruptcy Appellate Panel,
- the appellant(s) did not elect in the Notice of Appeal to proceed in the District Court rather than in the Bankruptcy Appellate Panel,
- no other appellee has filed a statement of election to proceed in the district court, and
- you elect to proceed in the District Court.

Part 1: Identify the appellee(s) electing to proceed in the District Court

1. Name(s) of appellee(s):
   ____

2. Position of appellee(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- ❑ Plaintiff
- ❑ Defendant
- ❑ Other (describe) ________________________

For appeals in a bankruptcy case and not in an adversary proceeding.

- ❑ Debtor
- ❑ Creditor
- ❑ Trustee
- ❑ Other (describe) ________________________

Part 2: Election to have this appeal heard by the District Court (applicable only in certain districts)

I (we) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 3: Sign below

____
Signature of attorney for appellee(s) (or appellee(s) if not represented by an attorney)

Date: ______________________________

Name, address, and telephone number of attorney (or appellee(s) if not represented by an attorney):
____
____
____

COMMITTEE NOTE

This form is new. It is the Official Form for an appellee to state its election to have an appeal heard by the district court rather than by the bankruptcy appellate panel. If an appellee desires to make that election and the appellant or another appellee has not already done so, the appellee must file a statement that conforms substantially to this form within 30 days of service of the Notice of Appeal. 28 U.S.C. § 158(c)(1)(B).

The form is applicable only in districts for which appeals to a bankruptcy appellate panel have been authorized. If an appeal is being taken from a bankruptcy court located in a circuit that does not have a bankruptcy appellate panel or in a district that has not authorized appeals to be heard by the circuit's bankruptcy appellate panel, the appellee should not complete this form.

When a bankruptcy appellate panel is available to hear an appeal, completion of the form is optional. An appellee that wants its appeal heard by the bankruptcy appellate panel should not complete this form.

The form should be captioned as in Official Form 16A, Caption (Full); Official Form 16B, Caption (Short Title); or Official Form 16D, Caption for Use in Adversary proceeding, as appropriate. *See* 11 U.S.C. § 342(c); Rule 7008; Rule 9004(b).

[This certification must be appended to your brief if the length of your brief is calculated by maximum number of words or lines of text rather than number of pages.]

Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)

This brief complies with the type-volume limitation of Rule 8015(a)(7)(B) or 8016(d)(2) because:

- ❑ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D), or

- ❑ this brief uses a monospaced typeface having no more than 10½ characters per inch and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D).

____ Date: ______________________________
Signature

Print name of person signing certificate of compliance:
____

COMMITTEE NOTE

This form is new. When the length of a brief is calculated by the maximum number of words or lines of text rather than by number of pages, Rules 8015(a)(7)(C) and 8016(d)(3) require an attorney or unrepresented party to certify that the brief complies with the applicable type-volume limitation. Completion of this form satisfies that certification requirement. This form is not needed if the brief meets the applicable page limitation under Rule 8015(a)(7)(A) or 8016(d)(1).

The form does not include a caption because it is included in the brief.

THIS PAGE INTENTIONALLY BLANK

APPENDIX C

THIS PAGE INTENTIONALLY BLANK

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 2–3, 2013
New York, New York

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
Circuit Judge Adalberto Jordan (by telephone)
District Judge Karen Caldwell
District Judge Jean Hamilton
District Judge Robert James Jonker
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison
Michael St. Patrick Baxter, Esquire
Richardo I. Kilpatrick, Esquire
J. Christopher Kohn, Esquire
David A. Lander, Esquire
Jill Michaux, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Troy A. McKenzie, assistant reporter
Roy T. Englert, Jr., Esq., liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Bankruptcy Judge Erithe A. Smith, liaison from the Committee on Bankruptcy Administration
Jonathan Rose, secretary of the Standing Committee and Chief, Rules Committee Support Office
Patricia S. Ketchum, advisor to the Advisory Committee
Ramona D. Elliott, Deputy Director /General Counsel, Executive Office for U.S. Trustees (EOUST) (by telephone)
Lisa Tracy, Associate General Counsel, EOUST (by telephone)
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Peter G. McCabe, Assistant Director, Office of Judges Programs, Administrative Office of the U.S. Courts (Administrative Office)
Benjamin Robinson, Deputy Rules Officer
James H. Wannamaker, Administrative Office
Scott Myers, Administrative Office
Bridget Healy, Administrative Office
Molly Johnson, Federal Judicial Center
Michael T. Bates, Senior Company Counsel, Wells Fargo
Eric Donowho, Chief Administrative Officer, Barrett, Daffin, Frappier, Turner & Engel, LLP

Marcy J. Ford, Executive Vice President and Managing Partner Bankruptcy Department, Trott & Trott, PC
Craig Goldblatt, WilmerHale LLP
Raymond J. Obuchowski, on behalf of the National Association of Bankruptcy Trustees
Anita M. Warner, Vice President, Assistant General Counsel, Chase
Daniel A. West, Shareholder/Managing Attorney, South & Associates

The following summary of matters discussed at the meeting is written in the order of the meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee.

An electronic copy of the agenda materials, other than materials distributed at the meeting after the agenda materials were published, is available at http://www.uscourts.gov/RulesAndPolicies/rules/archives/agenda-books/committee-rules-bankruptcy-procedure.aspx. Votes and other action taken by the Advisory Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings; welcome to new member Jill Michaux, Esq., and new liaison representatives Roy T. Englert, Jr., Esq., and Judge Erithe A. Smith; and recognition of the service of former committee member Jerry Patchan.

The Chair welcomed the Advisory Committee's newest member, Jill Michaux, Esq., and its new liaisons from the Standing Rules Committee, Roy Englert, and from the Committee on Bankruptcy Administration, Judge Erithe Smith.

At the Chair's request, Ms. Ketchum and Mr. McCabe recognized the service of former member Jerry Patchan, who recently passed away. Ms. Ketchum noted that it was ironic to honor Mr. Patchan at this time in light of the many comments the Advisory Committee received in response to publication of the first set forms produced as part of the Forms Modernization Project. Mr. Patchan, she said, was the first chair of the Advisory Committee's Forms Subcommittee and he presided over the last major overhaul of bankruptcy forms in the late 1980s. Mr. Patchan was a former bankruptcy judge, became a private attorney and joined the Advisory Committee, and later was director of the Executive Office for United States trustees.

2. Approval of minutes of Portland meeting of September 20–21, 2012.

The draft minutes were approved with minor edits.

3. Oral reports on meetings of other committees:

(A) January 2013 meeting of the Advisory Committee on Rules of Practice and Procedure.

The Chair said that the Standing Committee was asked to comment on the modernized bankruptcy forms for individuals at its January meeting, and that there was general approval of the new forms. There were some concerns, however, about the Advisory Committee's attempt to

incorporate the Supreme Court's holding in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010) into the exemption schedule. The Chair said that the Joint Consumer Forms Subcommittee has amended the exemption schedule to address the Standing Committee's concerns, and that the revised form would be considered at Agenda Item 7(A).

The Chair said the Standing Committee asked the Advisory Committee to move forward in its consideration of a rule for electronic signatures and that the proposal of the Subcommittee on Technology and Cross Border Insolvency on that issue would be considered at Agenda Item 10.

(B) January 2013 meeting of the Advisory Committee on the Administration of the Bankruptcy System.

Judge Smith reported on the most recent meeting of the Advisory Committee on the Administration of the Bankruptcy System, which she said focused largely on budget matters.

(C) November 2012 meeting of the Advisory Committee on Civil Rules, including the Civil Rules Committee's approval of an amendment of Civil Rule 6(d) for future publication.

Judge Harris said there was one matter before the Committee on Civil Rules that has near term bankruptcy rules implications. The Civil Rules Committee voted to approve a proposed amendment to Rule 6(d), he said, that would clarify that only the party being served (not the party serving) by certain means described in the rule could add 3 days to a time period. Judge Harris moved for the Advisory Committee to recommend publication of the same change to Bankruptcy Rule 9006(f), which incorporates the language from Rule 6(d), so that counting under the two rules remains the same. **The Advisory Committee recommended the following amendment Rule 9006(f) for publication**: Replace the word "service" with "being served."

Mr. McCabe added that a pending change to the Rule 45 on track to take effect December 1, 2013, which is incorporated into Bankruptcy Rule 9016, would require changes to the bankruptcy subpoena forms. **The Chair asked the Forms Subcommittee to consider needed changes this summer, and to report back at the fall meeting**.

(D) October 2012 meeting of the Advisory Committee on Evidence.

Judge Wizmur reported on the work of the Advisory Committee on Evidence.

(E) September 2012 meeting of the Advisory Committee on Appellate Rules.

Judge Jordon reported on the work of the Advisory Committee on Appellate Rules.

(F) Bankruptcy Next Generation of CM/ECF Working Group.

Judge Perris reported on the progress of Next Generation of CM/ECF at Agenda item 7.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Oral report concerning Suggestion 12-BK-I by Judge John E. Waites (on behalf of the Bankruptcy Judges Advisory Group) to amend Rule 1006(b) to provide that courts may require a minimum initial payment with requests to pay filing fees in installments.

Judge Harris said that in light of the amount of material currently being considered by the Advisory Committee, the Subcommittee decided to table this issue for now. He added that, although the Subcommittee did not fully discuss the suggestion, there was concern expressed by some members that requiring an initial installment payment at the time of filing might encourage eligible debtors in chapter 7 to file an application to waive the filing fee instead an application to pay in installments.

(B) Oral report concerning Suggestion 12-BK-B by Matthew T. Loughney (on behalf of the Bankruptcy Noticing Working Group) to amend Rule 2002(f)(7) to require notice of the confirmation of the debtor's chapter 13 plan.

Judge Harris said that in light of the amount of material currently being considered by the Advisory Committee, the Subcommittee decided to table this issue for now. He added that the Subcommittee will attempt to ascertain and review current practice to determine how many courts already require notice of confirmation of the debtor's chapter 13 plan and who does the notice (i.e., court, debtor or trustee).

(C) Recommendation concerning Suggestion 12-BK-D by Judge S. Martin Teel, Jr., to amend Rule 7001(1) as it concerns compelling the debtor to deliver the value of property to the trustee.

Professor Gibson gave the report. She said that the Subcommittee had concluded that the proposed amendment should not be pursued for two reasons. First, the issue that provoked Judge Teel's suggestion does not appear to have caused much confusion in the courts. There is agreement that a trustee may proceed by motion to seek a turnover from the debtor of property of the estate or proceeds of the property and, when that property is money that the debtor no longer possesses, the turnover of an equivalent amount of money. The only disagreement concerns whether the trustee must proceed by way of an adversary proceeding to recover a money judgment for the value of non-cash property of the estate when neither the property nor its proceeds remain in the debtor's possession at the time of the turnover action. There is little case law on the question. The one decision that created the issue, *Price*, was an unpublished decision in 2006 that has not been cited for its procedural ruling in any other opinions.

Second, the Subcommittee concluded that a basis exists for limiting the Rule 7001(1) exception to "a proceeding to compel the debtor to deliver property to the trustee." A proceeding to recover a judgment against the debtor for the *value* of property that the debtor no longer possesses results in a money judgment that is enforceable by execution and levy on any of the debtor's non-exempt property. The Subcommittee concluded that there is a reasonable basis for treating such an action like most other proceedings to recover money or property—with the greater formalities required for an adversary proceeding. No member objected to the Subcommittee's recommendation. No further action will be taken.

(D) Oral report concerning Comment 11-BK-12 by Judge Frank regarding the negative notice procedure for objections to claims in the proposed amendment to Rule 3007 that was published (and withdrawn).

Judge Harris said that in light of the amount of material currently being considered by the Advisory Committee, the Subcommittee decided to table this issue for now. He added that in preliminary discussions, members on the Subcommittee were concerned about changing the burden of proof in a negative notice process, and whether negative notice would be sufficient if service was made only on the name and address on the filed proof of claim.

5. Report by the Chapter 13 Plan Form Working Group.

Recommendation by the Subcommittees on Consumer Issues and Forms concerning adopting a national chapter 13 plan form and amending Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009 in connection with adopting a plan form.

The Chair, Judge Perris and Professor McKenzie presented the recommendation of the Joint Subcommittee on Consumer Issues and Forms for publication of a national chapter 13 plan form and related rule amendments. Judge Perris said that the original suggestions for a national form for chapter 13 plans came from a bankruptcy judge and a group of state attorneys general. Bankruptcy judges were polled and most responded that a national form would be a good idea, and many recommended that the national form be based upon the local version currently in effect in their districts.

A central goal of the plan form is to improve procedures in chapter 13 practice. That goal has taken on heightened importance with the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), which held that an order confirming a procedurally improper chapter 13 plan is nevertheless *res judicata*, and which emphasized the duty of bankruptcy judges to review chapter 13 plans for compliance with the law.

At its September 2012 meeting in Portland, Oregon, the Advisory Committee discussed drafts of the plan form and rule amendments prepared by the Advisory Committee's Chapter 13 Plan Form Working Group (Working Group). The Advisory Committee also approved a recommendation to hold a mini-conference on the draft plan and rules. That mini-conference, held in January 2013, brought together participants from a broad cross-section of groups interested in the chapter 13 process. The participants included chapter 13 trustees, bankruptcy judges, a court clerk, and representatives of creditors and consumer debtors. The Working Group incorporated the input received during the mini-conference, and the joint Subcommittees on Consumer Issues and Forms (Joint Subcommittee) provided additional input on the draft plan and rules.

Professor McKenzie said that the plan form contains three features that will be highlighted at the beginning of the document. First, it permits the debtor to limit the amount of a secured claim under § 506(a) of the Code, subject to a creditor's objection to confirmation. Second, the plan also permits the debtor to request the avoidance of certain liens impairing exemptions under Code § 522(f). Third, the plan includes a space in which the debtor may propose nonstandard provisions—that is, provisions not included in, or contrary to, the plan form. None of these features will be effective unless the debtor indicates, in the first part of the

document, that the plan contains that feature. One member suggested that a requirement to both complete the relevant section and then indicate that section had been completed at the beginning of the plan creates the possibility of inconsistencies, but other members pointed out that highlighting these three issues at the beginning of the plan provides heightened notice to the affected party, and that the plan is clear about what needs to be completed to make a provision effective.

The Joint Subcommittee concluded that effective implementation of the plan form will require conforming amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009. The amendments fall into three categories.

First, there are amendments that would affect the filing, processing, and treatment of claims. Rule 3002(a) would be amended to require a secured creditor to file a proof of claim in order to have an allowed claim. Rule 3002(c) changes the deadline for filing proofs of claim in chapter 13 cases to 60 days after the petition date so that the confirmation hearing date established by § 1324(b) of the Code could be set after all non-governmental proofs of claim are filed. The sixty-day period is extended to allow the filing of documentation required under Rule 3001(c)(1) and (d) for certain mortgage claims.

Several interrelated rule amendments would provide for circumstances when the plan will control over a contrary proof of claim. Amendments to Rules 3012 and 3015 provide that the plan may make a binding determination of the amount of a secured claim subject to ultimate resolution at the confirmation hearing. Amended Rule 3007, in turn, provides an exception to the need to file a claim objection if claim allowance is resolved under Rule 3012. Similarly, amended Rule 4003(d) makes clear that a plan may provide for avoidance of liens under 11 U.S.C. § 522(f). And amended Rule 7001 makes clear that an adversary proceeding is not necessary to determine the validity, priority, or extent of a lien resolved through a plan. Relatedly, if a lien encumbering property of the estate has been satisfied, amended Rule 5009(d) provides that the debtor may request an order documenting that the lien has been satisfied.

Second, several proposed rule amendments concern service and notice in chapter 13 cases. Amendments to Rule 3015 are intended to ensure that creditors receive a copy of the plan before confirmation and that any objections to confirmation are filed and served seven days before the confirmation hearing. Similarly, Rule 2002 would be amended to clarify the notice period before a confirmation hearing (28 days) and the deadline for filing objections to confirmation (21 days).

Some of the amendments require enhanced service. Rule 3012 would be amended to provide that a request to determine the amount of a secured claim under a plan must be served in accordance with Rule 7004's requirements for adversary proceedings. Similar service requirements are included in amended Rule 4003(d), which concerns a plan proposing lien avoidance under Code § 522(f). If a debtor requests an order declaring a lien satisfied under amended Rule 5009(d), service in accordance with Rule 7004 is also required.

Third, the Advisory Committee is proposing amendments to the Bankruptcy Rules that would limit deviations from the Official Form chapter 13 plan.

Rule 3015(c) would be amended to require the use of the Official Form plan and to make clear that provisions deviating from the Official Form are not effective unless they are placed in the part of the Official Form for nonstandard provisions (and identified accordingly).

The Advisory Committee considered alternative proposed revisions to Rule 9009, which were set out beginning at page 147 of the Agenda Book. Both versions would prohibit alterations of an Official Form, except when the Bankruptcy Rules or an Official Form itself would permit modification, and except for Official Form orders, which could be modified by a court in individual cases unless a Bankruptcy Rule or the Official Form itself provided otherwise. Both versions of proposed Rule 9009 also provide for alterations to forms with respect to fonts, and for the addition or deletion of spaces, as the case may be, when responding to an item.

The two versions of the proposed Rule 9009 differed, however, on whether a court could permissively adopt a localized version of a national form—to, for example, add a certificate of service to a form that must be served. The first version of the rule, on page 147 of the Agenda Book, would not allow such localization. Instead, the local court could adopt a supplemental form to handle the local requirement. The alternate variation, on page 149 of the Agenda Book, would permit but not allow a court to require that filers to use a localized version of an Official Form. **The Advisory Committee voted 7–5 to recommend publishing the first version of Rule 9009, as set out at page 147 of the Agenda Book, subject to review by the Style Subcommittee. The Advisory Committee voted unanimously to recommend publication of the proposed plan form and accompanying rule amendments.**

6. Joint Report by the Subcommittees on Consumer Issues and Forms.

(A) Status report on mortgage rules and forms amendments discussed at the mini-conference in Portland, including requiring a detailed loan history and amending Rule 9009 to specify the extent to which Official Forms may be modified.

The Reporter gave a status report on the mortgage forms mini-conference. She said that several issues were raised at the meeting, including the possible need to adopt a national form detailing the loan payment history. There are still questions, she said, about the time frame any loan history should start, and servicers were concerned about local courts modifying any a national loan history form if one is adopted. Proposed revisions to Rule 9009, however, which are to be published this fall in connection with the nation chapter 13 plan discussed at Agenda Item 5 above, would limit the types of modifications that can be made to official bankruptcy forms. Accordingly, the Joint Subcommittee decided to wait until after the Rule 9009 comment period ends before considering further changes to the mortgage rules and forms. No recommendation is being made at this time.

(B) Recommendation concerning Suggestion 11-BK-N by David S. Yen for a rule and form for applications to waive fees other than filing fees, under 28 U.S.C. § 1930(f)(2) and (f)(3).

Judge Harris gave the report. He said that the Joint Subcommittee had been asked at the September 2012 meeting to consider a Director's Form for fee waivers under 28 U.S.C. § 1930(f)(2) and (f)(3). He said the Joint Subcommittee concluded that there is not a pressing need for a special form to request fee waivers under 28 U.S.C. § 1930(f)(2). There is already an official form that a chapter 7 debtor may use to request a waiver of the filing fee under 28 U.S.C. § 1930(f)(1). The information on that form would generally be relevant, or could be updated, if the chapter 7 debtor seeks a waiver of other fees under Section 1930(f)(2) later in the case.

Judge Harris said that 28 U.S.C. § 1930(f)(3) refers to fee waivers "in accordance with Judicial Conference policy." The current Judicial Conference policy on fee waivers is limited to chapter 7 debtors. In 2005 the Judicial Conference adopted Interim Procedures Regarding Chapter 7 Fee Waiver Provisions. The procedures primarily address fee waivers under § 1930(f)(1), but they also state that "[o]ther fees scheduled by the Judicial Conference under 28 U.S.C. §§ 1930(b) and (c) may be waived in the discretion of the bankruptcy court or district court for individual debtors whose filing fee has been waived." The interim procedures do not contain any reference to waiver of fees for creditors or for debtors who are not entitled to a fee waiver under § 1930(f)(1).

Judge Harris said that the Judicial Conference's Committee on the Administration of the Bankruptcy System is currently considering a revision of the interim fee waiver procedures. The most recent draft of the revision does not address fee waivers under § 1930(f)(3). In light of the ongoing revisions of the fee waiver guidelines and the current absence of any Judicial Conference policy for waivers under § 1930(f)(3), the Joint Subcommittee recommends that the Advisory Committee refrain from acting further on a Director's Form for fee waivers under § 1930(f)(3) until a Judicial Conference policy on this type of waiver is issued.

7. Report by the Subcommittee on Forms and the Forms Modernization Project.

(A) Report on the status of the Forms Modernization Project and recommendation concerning publication of the remaining new individual forms developed by the project, including revision of the exemption schedule as a result of the Supreme Court's holding in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010).

Forms Modernization Project and the Next Generation of CM/ECF

Judge Perris gave an overview of the Forms Modernization Project (FMP) and how the FMP's work has been coordinated with development of the next generation of case management and electronic case filing software (Next Gen).

The FMP is a working group of the Advisory Committee and consists of current and former members of the Forms Subcommittee, advisors from other Judicial Conference groups such as the Bankruptcy Judges Advisory Group and the Bankruptcy Clerks Advisory Group, advisors from the Federal Judicial Center, the Executive Office for United States Trustees, and a Bankruptcy Administrator. The FMP began its work modernizing the official bankruptcy forms in 2008. The dual goals of the FMP are to improve the language and format of official bankruptcy forms and to improve the interface between the forms and available technology, including the enhanced technology that will become available through the judiciary's Next Gen program.

From a forms perspective, the major change in Next Gen 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. Judge Perris said that the initial release of Next Gen, which would include report generating tools for internal court users, is planned for 2014.

As an initial matter, the FMP separated case opening forms for individual and non-individual debtors. Drafting of the individual forms is complete, and a subset of those forms (3A, 3B, 6I, 6J, 22A-1, 22A-2, 22B, 22C-1 and 22C-2), were published for public comment in August

2012. The comments and recommendations for those nine forms are discussed at Agenda Items 7(B) and 7(C) below.

Judge Perris said there were several reasons the Advisory Committee published only a subset of individual forms in 2012, including the need for further refinements on some forms. A more important concern, however, was that it was unclear in 2012 whether Next Gen would be in place when the new forms were projected to go into effect on December 1, 2013. Putting all of the new forms into effect before the Next Gen report writing functions are available to the courts would likely increase the difficulty of transitioning to the new forms. On the other hand, having a small subset in place when Next Gen goes into effect will allow for fuller testing of the new forms before other modernized forms are approved.

Judge Perris said that the remaining individual debtor forms were presented to the Advisory Committee at its fall 2012 meeting and to the Standing Rules Committee at its winter 2012 meeting with a request for preliminary comments prior to publication. She said that those forms, set out in the Supplement to the Agenda Book beginning at page 91, have been revised to reflect the preliminary comments from the Advisory Committee and Standing Committee and also reflect formatting changes that were made as a result of general comments about the nine FMP forms that were published last August. The most significant formatting change since the Advisory Committee and Standing Committee last saw the forms that will be recommended for publication this year, she said, was a reduction in the use of shading and long black bars to separate the parts and sections on the new forms.

Judge Perris said that the non-individual forms are on track to be published for comment in August 2014. The FMP has completed initial drafts of most of the non-individual forms, she said, and has begun prepublication testing with groups of law clerks, law students, lawyers and judges.

Judge Perris said three issues needed to be resolved prior to a motion for publication of the remaining individual FMP forms in August 2013: (1) a revision of the proposal to modify the exemption schedule to account for the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010); (2) a request to change the lettering of the new schedules (discussed at Agenda Item 7(D) below); and (3) a recommendation for a delayed effective date of the renumbered individual forms.

<u>Schwab v. Reilly and the Individual Debtor's Exemption Schedule</u>

The Chair spoke about the proposed *Schwab* changes to the exemption schedule. He said that some members of the Standing Committee had been concerned that the proposal recommended by the Advisory Committee was unclear. As submitted to the Standing Committee, the exemption schedule had a blank line in the value column and an instruction at the top of the form that an exemption amount could be put in on the line, or the debtor could write on the line "full fair market value." The Chair said that as a result of the Standing Committee's concerns, the Joint Subcommittee recommended revising the exemption schedule to include two checkboxes: one checkbox that would allow the debtor to specify a dollar amount for the exemption, and a second checkbox that would allow the debtor to exempt "100% fair market value *up to the applicable statutory limit.*" The italicized language, he said, addressed a concern previously raised by case trustees that if a checkbox simply allowed the debtor to exempt "100% of full market value," debtors would routinely check the box without considering whether the exemption had a dollar limit specified by statute. By limiting the checkbox

exemption to 100% of full market value up to any applicable statutory limit, the Chair said, a debtor would be easily able to follow *Schwalb* without prompting unnecessary objections from case trustees. **After a short discussion, the Advisory Committee recommended the revised exemption schedule for publication.**

Motion for delayed effective date of the remaining individual forms

Judge Perris explained that, depending on the Advisory Committee's decisions at Agenda Items 7(B) and 7(C), the forms published last fall (3A, 3B, 6I, 6J, 22A-1, 22A-2, 22B, 22C-1 and 22C-2) are on track to go into effect December 1, 2013, and December 1, 2014. She said that there is no problem with the proposed effective dates for those forms because they are projected to replace existing versions that are used exclusively by individuals. Most of the forms to be published this August, however, are individual debtor versions of forms that are currently used by all debtors. Official Form 1, the current voluntary petition, for example, will be replaced by two FMP versions: one version for individual-debtors, Official Form 101, and another version for non-individual debtors, Official Form 201. Only the individual debtor version of the voluntary petition is complete and ready to be published this year, however.

Like the petition, there will be different versions of the schedules and the statement of financial affairs for individuals and non-individuals. The need for different versions of case opening forms for individuals and non-individuals required the FMP to develop a new numbering system for all the bankruptcy forms that both organizes the bankruptcy forms in a logical way and has some relationship to current form numbers. The basic numbering protocol for the new forms is:

1XX – Forms for Individuals Filing for Bankruptcy

2XX – Forms for Non-individual Filing for Bankruptcy

3XX – Orders and Court Notices

4XX – Additional Official Forms

XXXX - Director's Forms

The new numbering system will make it difficult, Judge Perris said, to introduce renumbered forms piecemeal. She explained that the normal effective date for the renumbered individual-debtor forms to be published this August would be December 1, 2014. The Subcommittee recommended delaying the effective date until at least December 1, 2015, so that they can go into effect at the same time as the non-individual versions of the forms—which are about a year behind in development.

Judge Perris said that there are two reasons to synchronize the effective date of the individual and non-individual forms. First, as explained above, many of the individual-debtor forms being published this August are revisions of forms that currently apply in all bankruptcy cases, individual and non-individual. To avoid overlap and confusion, the non-individual forms should not go into effect until the current forms have been replaced for all cases. Second, the forms that will be published this August implement the new forms-numbering scheme described above. Delaying the effective date of the non-individual forms will allow there to be a uniform numbering scheme for all of the bankruptcy forms. The delay will also permit the bulk of the

modernized forms to go into effect after the first release of the Next Gen is fully operational, thus making it easier for court personnel to take advantage of the improved technology and interface.

In the meantime, courts will be able to work with a smaller subset of the new forms (3A, 3B, 6I and 6J scheduled to take effect December 1, 2013, and the means-test forms scheduled to take effect December 1, 2014), allowing time to adjust to the new format and technology features.

A motion to publish the remaining individual forms, with a proposed effective date no earlier than December 1, 2015, passed without opposition.

NOTE: The remaining individual-debtor forms to be published are set out beginning at page 91 of the Supplement to the Agenda Book. As set out in the Supplement, they are Official Forms 101, 101A, 101B, 104, 105, 107, 112, 119, 121, 318, 423, 427, and the debtor's schedules – 106A, 106B, 106, C, 106D, 106E, 106F, 106Dec, and 106Sum. As revised at Agenda Item 7(D), however, the schedules to be published will be labeled 106A/B, 106C, 106D, 106E/F, 106G, 106Dec, and 106Sum. A form number conversion chart for the individual-debtor forms is attached to these minutes.

(B) Recommendation concerning comments received on the published amendments to Official Forms 3A, 3B, 6I, and 6J.

Judge Perris highlighted the more significant comments for proposed Official Forms 3A, 3B, 6I, and 6J. She added that the comments were more fully discussed in the agenda materials.

Judge Perris said that Official Forms 3A (Application for Individuals to Pay the Filing Fee in Installments), 3B (Application to Have the Chapter 7 Filing Fee Waived), 6I (Schedule I: Your Income), and 6J (Schedule J: Your Expenses) were selected for the initial implementation stage of the FMP because they make no significant change in substantive content and simply replace existing forms, which already apply only in individual-debtor cases. The restyled forms 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.

In response to the publication of these forms—and of Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, discussed at Agenda Item 7(C) below—29 sets of comments were submitted, and one letter was informally submitted. Judge Perris said that the comments on the overall project and the published forms in general fell primarily into the following categories:

- support for the new forms;
- dislike of the new forms and a preference for maintaining the current forms;
- concern that the forms contain too much shading, too much white space, and too many pages, all of which will increase printing, mailing, and electronic transmission costs;
- concern that the forms will encourage *pro se* filings, to the detriment of the debtors and the courts; and
- the need for a clear statement about the extent to which software-generated forms can deviate from the graphic and formatting styles of the proposed forms, including the omission of instructions that are provided in the format of checkboxes and the omission or collapsing of inapplicable sections.

Judge Perris first discussed the most fundamental question—whether the project should proceed notwithstanding the preference of some commenters for the current forms. **After reviewing the reasons for the project and the guiding principles behind the redesign, the Advisory Committee unanimously concluded that the project should proceed.**

In response to the numerous comments about shading, **the Advisory Committee voted to accept the FMP's recommendation that shading should largely be eliminated**. The Advisory Committee also agreed with the FMP's proposed redesign of the forms, which retains the black banner for the "part" designation but uses a different format for the title of each part. Shading was largely eliminated from the balance of each of the forms. Members commented that these changes will reduce toner usage and increase the ease with which forms are printed and reproduced.

Judge Perris said that the increase in the length of the forms is a function of several factors. First, in an effort to increase accuracy and ease of use, and to create a form whose answers can populate a usable database of answers, more specific questions are asked, and the debtor is often prompted to provide an answer by selecting from a list of choices. Second, rather than providing a dense set of instructions at the beginning of a form and then blank spaces for the answers, many instructions are integrated throughout the form where the debtor is likely to need them. Third, more space is provided to answer some of the questions. Finally, examples are often included to help the debtor understand what information is being requested.

Judge Perris added that evaluating the length of the new forms before they are completed with debtor information is misleading because proposed revisions to Rule 9009, which is part of the chapter 13 plan form and rules package presented at this meeting for publication, will allow the filer to "collapse" question answers that do not require all the white space provided on the forms. In discussing this issue, members agreed that new design is likely to provide more accurate, usable information.

Judge Perris said that proposed Rule 9009 also provides guidance regarding the extent to which software-generated forms may deviate from the official forms.

Judge Perris said that whether the use of plain English and a more user-friendly design will encourage more *pro se* filings has been the subject of discussion since the beginning of the project. She said that FMP believes that the preparation of comprehensive instructions that explain the impact and complexity of a bankruptcy case and provide extensive warnings about the significance of filing for bankruptcy will discourage, not encourage, *pro se* filings. In addition, the FMP believes that it is important that forms be understandable by all debtors, including those who are represented, because debtors are required to sign the forms under penalty of perjury. The comments did not change those views.

Comments on Official Form 3A. Two sets of comments addressed this form specifically. Both suggested adding an option to the form allowing for payment a chapter 13 filing fee through the debtor's plan. Districts differ on whether they permit this practice, and the current form does not expressly provide this option. Because the practice is not universal and the bankruptcy system has historically been able to accommodate the practice where it is allowed, the Subcommittee recommends that the form should remain silent regarding that option. The Advisory Committee agreed with the Subcommittee.

Line 2 of the published form stated that a debtor may ask the court to extend the deadline for payment of the final fee installment and that the debtor must explain why an extension is needed. One comment noted that no space was provided on the form for the explanation. Judge Perris said that the FMP contemplated that such an extension would require a separate application at a later time, and in order to avoid any confusion, recommended moving the statement about the possibility of an extension from the form to the separate form instructions. Judge Perris said that the change is consistent with the form currently in effect, which merely informs the debtor of the possibility of obtaining an extension "for cause shown" and does not ask the debtor to provide reasons for the extension as part of the application. **The Advisory Committee agreed with the proposed change.**

One comment suggested deleting the instruction in the signature box not to pay "anyone else in connection with your bankruptcy case" until the entire filing fee is paid because it would prohibit a debtor from making payments to a chapter 13 trustee before all of the installment payments are made. A member noted that current Official Form 3A includes the statement, "Until the filing fee is paid in full, I will not make any additional payment or transfer any additional property to an attorney or any other person *for services* in connection with this case" (emphasis added). **The Advisory Committee agreed with the FMP that the comment should be addressed by reinserting "for services" in the statement.**

Comments on Official Form 3B. Five comments were submitted regarding this form. Several of them stated that certain information asked for on the proposed form should be omitted because of its irrelevance to the waiver decision. The following information was suggested for deletion:

- line 3, non-cash government assistance;
- lines 12–16, various assets that the debtor owns;
- line 19, payment for bankruptcy services by someone else; and
- line 20, prior bankruptcy filings by the debtor or the debtor's spouse.

The current version of the form asks for the second and third items of information listed above, and the Advisory Committee decided to continue requesting that information. The current form also asks for prior bankruptcy filings by the debtor, but not by the debtor's spouse unless the spouse is also filing. Upon consideration of the comments, the FMP recommended deleting the request for information about prior filings of a non-filing spouse. **The Advisory Committee agreed with the FMP.**

Judge Perris said that the decision about how to respond to the first item, non-cash government assistance, was more complicated. The amount of non-cash government assistance may be relevant to determining whether a debtor is able to pay the filing fee in installments, since it may reduce the debtor's other expenses, but it is not specifically asked for on current Official Form 3B. Instead, the current form simply asks for the total combined monthly income as computed on Schedule I. Restyled Schedule I as published asked debtors to include the value of "[o]ther government assistance." Immediately preceding that question, it asked for "unemployment compensation" and "Social Security," which might have suggested to some debtors that "other government assistance" referred only to other forms of cash assistance. At the same time, non-cash governmental assistance should not be counted in determining whether the debtor meets an income threshold for waiver eligibility. The interim procedures of the Judicial

Conference regarding chapter 7 fee waivers direct that "Non-cash governmental assistance (such as food stamps or housing subsidies) is not included [in income]."

Judge Perris said that, as a result of the comments, the FMP recommends rephrasing the requests for information about governmental assistance on both Official Form 3B and Schedule I to harmonize the two forms. In completing Official Form 3B, the debtor is permitted to use the income calculated on Schedule I. As revised, however, the income on Schedule I includes non-cash governmental assistance in income to the extent that the debtor knows the value of such assistance. Accordingly, on Official Form 3B it was necessary to have the debtor first report the amount of income including the value of non-cash assistance, and then deduct the value of such assistance to determine the amount of income for purposes of the fee waiver application. In addition, the FMP recommended revising both forms to clarify that the debtor only needs to include the value of non-cash governmental assistance to the extent known. **The Advisory Committee approved the changes recommended by the FMP.**

Comments on Official Form 6I. Judge Perris said that 14 comments specifically addressed this form. Several of them raised questions about when income information must be provided about non-filing spouses. In order to clarify the requirement, the FMP added the following instruction at the beginning of the form: "If you are married, not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse." The form specifically asks for information about both spouses when they file jointly. **The Advisory Committee agreed with the FMP.**

In addition to the changes needed to coordinate Schedule I with Official Form 3A (discussed above) the FMP recommended two changes to the form's list of payroll deductions. As revised in the agenda materials, Schedule I was amended to ask separately about mandatory and voluntary contributions to retirement plans. And a new specific payroll deduction for "domestic support obligations" was added in response to a comment that these deductions are sufficiently common to justify a specific listing. **The Advisory Committee approved the changes.**

Comments on Official Form 6J. Fifteen comments specifically addressed Schedule J. Judge Perris said that the part of the proposed form drawing the most comment was the inclusion in part 2 of column B ("For Chapter 13 Only – What your expenses will be if your current plan is confirmed"). Many commenters were uncertain about the purpose of that column and doubted whether debtors would provide useful information. The FMP recommended two changes in response to those comments. First, column B was eliminated. Second, in order to permit districts that currently allow debtors to use Schedules I and J to update their income and expense information, a new checkbox was added to both forms where a debtor can indicate that the information on the form is a "supplement as of the following post-petition date:______." **The Advisory Committee approved the changes recommended by the FMP.**

One commenter questioned the reason for the question, "Does anyone else live in your household?" Judge Perris said that the FMP concluded that the question was too broad, and recommended the following changes to Part 1 of Schedule J. First, questions 1 and 2 on the published form were combined into a single question asking about all of the debtor's dependents, regardless of whether the dependents live with the debtor. Second, question 3 was revised to make its financial purpose clear. In the published version of the form, question 3 asked, "Does anyone else live in your household?" This was amended to read "Do your expenses include

expenses of people other than yourself and your dependents?" The question has been converted to a simple "yes/no" format. If the debtor's Schedule J reveals that it includes expenses for people other than the debtor and the debtor's dependents, interested parties may investigate further if warranted. **The Advisory Committee approved the changes.**

Several comments questioned the inclusion of student loan payments as an expense deduction in Schedule J. They argued that explicitly listing this deduction represented a policy decision that student loans can continue to be paid during a chapter 13 case without constituting unfair discrimination against other unsecured claims that are not being paid in full. Another comment contrasted the treatment of student loans with other nondischargeable debts that are not treated as deductions. In response, the category of student loans as a distinct line item was eliminated. Now debtors who are paying student loans as an expense may list those payments as an "other" installment payment on line 17 of the form. **The Advisory Committee approved the changes.**

Just as with Schedule I, some comments questioned the treatment of non-filing spouses on Schedule J. To eliminate the confusion, the FMP added the following instructions: "If you are married and are filing individually, include your non-filing spouse's expenses unless you are separated. If you are filing jointly and Debtor 1 and Debtor 2 keep separate households, fill out a separate *Schedule J* for each debtor. Check the box at the top of page 1 of the form for Debtor 2 to show that a separate form is being filed." New question 1 affirmatively asks if debtor 2 lives in a separate household. If so, that debtor is directed to file a separate Schedule J. **The Advisory Committee approved the changes.**

After approving the changes listed above, the Advisory Committee recommended that Official Forms 3A, 3B, 6I and 6J become effective on December 1, 2013.

(C) Recommendation concerning comments received on the published amendments to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2.

The Chair discussed Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, the restyled means-test forms for individual debtors under chapter 7, 11, and 13, that were published for comment in August 2012. Eighteen sets of comments on the means-test forms were officially submitted, and one person informally provided the Advisory Committee with a detailed review of the forms. The Chair said that the comments ranged from suggestions and critiques regarding wording, style, and formatting of the forms to ones raising questions about interpretations of the Bankruptcy Code and case law. The FMP and the Forms Subcommittee carefully considered all of the comments. The Subcommittee determined that several of the comments were well taken, and recommended the following changes to the forms in response.

<u>Creation of a separate form for chapter 7 means-test exemption and harmonizing the line numbers across the means-test forms</u>.

The Chair explained that 11 U.S.C. § 707(b)(2)(D) exempts—either permanently or for a specified period—a small percentage of chapter 7 debtors from being subject to the means test. In the current chapter 7 means-test form (Official Form 22A) and the revised form that was published last summer (proposed Official Form 22A-1), information about eligibility for an exemption is asked for at the beginning of the form. Because of the complexity of the qualifying

requirements, this portion of the form occupies multiple line numbers and the entire first page of the form.

The Chair said that several comments were submitted regarding this part of the published form, and one comment suggested that because of its limited applicability, the questions that pertain to exemptions based on certain types of military service should be moved to the separate form. The Subcommittee agreed with the proposal and recommends that a separate supplement to Official Form 22A-1 be created, listing all exemption questions, to be used only when applicable. The Chair explained that the proposal would serve two purposes: It would unclutter Official Form 22A-1 by removing questions that are only occasionally applicable, and it would allow the Advisory Committee to address another criticism by adopting uniform line numbering in the three means-test forms dealing with income (22A-1, 22B, and 22C-1). Currently, the initial questions that were only in the chapter 7 form caused a misalignment of line numbers covering similar topics across the forms. **The Advisory Committee agreed with the Subcommittee's recommendation.**

New instruction about a domestic support obligation paid by one joint debtor or non-filing spouse to the other debtor.

The Chair said that a comment suggested that in any case where the income of both spouses is set out, there should not be a separate income item for the payment of a domestic support obligation from one spouse to the other. He said that the Subcommittee recommends adding an instruction to the relevant questions in order to prevent double reporting of the same income. **The Advisory Committee agreed.**

Changes to implement the *Hamilton v. Lanning* decision.

In *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), the Supreme Court held that the calculation of a chapter 13 debtor's projected disposable income under § 1325(b) requires consideration of changes to income or expenses reported elsewhere on Official Form 22C that, at the time of plan confirmation, had occurred or were virtually certain to occur. As published last summer, the Chair explained, proposed Official Form 22C-2 included a section that asked the debtor to report any income or expense listed on the form that "has changed or is virtually certain to change during the 12 months after the date you filed your bankruptcy petition."

The Chair said that two comments stated that the 12-month limitation should be eliminated because the *Lanning* decision does not support such a limitation. **The Advisory Committee agreed that the 12-month limitation should be eliminated from Official Form 22C-2. After the meeting, the *Lanning* instruction was revised to direct the debtor to indicate if reported income or expenses "have changed or are virtually certain to change after the date that you filed your bankruptcy petition and during the time your case will be open."**

The Chair said that another issue raised by the comments was whether Official Forms 22C-1 and 22C-2 should introduce an adjustment for changes in income, under the *Lanning* decision, for determining the applicable commitment period under 11 U.S.C. § 1325(b)(4). He said that at least one decision has accepted the argument that a change in the debtor's income from the calculation of current monthly income should similarly allow a change in the applicable commitment period. *In re Ducret,* 2011 WL 2621329 (Bankr. S.D. Fla. 2011). However, this decision was reversed on appeal, in a decision finding that the definition of § 101(10A) is

controlling, and that the *Lanning* decision is inapposite. *In re Ducret*, 2012 WL 4468376 at *4 (S.D. Fla. 2012).

One member was in favor of an explicit adjustment. Another member said that the applicable commitment period could vary from the result stated in the form if the debtor's "current monthly income were calculated under § 101(10A)(A)(ii) of the Code rather than under § 101(10A)(A)(i), the method applicable where the debtor has timely filed the required income statement. **After a discussion, the Advisory Committee voted to add to the direction on the form for specifying the three-year commitment, "Unless otherwise ordered by the court . . .".**

The Chair said that another issue presented by the comments was whether the means test forms should continue to reject the holding in *Drummand v. Wiegand (In re Wiegand),* 386 B.R. 238 (9th Cir. BAP 2008), that gross business and rental receipts are to be counted as "current monthly income" under § 101(10A).

The Chair said that the Advisory Committee rejected the logic of *Wiegand* when the means test forms were developed and had revisited the issue several times since then without changing the forms. *Wiegand*, he pointed out, is limited to chapter 13 cases, and is based on language in § 1325(b) that, before the means test was introduced in the 2005 Code amendments, allowed the deduction of business expenses from the income that a debtor could be required to pay into a chapter 13 plan. However, there is no indication that Congress considered this provision when it included the definition of current monthly income as part of the means test, which it made applicable to both chapter 7 and chapter 13 cases. Among other things, the Chair said, counting gross business receipts as "current monthly income" creates unreasonable distinctions between similarly situated debtors, giving a sole proprietor current monthly income based on the business's gross receipts, while giving the sole owner of an LLC or Chapter S corporation only the net profits of the business. Moreover, the Census Bureau's median state income, to which the debtor's current monthly income is compared, itself includes only net business income. And finally, the chapter 7 means test includes no deduction for business expenses, which would result in nearly all chapter 7 debtors operating a business having a presumption of abuse.

Since *Wiegand* was decided, the Chair said, three courts other than those in the Ninth Circuit have adopted the Ninth Circuit BAP's decision, and two courts have rejected it. One member suggested creating a supplement to deal with *Wiegand* but another member pointed out the case has been in effect in the Ninth Circuit for five years now, and bankruptcy practice appears to have adapted in that circuit without a change to the forms. After further discussion, only one member was in favor of adding a line to Official Form 22C-1 to report gross income for a debtor that operates a business.

The Chair said that another legal issue raised by the comments was whether Official Forms 22A-2, and 22C-2 should allow the use the *Johnson v. Zimmer* formula for determining the number of persons used in calculating National and Local IRS expense allowances. The current forms, the Chair said, incorporate the rule from the IRS Collection Financial Standards providing that the number of persons used to calculate IRS expense allowances should be the number that would be allowed as exemptions on the debtor's federal income tax return, plus the number of any additional dependents that the debtor supports. *Johnson v. Zimmer*, 686 F.3d 224 (4th Cir. 2012), the Chair said, uses a different, fractional economic unit approach. The Chair noted that there have been no reported decisions to date that follow the *Johnson v.*

Zimmer approach. After a discussion, no member favored changes to the forms to account for *Johnson v. Zimmer*.

After the meeting, by email vote, the Advisory Committee approved for republication revised versions of Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, and new Official Form 22A-1Supp with the changes recommended in bold above.

(D) Alternative proposal by Judge Harris and Ms. Michaux to reletter proposed new Forms 106A, 106B, 106C, 106D, 106E, 106F, 106G, and 106H.

Committee members Judge Harris and Ms. Michaux presented an alternative to the relettering scheme proposed by the Advisory Committee for the new FMP schedules. Mr. Myers explained that early in its revision process, the FMP concluded that the existing order of schedules—listing property, then exemptions, and then debts was illogical, because a debtor first needs to know whether there is equity available in an asset before applying an exemption to that asset. The more logical approach, the FMP concluded, would be to list property, then claims—which allows the debtor to calculate equity, and then list exemptions. This reordering, however, plus the FMP's decision to combine related schedules (personal and secured property schedules are combined into a single two-part property, and priority and non-priority claims are combined into a single two-part claims schedule), meant that the proposed new lettering scheme would not track the existing lettering scheme.

Judge Harris and Ms. Michaux suggested an alternative: representing the newly combined schedules by both letters of the schedules they were derived from (i.e., the FMP property schedule for individuals would be lettered 106A/B to show to it is derived from exiting Schedules 6A and 6B, and the claims schedule for individuals would be lettered 106E/F to show it was derived from existing schedules 6E and 6F). Under this proposal, the remaining schedules would retain their existing letter designations. Judge Harris and Ms. Michaux argued that their proposal would make the transition to the new forms much less disruptive since existing letter designations have become highly ingrained over the past 30 years.

After discussing the alternatives, the Advisory Committee voted 7 to 5 in favor of the alternative proposal for renumbering.

(E) Report on automatic dollar adjustments to Official Forms 1, 6C, 6E, 7, 10, 22A, and 22C and Director's Procedural Forms 200 and 283 on April 1, 2013, to conform to the dollar adjustments in the Bankruptcy Code, as provided in Section 104(a) of the Code.

Mr. Myers explained that under Section 104(a) of the Bankruptcy Code, certain dollar amounts stated in Bankruptcy Code sections are automatically updated to reflect changes in the consumer price index over the prior three years. The most recent adjustment, he said, which occurred on April 1, 2013, required adjustments to dollar amounts listed in the seven official bankruptcy forms and two director's forms listed above. None of the changes require action by the Advisory Committee, Mr. Myers said, and the revised forms have already been posted on the court's public website.

8. Report by the Subcommittee on Business Issues.

Recommendation concerning comments received on published amendments to Rules 7008, 7012, 7016, 9027, and 9033 which were proposed in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

Judge Wizmur gave the report. She explained that currently the Bankruptcy Rules follow the division between core and non-core proceedings set forth in 28 U.S.C. § 157. With respect to proceedings that are core under the statute, she said, the rules contemplate that the bankruptcy judge may enter a final judgment. If a proceeding is non-core, on the other hand, the rules and statute contemplate that the bankruptcy judge will issue a report and recommendation to the district court, unless all parties consent to entry of a final judgment by the bankruptcy judge.

Stern held that a bankruptcy judge did not have authority under Article III of the Constitution to enter final judgment in a proceeding that was listed as core under 28 U.S.C. § 157(b)(2). Accordingly, reference in the rules to core and non-core no longer clarify whether the bankruptcy court has authority to enter a final judgment. As a result of *Stern*, the Advisory Committee proposed to amend the Bankruptcy Rules in three respects. First, the terms core and non-core would be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, in all bankruptcy proceedings (including removed actions), the parties would need 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, would be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

The Advisory Committee received eight comments on all or part of these proposed amendments. In the main, the comments expressed support for the amendments but raised five issues:

(1) whether to retain the terms "core" and "non-core";

(2) whether references to the "bankruptcy court" in the published amendments should revert to the "bankruptcy judge," the term that is currently used;

(3) whether to provide procedures for treating as proposed findings and conclusions a bankruptcy judge's decision entered as a final order or judgment when that decision is later determined to be beyond the bankruptcy judge's final adjudicatory power;

(4) whether to require a statement as to consent when a litigant proceeds by motion before filing a formal pleading; and

(5) whether to provide that a litigant may consent to final adjudication by a bankruptcy judge with respect to part, but not the whole, of a proceeding.

After reviewing the comments, the Advisory Committee voted unanimously to recommend final approval of the published amendments. With respect to the first three issues raised by the comments, these points were thoroughly considered before publication of the amendments. The Advisory Committee did not find that the comments raised new concerns that would justify revisiting those issues. Issues (4) and (5), on the other hand, were not considered previously. The Advisory Committee nevertheless concluded that the comments raising those issues, although presenting possible suggestions for future rulemaking, did not require alteration of the published amendments. Similarly, the Advisory Committee concluded that a comment by the Bankruptcy Clerks Advisory Group regarding the requirement of service of notice by mail

under current Rules 9027 and 9033 might be considered for future rulemaking but was beyond the scope of the *Stern*-related amendments.

9. Report by the Subcommittee on Privacy, Public Access, and Appeals.

(A) Recommendation concerning comments received on published amendments to Rules 8001–8028, the proposed revision of the bankruptcy appellate rules, and to Rules 9023 and 9024, amended to refer to the procedure in proposed new Rule 8008 governing indicative rulings.

The Reporter first addressed the proposed revisions to Rules 9023 and 9024 to incorporate a cross-reference to Rule 8008 regarding indicative rulings. The National Bankruptcy Conference suggested adding the cross reference to committee notes for Rules 9023 and 9024, instead of in the rules themselves, but committee notes are historical and can only be added when rules are updated, **so the Advisory Committee recommended Rules 9023 and 9024 for final approval as published.**

The Reporter explained that published revisions to Rules 8001–8028 (Part VIII of the Bankruptcy Rules) are the products of a comprehensive revision of the rules governing bankruptcy appeals to district courts, bankruptcy appellate panels, and, with respect to some procedures, courts of appeals. They result from a multi-year project to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure (FRAP); to incorporate a presumption favoring the electronic transmission, filing, and service of court documents; and to adopt a clearer style. Existing rules were reorganized and renumbered, some rules were combined, and provisions of other rules were moved to new locations. Much of the language of the existing rules was restyled.

She said that 14 sets of comments were submitted in response to the publication of these rules. Many of the comments were lengthy and detailed and demonstrated the commenters' careful review of the published rules and provided suggestions on issues of style, organization, and substance. The Reporter said that in considering the comments, the Subcommittee was guided by the goal of maintaining close adherence to the FRAP, except where those rules are incompatible with bankruptcy appeals. It also recommended postponing for future consideration a number of suggestions that would change existing practice or raise policy issues requiring careful consideration.

In general, the Reporter said, the comments displayed a positive response to the proposed revision of the Part VIII rules. She discussed the more significant comments, as set forth below, and noted that a more complete listing of comments and changes recommended by the Subcommittee was included in the agenda materials.

General Comments. Two bankruptcy judges and the National Conference of Bankruptcy Judges praised the revision of the Part VIII rules, stating that it would lead to improved quality of bankruptcy appellate practice, reduce confusion, and yield a more efficient and effective bankruptcy appellate practice.

Rule 8002. Two comments expressed concern about the inclusion of an inmate mailbox rule, which deems a notice of appeal by an inmate timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. The commenters stated that this rule could delay for several days the determination that a bankruptcy court order or judgment

has become final. The Subcommittee continued to support the inclusion of this provision in order to mirror FRAP 4(c). It believed that, given the rarity of inmate appeals in bankruptcy cases, the impact of the provision on finality will be limited. **A motion to change the title of 8002(b)(3) to "Appealing the Ruling on the Motion" was approved.**

Rule 8003. Several comments pointed out that the provision in subdivision (d) directing the clerk of the appellate court to docket an appeal "under the title of the bankruptcy court action" was unclear since "action" might refer to the overall bankruptcy case or to an adversary proceeding within the case. The Subcommittee agreed that this was an instance in which the FRAP language needs to be modified for the bankruptcy context. **The Advisory Committee voted to change the wording in Rule 8003(d)(2) and the parallel provision in Rule 8004(c)(2) to "under the title of the bankruptcy case and the title of any adversary proceeding."**

Rule 8004. The clerk of a bankruptcy appellate panel ("BAP") commented on the provision of subdivision (c)(3) that directed the dismissal of an appeal if leave to appeal is denied. She stated that appellants sometimes file a motion for leave to appeal when leave is not required and in that situation, although the motion is denied, dismissal is not appropriate. **The Advisory Committee voted to delete the sentence in question, which is not contained in either the current bankruptcy rule or the FRAP rule from which the proposed rule is derived.**

One comment pointed out an inconsistency between proposed Rule 8003 and Rule 8004. Rule 8003(c) requires the bankruptcy clerk to serve the notice of appeal, whereas Rule 8004(a) places that duty on the appellant (along with the motion for leave to appeal). This difference is a carryover from existing practice. **The Advisory Committee decided to consider in the future whether the service requirement should be the same in both rules.**

Rule 8005. Several comments questioned whether an election to have an appeal heard by the district court, rather than the BAP, must still be made by a statement in a separate document. Subdivision (a) of the proposed rule refers to an official form that did not exist at the time the rule was published, and some comments also expressed confusion about that reference. At Agenda Item 9(B) below, the Advisory Committee recommended publication an amendment to the notice of appeal form, Official Form 17A, that will include a section for making an election under this rule. That form, which if approved will take effect on the same date as the rule, will clarify that the separate-document rule no longer applies. The Subcommittee also recommended updating the committee note to indicate that a statement electing to have the appeal heard by the district court "must be made using the appropriate Official Form." One member noted, however, that the Official Form would be created by attorneys using word processors, not simply downloaded of the public website and filled out, and suggested retaining the committee note as published on this point to say "the statement must *conform substantially* to the appropriate Official Form." **The motion to retain "conform substantially" was approved.**

Two comments addressed the procedure that should apply when an appellee elects to have the district court hear an appeal that was initially sent to the BAP. The Subcommittee agreed with one of the comments that the BAP clerk should notify the bankruptcy clerk if an appeal is transferred to the district court, and it voted to add a sentence to that effect in subdivision (b) as set forth in the agenda materials. **The Advisory Committee approved the addition.**

Rule 8006. Two comments stated that the proposed rule does not give the bankruptcy court sufficient time to certify a direct appeal to the court of appeals. Under subdivision (b), a matter is deemed to remain pending in the bankruptcy court for purposes of this rule for 30 days after the effective date of the first notice of appeal. The Subcommittee decided that this time limit strikes an appropriate balance between giving the bankruptcy court time to decide whether to certify a direct appeal and letting the district court or BAP know at a reasonably early time that a certification for direct appeal will not be coming from the bankruptcy court. However, the Subcommittee did add cross-references to Rule 8002 and FRAP 6(c), and deleted a cross-reference to 9014. **The Advisory Committee approved the changes.**

Rule 8007. Two comments questioned the provision of the published rule that appeared to permit a party to seek a stay pending appeal in an appellate court before a notice of appeal has been filed. The comments took the position that, until a notice of appeal is filed, the appellate court lacks jurisdiction to rule on a stay motion. The Subcommittee agreed and recommended deleting "or where it will be taken" from 8007(b)(2) to eliminate a possible reading of the rule that would permit the filing a motion for a stay in the appellate court prior to the filing of a notice of appeal. **The Advisory Committee approved the change.**

Rule 8009. Two bankruptcy judges and the Bankruptcy Clerks Advisory Group submitted comments stating that the practice of having the parties designate the record on appeal is now outdated and that the 8th Circuit BAP's rule regarding the record should be adopted. Under that rule the record before the bankruptcy court is the record on appeal, and parties refer by number to the appropriate bankruptcy court docket entries in their appellate briefs. BAP judges are able to review the entire bankruptcy court record electronically. The Subcommittee recommended that the rule should remain as published but that this issue should be taken up for consideration in the future. **The Advisory Committee agreed to consider the issue in the future.**

Several comments objected to two FRAP provisions that were included in this rule: subdivision (c) that permits a statement of the evidence when a transcript is unavailable, and subdivision (d) that permits an agreed statement as the record on appeal. As to both, the Subcommittee and the Advisory Committee favored remaining consistent with the parallel FRAP provisions.

The Advisory Committee approved the addition of language clarifying the designation of the bankruptcy record should be filed with the bankruptcy clerk.

Rule 8010. Three comments noted that, while subdivision (b)(1) directs the bankruptcy clerk to transmit the record to the appellate clerk when it is complete, it does not specify what the clerk should do if the record is never completed. **The Advisory Committee voted to add this issue to the list of matters for future consideration.**

Rule 8013. One comment suggested that district courts be allowed to require a notice of motion in bankruptcy appeals if they otherwise follow that practice in their court. Another comment made a similar suggestion concerning proposed orders. **The Advisory Committee agreed with these comments and added "Unless the court orders otherwise" to subdivision (a)(2)(D)(ii).**

Another comment questioned why a rule allowing intervention on appeal is necessary and whether a party moving to intervene would have standing. The Subcommittee concluded that it is not always clear who is a party to a contested matter, so someone affected by an order being

appealed may want to intervene to participate in the appeal. Likewise, a United States trustee may need this authority to participate in some appeals.

Rule 8016. Two comments raised questions about subdivision (f), which addressed the consequences of failing to file a brief on time. It was unclear why the provision was located in the rule governing cross-appeals, and it seemed to be inconsistent with a provision in Rule 8018. **The Advisory Committee thought that the comments were well taken, and it voted to delete the subdivision.**

Rule 8017. The States' Association of Bankruptcy Attorneys commented that all governmental units, not just the United States and states, should be permitted to file an amicus brief without consent or leave of court. The Advisory Committee made no change, adhering to the decision to make the bankruptcy rule consistent with FRAP 29.

Rule 8018. A bankruptcy judge commented that the authorization in subdivision (f) for dismissal of an appeal or cross-appeal should require notice and an opportunity to show cause why the appeal should not be dismissed. **The Advisory Committee voted to reword the provision to clarify that dismissal can occur only upon motion of a party or on the court's own motion, after which the appellant would have an opportunity to respond.**

Rule 8019. One comment stated that there should not be a presumption in favor of oral argument and that the grounds for not allowing it should not be limited. The Advisory Committee made no change to the proposed rule, which is consistent with current Rule 8012 and FRAP 34(a)(2).

Another comment asserted that there is an inconsistency between subdivision (b), which requires a unanimous vote of a BAP panel to dispense with oral argument, and subdivision (g), which allows a BAP panel by majority vote to require oral argument when the parties agree to submit the case on the briefs. The Advisory Committee concluded that these provisions are consistent with FRAP 34(a)(2) and (f) and with the presumption in favor of oral argument.

Rule 8021. The States' Association of Bankruptcy Attorneys commented that subdivision (b), which permits the assessment of costs for or against the United States, its agencies, and officers only if authorized by law, should apply to all governmental units. The Advisory Committee made no change to this provision, which is consistent with FRAP 39(b).

Rule 8023. The National Conference of Bankruptcy Judges (NCBJ) suggested two issues for future consideration by the Advisory Committee relating to this rule, which governs voluntary dismissals of appeals. (1) In the bankruptcy court, Rule 7041 requires a plaintiff seeking to dismiss an adversary proceeding objecting to the debtor's discharge to provide notice to certain parties and obtain a court order containing appropriate terms and conditions. The NCBJ suggests the need for similar safeguards when that type of proceeding is voluntarily dismissed on appeal. (2) Under Rule 9019 a trustee is required to obtain court approval of any compromise or settlement. The NCBJ stated that it is not clear how Rule 9019 relates to this rule. **The Advisory Committee added these issues to its list of matters for future consideration.**

Rule 8024. The NCBJ commented that the rule carries forward a problem in current Rule 8016: It does not provide for the issuance of a mandate by the appellate court and thus does not make clear when jurisdiction revests in the bankruptcy court after the conclusion of an appeal. While the existing rule does not appear to be disrupting bankruptcy administration unduly, the

comment suggested that the Advisory Committee consider this issue in the future. **The Advisory Committee agreed to do so.**

The Advisory Committee unanimously recommended the revised Part VIII Rules for final approval with the post-publication changes set forth in the agenda materials and as further revised at the meeting.

(B) Recommendation by Judge Perris and Professor Gibson concerning revising and renumbering Official Form 17A, Notice of Appeal, to include an election by the appellant to have an appeal heard by the district court; adopting new Official Form 17B, Statement of Election by Appellee(s); and adopting new Official Form 17C, Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2).

Judge Perris discussed the proposed forms.

Proposed Official Form 17A would include in the Notice of Appeal a section for the appellant's optional statement of election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. It would only be applicable in districts for which appeals to a bankruptcy appellate panel have been authorized. Inclusion of the statement in the notice of appeal would ensure compliance with the statutory requirement that an appellant make its election to have the district court hear its appeal "at the time of filing the appeal." 28 U.S.C. § 158(c)(1)(A).

New Official Form 17B—the Optional Appellee Statement of Election to Proceed in the District Court—would be the form that an appellee would file if it wanted the appeal to be heard by the district court and the appellant or another appellee had not made that election. To comply with § 158(c)(1)(B), the appellee would have to file the form within 30 days after service of the notice of appeal.

New Official Form 17C—Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)—would provide a means for a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text (the "type-volume limitation"). It is based on Appellate Form 6, which implements the parallel provisions of FRAP 32(a)(7)(B).

The Advisory Committee voted to recommend that the appellate forms be published this August so that they will be on track to go into effect on December 1, 2014, the same anticipated effective date for the revised Part VIII rules.

10. Report by the Subcommittee on Technology and Cross Border Insolvency.

Recommendation concerning adopting a bankruptcy rule establishing standards for electronic signatures.

Mr. Baxter gave the report. A request for a national rule governing electronic signature came to the Advisory Committee from the Forms Modernization Project and from the Court Administration and Case Management Committee (CACM). He referred members to the Reporter's memo of March 13, 2013, at page 321 of the Agenda Book for further background.

The need for a national rule governing electronic signatures, which would change the practice currently existing in many districts, was prompted by several concerns: the lack of uniformity of retention periods required by local rules, the burden placed on lawyers and courts to retain a large volume of paper, and potential conflicts of interest imposed on lawyers who are required to retain documents that could be used as evidence against their clients. At its fall 2012 meeting, the Advisory Committee referred the matter to the Subcommittee.

The Subcommittee, Mr. Baxter said, considered various options and ultimately recommended for publication an amendment to Rule 5005 that would prescribe the circumstances under which electronic signatures may be treated in the same manner as handwritten signatures without the need for anyone to retain paper documents with original signatures. The amended rule would supersede any conflicting local rules.

A new subdivision (a)(3) would be added to Rule 5005 to address the effect of signatures in documents that are electronically filed. One provision would apply to persons who are registered users of a court's electronic filing system and would adopt as the national rule the practice that currently exists in virtually all districts: the user name and password of an individual who is registered to use the CM/ECF system would be treated as that person's signature for all documents that are electronically filed. That signature could then be treated the same as a handwritten signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

The other proposed provision would apply to the signatures of debtors or other persons who are not registered to file electronically. When a document (such as petitions, schedules, and declarations) is signed by someone who is not a registered user of CM/ECF, it could be filed electronically along with a scanned image of the signature page bearing the individual's actual signature. The document would then be stored electronically by the court, and neither the court nor the filing attorney would be required to retain a paper copy. Moreover, scanned signature pages, filed electronically in accordance with the proposed new rule, could be treated the same as a handwritten signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

The Advisory Committee discussed the Subcommittee's recommendation, and reviewed the proposed new language to Rule 5005. Mr. Kohn said that he spoke with several lawyers from the Department of Justice and that there was concern about verification of the scanned signature. Some prosecutors, he said, would prefer that the actual signature be maintained by someone, or that some other authentication system be built in—for example notarization, or authentication by the case trustee at the 341 meeting of creditors. He suggested that the Advisory Committee defer for now, and perhaps work on the rule with the Advisory Committee on Evidence.

Judge Wedoff said that at the Standing Committee's January 2013 meeting, he explained that the Subcommittee was considering a rule change that would allow the scanned image of the signature of a debtor to be treated as a valid signature without the need for retention of the original hand-signed document by the court or the attorney. He said that there were no objections to continued consideration of a bankruptcy rule along these lines. He said he thought publication would be an opportunity for comments from those concerned about not retaining hand-signed documents.

Dr. Molly Johnson said that in conducting research on the current use of scanned signature, she received feedback from U.S. trustees, chapter 7 case trustees, and the Executive

Office for United States Attorneys (EOUSA). She said that feedback was consistent with Mr. Kohn's comments and that there was a preference for handwritten signatures affixed to original documents, but that there was also a recognition that scanned images of signature might work. The EOUSA was unwilling to provide written feedback considering possible alternatives being considered, preferring instead to withhold comments until a proposed rule is published.

After additional discussion, the Advisory Committee voted unanimously to recommend publication of the proposed amendments to Rule 5005 in August 2013.

11. Recommendations concerning comments received on published amendments to Rules 1014(b), 7004(e), 7008(b), and 7054. [

Bankruptcy Rule 1014(b).

Professor Gibson reviewed the comments on the proposed amendment to Rule 1014(b). That rule, she explained, governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. As revised, the rule would address uncertainty about what events trigger the stay in a subsequently filed petition by requiring an order from the first court. It would also permit a judicial determination—not just a party's assertion—that the rule applied and that a stay of other proceedings was needed.

Professor Gibson said four sets of comments were submitted. The comments raised issues about (1) whether the first court has authority to enjoin parties to cases in other courts; (2) whether the first court has the exclusive authority to determine the venue of the related cases; (3) who may seek a venue determination in the first court; and (4) whether the proposed rule would reduce inter-court cooperation. Some of the comments also suggested wording changes. For reasons discussed in Professor Gibson's March 22, 2013 memo at page 471 of the Supplemental Materials, she recommended that the amendment go into effect as published, with the following exception: at line 16 of the proposed rule (on page 477 of the Supplemental materials) replace the word "these" with "the effected cases." **The proposed revision was approved, and a recommendation for final approval passed without objection.**

Bankruptcy Rule 7004(e).

Professor McKenzie said that the Advisory Committee there were four comments on the amendment to Rule 7004(e). The proposed amendment would shorten the time during which a summons is valid from 14 days to 7 days after it is issued. The change is intended to ensure that the defendant has sufficient time to respond to a complaint in bankruptcy litigation. Although Rule 7012(a) gives a defendant (other than a United States officer or agency) 30 days to answer a complaint, the time period is measured from the date the summons is issued, not when it is served. Accordingly, a lengthy delay between issuance and service of the summons may unduly shorten the defendant's time to respond in a bankruptcy proceeding.

Professor McKenzie said that each of the four comments raise the same issue—that a 7-day window to serve a summons may be too short in some circumstances. The Business Subcommittee considered this possibility when it suggested the amendment. At that time, it concluded that a 7-day window would be sufficient in the vast majority of cases, and that the infrequent situations where a longer period is needed could be best handled through a request for

an enlargement of time under Rule 9006. Professor McKenzie said that the comments did not change that view.

After discussing the comments, the Advisory Committee recommended final approval of Rule 7004(e) as published. It also approved the concept of adding a sentence to the committee note that highlights the opportunity to seek an extension of time under Rule 9006 in appropriate circumstances.

Bankruptcy Rules 7008(b) and 7054.

The Reporter reviewed the comments on Bankruptcy Rules 7054 and 7008. She said that the proposed amendments to those rules would change the procedure for seeking attorney's fees in bankruptcy proceedings. Rule 7054 would be amended to include much of the substance of Civil Rule 54(d)(2). Rule 7008(b), which currently addresses attorney's fees, would be deleted. By bringing the bankruptcy rules into closer alignment with the civil rules, the amendments would eliminate a potential trap for an attorney, particularly one familiar with the civil rules, who might overlook the Rule 7008(b) requirement to plead a request for attorney's fees as a claim in the complaint, answer, or other pleading. As under the civil rules, the procedure for seeking an award of attorney's fees would be governed exclusively by Rule 7054, unless the governing substantive law requires the fees to be proved at trial as an element of damages.

Professor Gibson said that there were two comments on the proposal. Comment 12-BK-044 supported the changes. Comment 12-BK-010, submitted by the State's Association of Bankruptcy Attorneys ("SABA"), did not address the proposed changes. Instead, the SABA comment addressed the sentence in Rule 7054(b)(1) that permits the award of costs against the United States, its officers and agencies only to the extent permitted by law. SABA suggested that the provision be broadened to apply to all governmental units.

After a short discussion, the Advisory Committee decided not to take up the SABA suggestion, and **voted to recommend final approval of the proposed attorney fee changes to Rules 7008 and 7054 as published.**

12. Oral report by the Subcommittee on Attorney Conduct and Health Care.

Judge Jonker said that there was no business before the Subcommittee since the last Advisory Committee meeting.

Discussion Items

13. Oral report on Suggestion 13-BK-A by David W. Ostrander to include the debtor's age on the Statement of Financial Affairs or the Schedules of Assets and Liabilities.

Assigned to the Forms Subcommittee.

14. Oral report on Suggestion 13-BK-B by Judges Eric L. Frank and Bruce I. Fox to amend Official Form 1, the Voluntary Petition, to include checkboxes for the documents Section 1116(1) of the Bankruptcy Code requires small business debtors to file.

Assigned to the Forms Subcommittee.

15. Oral report on Suggestion 12-BK-M by Judge Scott W. Dales to amend Rule 2002(h) to mitigate the cost of giving notice to creditors who have not filed proofs of claim.

    Assigned to the Consumer Subcommittee.

16. Oral report on Suggestion 13-BK-C by the American Bankruptcy Institute's Task Force on National Ethics Standards to amend Rule 2014 to specify the relevant connections that must be described in the verified statement accompanying an application to employ professionals.

    Assigned to the Subcommittee on Attorney Conduct and Health Care.

17. Oral report on Judge William G. Young's suggestion to abolish Bankruptcy Appellate Panels (BAPs) and to assign bankruptcy appeals from courts with high caseloads to courts with low caseloads.

The Chair explained that this issue, which would likely require changes to the Bankruptcy Code and Rules if implemented, is being considered by the Advisory Committee on the Administration of the Bankruptcy System.

Information Items

18. Oral report on the status of bankruptcy-related legislation.

    Mr. Wannamaker reviewed bankruptcy-related legislation currently pending in Congress.

19. Oral update on opinions interpreting Section 109(h) of the Bankruptcy Code.

The Reporter said that there are now three cases that have addressed the 2010 technical update to 11 U.S.C. § 109(h) that appear to allow an individual to take the required credit counseling course *after* the petition is filed, so long as the course is taken on the same day. She said each of three courts reviewing the new language, however, have concluded that the course must be taken *before* the case if filed. **The Advisory Committee agreed that further reports would be unnecessary unless a split of authority among courts develops.**

20. *Bull Pen.*

    Amendment to Official Form 23 to implement the proposed amendment to Rule 1007(b)(7) which would authorize providers of financial management course providers to file notification of the debtor's completion of the course, approved at September 2010 meeting.

The Advisory Committee recommended that Official Form 23 be removed from the bull pen and go into effect December 1, 2013, along with the related amendment to Rule 1007(b)(7) that is scheduled to take effect December 1, 2013.

21. Rules Docket.

Mr. Wannamaker asked members to review the Rules Tracking Docket and to email him with any needed changes.

22. Future meetings: Fall 2013 meeting, September 24–25, in Minneapolis. Possible locations for the spring 2014 meeting.

    The Chair suggested Austin, Texas, for the spring 2014 meeting.

23. New business.

No new business.

24. Adjourn.

Respectfully submitted,

Scott Myers

Conversion Chart for Modernized Bankruptcy Forms for Individual Debtors

Current Schedule Number	Current schedule name	FMP schedule name	FMP label (agenda book)	FMP label (revised)	Proposed effective date
1	Voluntary Petition – including Exhibits A, C and D	Voluntary Petition for Individuals Filing for Bankruptcy *(incorporates former exhibits)*	**101**	same	12/15
		Initial Statement About an Eviction Judgment Against You *(formally part of petition).*	**101A**	same	12/15
		Statement About Payment of an Eviction Judgment Against You *(formally part of petition).*	**101B**	same	12/15
3A	Application and Order to Pay Filing Fee in Installments	Application for Individuals to Pay the Filing Fee in Installments	**103A (pub as 3A in 2012)**	same	**12/13 as 3A**; 12/15 as 103A
3B	Application for Waiver of Chapter 7 Filing Fee	Application to Have the Chapter 7 Filing Fee Waived	**103B (pub as 3B in 2012)**	same	**12//13 as 3B**; 12/15 as 103B
4	List of Creditors Holding 20 Largest Unsecured Claims	For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(individuals)*	**104**	same	12/15
5	Involuntary Petition	Involuntary Petition Against an Individual	**105**	same	12/15
6A 6B	Real Property Personal Property	Property (*combines real and personal property, individuals)*	106A	**106A/B**	12/15
6C	Property Claimed as Exempt	The Property You Claim as Exempt (*individuals)*	106D	**106C**	12/15
6D	Creditors Holding Secured Claims	Creditors Who Hold Claims Secured By Property (*against individuals*)	106B	**106D**	12/15
6E 6F	Creditors Holding Unsecured Priority Claims Creditors Holding Unsecured Nonpriority Claims	Creditors Who Have Unsecured Claims *(against individuals, combines priority and non-priority)*	106C	**106E/F**	12/15
6G	Executory Contracts and Unexpired Leases	Executory Contracts and Unexpired Leases (*individuals)*	106E	**106G**	12/15
6H	Codebtors	Your Codebtors (*individuals)*	106F	**106H**	12/15
6I	Executory Contracts and Unexpired Leases	Your Income (*individuals)*	106G (pub as 6I in 2012)	**106I**	**12/13 as 6I**; 12/1/15 as 106I
6J	Current Income of Individual Debtor(s)	Your Expenses (*individuals)*	106H (pub as 6J in 2012)	**106J**	**12/13 as 6J**; 12/1/15 as 106J
7	Statement of Financial Affairs	Statement of Financial Affairs for Individuals Filing for Bankruptcy	**107**	same	12/1/15
22A	Statement of Current Monthly Income and Means Test Calculation (Chapter 7)	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation *(published as 22A-1)*	**108-1**	same	**12/14 as 22A-1**; 12/15 as 108-1
		Chapter 7 means test exclusion attachment (*published as 22A-1Supp*)	**108-1Supp**	same	**12/14 as 22A-1Supp**; 12/15 as 108-1Supp
		Chapter 7 Means Test Calculation *(published as 22A-2)*	**108-2**	same	**12/14 as 22A-2**; 12/15 as 108-2

Current Schedule Number	Current schedule name	FMP schedule name	FMP label (agenda book)	FMP label (revised)	Proposed effective date
22B	Statement of Current Monthly Income (Chapter 11)	Chapter 11 Statement of Your Current Monthly Income *(published as 22B)*	**109**	same	**12/14 as 22B**; 12/15 as 109
22C	Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Chapter 13)	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period *(published as 22C-1)*	**110-1**	same	**12/14 as 22C-1**; 12/15 as 110-1
		Chapter 13 Calculation of Your Disposable Income *(published as 22C-2)*	**110-2**	same	**12/14 as 22C-2**; 12/15 as 110-2
8	Chapter 7 Individual Debtor's Statement of Intention	Statement of Intention for Individuals Filing Under Chapter 7	**112**	same	12/1/15
19	Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer	Bankruptcy Petition Preparer's Notice, Declaration and Signature	**119**	same	12/1/15
21	Statement of Social Security Number	Your Statement About Your Social Security Numbers	**121**	same	12/1/15
18	Discharge of Debtor	Order of Discharge	**318**	same	12/1/15
23	Debtor's Certification of Completion of Instructional Course Concerning Financial Management	Certification About a Financial Management Course	**423**	same	12/1/15
27	Reaffirmation Agreement Cover Sheet	Cover Sheet for Reaffirmation Agreement	**427**	same	12/1/15

THIS PAGE INTENTIONALLY BLANK

TAB 5

THIS PAGE INTENTIONALLY BLANK

TAB 5A

THIS PAGE INTENTIONALLY BLANK

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: **Honorable Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

DATE: **May 7, 2013**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on May 3, 2013 at the University of Miami School of Law, Coral Gables, Florida.

The Committee seeks final Standing Committee approval and transmittal to the Judicial Conference of the United States of four proposals: 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, and amendments to 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.

II. Action Items

A. Proposed Amendment to Evidence Rule 801(d)(1)(B)

The Committee proposes that Rule 801(d)(1)(B) 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 Standing Committee approved proposed amended Rule 801(d)(1)(B) for publication at its June 2012 meeting. The proposed rule and committee note now presented for final Standing Committee approval are attached as an appendix to this report. They have been modified slightly from the versions issued for publication to address certain concerns raised by public comment.

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.

The public comment on the proposed amendment is summarized in the appendix to this report. Although largely negative, it is sparse. The Committee found two concerns expressed in the public comment to merit revisions to the proposed rule and committee note. First, there was a concern that the phrase "otherwise rehabilitates the declarant's credibility as a witness" is vague and could lead courts to admit prior consistent statements that heretofore have been excluded for any purpose. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness had a motive to falsify, even though the statement was made *after* the motive to falsify arose, thereby undermining the Supreme Court's ruling in *Tome v. United States,* 513 U.S. 150 (1995).

In response to these concerns, the Committee voted, with one member dissenting, to approve proposed Rule 801(d)(1)(B) with the slight modification to (ii) shown on the following blacklined version. The Committee concluded that the proposal preserves the *Tome* pre-motive rule as to consistent statements offered to rebut a charge of bad motive, while properly expanding substantive admissibility to statements offered to rehabilitate on other grounds—such as to explain an inconsistency or to rebut a charge of bad memory. And the proposal does so without resorting to the potentially vague "otherwise rehabilitates" language.

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

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

* * *

(B) is consistent with the declarant's testimony and is offered:
(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; * * *

The committee note has also been slightly modified to account for the proposed changes to the Rule.

At the suggestion of the Chair of the Standing Committee, this report includes Judge Friendly's observation that Rule 801(d)(1)(B) was problematic when enacted because it relied on an insubstantial distinction between substantive and rehabilitative use. *See United States v. Quinto*, 609 F.2d 66-67 (2d Cir. 1979) (Friendly, J., concurring) ("Before adoption of the Federal Rules of Evidence, there had been . . . little need to consider the use of prior consistent statements as affirmative evidence, since they were no more probative for that purpose than what the witness had said or could say on the stand.").

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 801(d)(1)(B) be approved and transmitted to the Judicial Conference of the United States.

B. Proposed Amendments to Evidence Rules 803(6)-(8)

The Committee proposes that Evidence Rules 803(6)-(8) be amended to address an ambiguity uncovered during restyling, but left unaddressed at that time because the changes required to clarify the ambiguity were viewed as substantive. The Standing Committee approved proposed amended Rules 803(6)-(8) for publication at its June 2012 meeting. The proposed rules and committee notes now presented for final Standing Committee approval are attached as appendixes to this report. The committee notes have been modified slightly from the versions issued for publication to address the concern, raised by public comment, that the notes use language that fails to track the text of the Rules. No changes have been made to the proposed rules as published.

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.

Initially, the Committee did not think it necessary to propose clarifying amendments to these Rules. At its spring 2012 meeting, however, the Reporter noted 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 then revisited the matter. The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the Committee for the amendments are: first, to resolve a conflict in the case law by providing uniform rules; second, to clarify a possible ambiguity in the Rules as originally adopted and as restyled; and third, to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these Rules are met—requirements that tend to guarantee trustworthiness in the first place.

There were only two public comments on the proposed amendments. Both approved of the text, but one comment suggested that the committee notes use language that fails to track the text of the Rules. Slight changes have been made to each of the three committee notes to address this concern.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rules 803(6)-(8) be approved and transmitted to the Judicial Conference of the United States.

III. Information Items

A. Symposium on Technology and the Federal Rules of Evidence

As noted in a prior report, the Committee plans to convene a symposium in conjunction with its fall 2013 meeting at the University of Maine School of Law to consider the intersection of the Evidence Rules and emerging technologies. The Committee will examine whether the Evidence Rules should be amended to accommodate technological advances in the presentation and preservation of evidence. This symposium will follow the same process as the previous symposia on the Restyled Rules of Evidence and Rule 502. The Committee intends to invite outstanding members of the bench, bar, and legal academy, as well as leaders in the area of electronic information management, to make presentations. The proceedings will be published in the *Fordham Law Review*.

B. Possible Amendment of Rule 902(1)

The Committee considered whether the Reporter should prepare materials for discussion at a future meeting on a proposed amendment to Evidence Rule 902. Judge Andrew D. Hurwitz, a judge of the Ninth Circuit and a former Committee member, suggested that the Committee consider whether federally-regulated Indian tribes should be included in the list of public entities that issue self-authenticating documents under Evidence Rule 902. In *United States v. Alvirez*, No. 11-10244 (9th Cir. Mar. 14, 2013), the Ninth Circuit held that documents bearing the seal of a federally-recognized Indian tribe were not self-authenticating under Rule 902(1). Judge Hurwitz suggested that it is anomalous that self-authentication is granted to cities and, for example, the Trust Territory of the Pacific Islands, but not to Indian tribes.

The Chair of the Standing Committee informed the Committee of the experience of the Appellate Rules Committee in reviewing whether Indian tribes should have the right to file *amicus* briefs in the circuit courts.

Following a wide-ranging discussion, the Committee concluded that it should not proceed at this time to consider an amendment to Rule 902. Instead, because the treatment of Indian tribal documents raises questions that potentially impact rules other than the Evidence Rules, the Committee should await the direction of the Standing Committee concerning whether this is an issue for the Committee or for more than one advisory committee to consider.

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. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration.

D. Electronic Signatures and Bankruptcy Rule 5005(a)

The Bankruptcy Rules Committee asked the Committee to review a proposed amendment to Bankruptcy Rule 5005—the rule on filing and signature—for its potential impact on the Evidence Rules.

The proposal would add a new subdivision (3) to govern signatures on documents filed by electronic means. Proposed subdivision (3)(A) provides that if a filer is registered with ECF, the filer's username and password will serve as the filer's signature on any electronic document. Subdivision (3)(B) provides that, if a document is signed by a person who is not registered with ECF, a scanned signature page can be filed with the document as a single filing, without any need for the filing user to retain the original document. Both subdivisions provide that a signature in accord with the Rule "may be used with the same force and effect as a written signature for the

purpose of applying these rules and for any other purpose for which a signature is required in proceedings before the court."

The Committee provided preliminary feedback on the proposed amendment to Bankruptcy Rule 5005, including the view that the amendment would not require a corresponding amendment to the Evidence Rules.

E. Privileges Report

At the spring 2013 meeting, Professor Kenneth S. Broun, the Committee's consultant on privileges, presented his analysis of the clergy-penitent privilege and the trade secret privileges. He noted that he would add to his analysis of the clergy-penitent privilege by discussing a possible crime-fraud exception.

Professor Broun's work on privileges is informational and is part of his continuing work to develop an article that he will publish on the federal common law of privileges. 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 2013 Meeting

The draft of the minutes of the Committee's spring 2013 meeting is attached to this report. These minutes have not yet been approved by the Committee.

TAB 5B

THIS PAGE INTENTIONALLY BLANK

Appendix to Report to the Standing Committee
from the Advisory Committee on Evidence Rules

June 2013

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 801(d)(1)(B)

1 **Rule 801. Definitions That Apply to This Article; Exclusions from**
2 **Hearsay**
3 * * *
4 **(d) Statements That Are Not Hearsay.** A statement that
5 meets the following conditions is not hearsay:
6 **(1)** ***A Declarant-Witness's Prior Statement.*** The
7 declarant testifies and is subject to cross-examination
8 about a prior statement, and the statement:
9 * * *
10 **(B)** is consistent with the declarant's
11 testimony and is offered:
12 (i) to rebut an express or implied
13 charge that the declarant recently
14 fabricated it or acted from a recent
15 improper influence or motive in so
16 testifying; or
17 (ii) to rehabilitate the declarant's
18 credibility as a witness when attacked

19 on another ground; * * *

20

21 * * *

22 Committee Note

23

24 Rule 801(d)(1)(B), as originally adopted, provided for
25 substantive use of certain prior consistent statements of a witness
26 subject to cross-examination. As the Advisory Committee noted,
27 "[t]he prior statement is consistent with the testimony given on the
28 stand, and, if the opposite party wishes to open the door for its
29 admission in evidence, no sound reason is apparent why it should not
30 be received generally."
31
32 Though the original Rule 801(d)(1)(B) provided for
33 substantive use of certain prior consistent statements, the scope of
34 that Rule was limited. The Rule covered only those consistent
35 statements that were offered to rebut charges of recent fabrication or
36 improper motive or influence. The Rule did not, for example,
37 provide for substantive admissibility of consistent statements that are
38 probative to explain what otherwise appears to be an inconsistency in
39 the witness's testimony. Nor did it cover consistent statements that
40 would be probative to rebut a charge of faulty memory. Thus, the
41 Rule left many prior consistent statements potentially admissible only
42 for the limited purpose of rehabilitating a witness's credibility. The
43 original Rule also led to some conflict in the cases; some courts
44 distinguished between substantive and rehabilitative use for prior
45 consistent statements, while others appeared to hold that prior
46 consistent statements must be admissible under Rule 801(d)(1)(B) or
47 not at all.
48
49 The amendment retains the requirement set forth in *Tome v.*
50 *United States,* 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a
51 consistent statement offered to rebut a charge of recent fabrication of
52 improper influence or motive must have been made before the alleged
53 fabrication or improper inference or motive arose. The intent of the
54 amendment is to extend substantive effect to consistent statements
55 that rebut other attacks on a witness — such as the charges of
56 inconsistency or faulty memory.
57
58 The amendment does not change the traditional and well-
59 accepted limits on bringing prior consistent statements before the
60 factfinder for credibility purposes. It does not allow impermissible

61 bolstering of a witness. As before, prior consistent statements under
62 the amendment may be brought before the factfinder only if they
63 properly rehabilitate a witness whose credibility has been attacked. As
64 before, to be admissible for rehabilitation, a prior consistent statement
65 must satisfy the strictures of Rule 403. As before, the trial court has
66 ample discretion to exclude prior consistent statements that are
67 cumulative accounts of an event. The amendment does not make any
68 consistent statement admissible that was not admissible previously —
69 the only difference is that prior consistent statements otherwise
70 admissible for rehabilitation are now admissible substantively as well.
71
72
73
74
75 **CHANGES MADE AFTER PUBLICATION AND COMMENTS**
76
77 The text of the proposed amendment was changed to clarify
78 that the traditional limits on using prior consistent statements to rebut
79 a charge of recent fabrication or improper influence or motive are
80 retained. The Committee Note was modified to accord with the
81 change in text.
82
83 **SUMMARY OF PUBLIC COMMENTS**
84
85 **Hon. Joan Ericksen, (12-EV-001)** opposes the proposed
86 amendment as released for public comment on the ground that it is
87 not needed and may lead to unintended consequences.
88
89 **The Federal Public Defender (12-EV-002)** opposes the
90 proposed amendment as released for public comment on the ground
91 that it is "unnecessary and would actually be counterproductive"
92 because it would allow for admission of more prior consistent
93 statements and would "change the dynamics at the trial."
94
95 **The Federal Magistrate Judges Association (12-EV-003)**
96 "is concerned that, despite the Advisory Committee's stated purpose,
97 the proposed revision significantly undermines the rule against
98 bolstering a witness and opens the door to the admission of self-
99 serving consistent statements as substantive evidence." The FMJA
100 suggests that "the revision specifically state limits to the expansion of
101 what types of rehabilitation evidence are admissible — for example,
102 to rebut a charge of faulty recollection — or that the Rule not be
103 changed at all."
104
105 **Professor Liesa Richter (12-EV-004)** states that "[a]mending

Rule 801(d)(1)(B) to include prior consistent statements used to rehabilitate impeaching attacks other than attacks on motivation is completely consistent with the stated reason for the original hearsay exemption" and "advances the development of clear and rational evidentiary policies that can be administered efficiently and uniformly." Professor Richter argues, however, that the proposal as issued for public comment could be read to undermine the limitation on admitting prior consistent statements established in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or alleged improper influence or motive arose. The proposed amendment as issued for public comment was revised with the intent to address that concern.

The National Association of Criminal Defense Lawyers (12-EV-005) contends that prior consistent statements should be subject to the same admissibility requirements as those applicable to prior inconsistent statements under Rule 801(d)(1)(A), i.e., they should be admissible as substantive evidence only when made under oath and subject to cross-examination. The NACDL also contends that the words "otherwise rehabilitates" — as used in the proposed amendment as released for public comment — are "fatally ambiguous."

William T. Hangley, Esq. (12-EV-006) objects to the proposed amendment because it would lead to greater admissibility of prior consistent statements, and suggests that more study is required before that result is mandated. He also argues that treating prior consistent statements as substantive is unnecessary because the statement simply replicates testimony that the witness has already given.

TAB 5C

THIS PAGE INTENTIONALLY BLANK

Appendix to Report to the Standing Committee
from the Advisory Committee on Evidence Rules

June 2013

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(6)

1 **Rule 803. Exceptions to the Rule Against Hearsay— Regardless**
2 **of Whether the Declarant is Available as a Witness**
3 The following are not excluded by the rule against hearsay,
4 regardless of whether the declarant is available as a witness.
5 * * *
6 **(6)** ***Records of a Regularly Conducted Activity.*** A record
7 of an act, event, condition, opinion, or diagnosis if:
8 **(A)** the record was made at or near the time by -
9 or from information transmitted by - someone
10 with knowledge;
11 **(B)** the record was kept in the course of a
12 regularly conducted activity of a business,
13 organization, occupation, or calling, whether
14 or not for profit;
15 **(C)** making the record was a regular practice of
16 that activity;
17 **(D)** all these conditions are shown by the
18 testimony of the custodian or another
19 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 that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on 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. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (12-EV-003)

58 endorses the proposed amendment.
59
60 **The National Association of Criminal Defense Lawyers**
61 **(12-EV-005)** states that the text of the amendment is "well-
62 constructed" but suggests that the Committee Note strays from the
63 language of the text and suggests that the Committee Note be revised
64 to refer to the opponent's burden to prove that the circumstances of
65 preparation "indicate" a lack of trustworthiness.
66

Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2013

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(7)

1 **Rule 803. Exceptions to the Rule Against Hearsay— Regardless**
2 **of Whether the Declarant is Available as a Witness**
3 The following are not excluded by the rule against hearsay,
4 regardless of whether the declarant is available as a witness.
5 * * *
6 **(7)** ***Absence of a Record of a Regularly Conducted***
7 ***Activity.*** Evidence that a matter is not included in a record described
8 in paragraph (6) if:
9 **(A)** the evidence is admitted to prove that the
10 matter did not occur or exist;
11 **(B)** a record was regularly kept for a matter of that
12 kind; and
13 **(C)** ~~neither~~ the <u>opponent does not show that the</u>
14 possible source of the information ~~nor~~ <u>or</u> other
15 circumstances indicate a lack of
16 trustworthiness.
17
18
19

20 * * *

21 ## Committee Note
22
23 The Rule has been amended to clarify that if the proponent
24 has established the stated requirements of the exception — set forth
25 in Rule 803(6) — then the burden is on the opponent to show that the
26 possible source of the information or other circumstances indicate a
27 lack of trustworthiness. The amendment maintains consistency with
28 the proposed amendment to the trustworthiness clause of Rule
29 803(6).
30
31
32 **CHANGES MADE AFTER PUBLICATION AND COMMENTS**
33
34 In accordance with a public comment, a slight change was
35 made to the Committee Note to better track the language of the rule.
36
37 **SUMMARY OF PUBLIC COMMENTS**
38
39 **The Federal Magistrate Judges Association (12-EV-003)**
40 endorses the proposed amendment.
41
42 **The National Association of Criminal Defense Lawyers**
43 **(12-EV-005)** states that the text of the amendment is "well-
44 constructed" but suggests that the Committee Note strays from the
45 language of the text and that the Committee Note be revised to refer
46 to the opponent's burden to prove that the circumstances of
47 preparation "indicate" a lack of trustworthiness.

Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2013

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(8)

1 **Rule 803. Exceptions to the Rule Against Hearsay— Regardless**
2 **of Whether the Declarant is Available as a Witness**
3 The following are not excluded by the rule against hearsay,
4 regardless of whether the declarant is available as a witness.
5 * * *
6 **(8)** ***Public Records.*** A record or statement of a public
7 office if:
8 **(A)** it sets out:
9 **(i)** the office's activities;
10 **(ii)** a matter observed while under a legal
11 duty to report, but not including, in a
12 criminal case, a matter observed by
13 law-enforcement personnel; or
14 **(iii)** in a civil case or against the
15 government in a criminal case, factual
16 findings from a legally authorized
17 investigation; and
18
19 **(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 that the source of information or other circumstances indicate 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 opponent 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. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (12-EV-003) endorses the proposed amendment.

The National Association of Criminal Defense Lawyers (12-EV-005) states that the text of the amendment is "well-

61 constructed” but suggests that the Committee Note strays from the
62 language of the text and that the Committee Note be revised to refer
63 to the opponent’s burden to prove that the circumstances of
64 preparation “indicate” a lack of trustworthiness.

TAB 5D

THIS PAGE INTENTIONALLY BLANK

Advisory Committee on Evidence Rules

Minutes of the Meeting of May 3, 2013

Miami, Florida

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on May 3, 2013, at the University of Miami School of Law, Coral Gables, Florida.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. William K, Sessions, III
Hon. John A. Woodcock, Jr.
Edward C. DuMont, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Public Defender, by phone

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Judith Wizmur, Liaison from the Bankruptcy Committee, by phone
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Timothy Reagan, Esq., Federal Judicial Center
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office
Andrea Kuperman, Rules Clerk for Judge Sutton, by phone.

I. Opening Business

Welcoming Remarks

Judge Fitzwater, the Chair of the Committee, greeted the members and thanked Dean Patricia White and Professor Michael Graham of the University of Miami School of Law for hosting the

Committee.

The Chair welcomed Judge Sutton, the Chair of the Standing Committee. Judge Sutton spoke briefly about the pace of rulemaking, a concern that has been addressed by the Standing Committee. He noted that ideally it would be best to correlate the efforts of the Rules Committees in promulgating amendments, so that the Supreme Court is not inundated at any particular time. The Standing Committee has found, however, that the pace of rulemaking is highly affected by outside forces, most prominently from Congressional and Supreme Court activity. Thus, coordination among the Committees in promulgating rule amendments is difficult if not impossible. That said, Judge Sutton stressed the need of the Committees to be sensitive to rule fatigue, i.e., to the notion that the rules are in a constant state of flux. One way to address rule fatigue is for an Advisory Committee to package a set of amendments rather than stagger them — thus some amendments might be held back or accelerated to be put on the same timetable as others. In fact the Evidence Rules Committee does group amendments whenever possible, as the package of amendments from 2006 indicates.

Judge Sutton noted that the Evidence Rules Committee proposed the least number of amendments of all the Rules Committees over the last 15 years. The Chair noted that the attitude of the Committee has always been that Evidence Rules are not to be amended unless there is a compelling reason, and the Committee continues its review of the rules on that principle.

Approval of Minutes

The minutes of the Fall 2012 Committee meeting were approved.

Changes to the Committee

The Chair noted with sadness that it was the last meeting for Judge Brody, a valued member of the Committee and the last remaining Committee member involved with the Restyling Project. He noted that Judge Brody was invited to the next meeting and would be getting a tribute at that time.

The Chair also noted that Dr. Tim Reagan was moving to the Standing Committee as the FJC representative. He thanked Dr. Reagan for all his fine service to the Evidence Rules Committee.

New Members

Judge Fitzwater introduced and welcomed two new Committee members: 1) Edward DuMont, Partner at Wilmer Hale, vice chair of the firm's appellate and Supreme Court practice; and 2) A.J. Kramer, Public Defender for the District of Columbia. He thanked the Chief Justice for appointing members with such outstanding credentials.

June Meeting of the Standing Committee

The Chair reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. The Chair reported to the Standing Committee on the successful Rule 502 symposium that was recently published in the *Fordham Law Review*. He also reported on the Committee's plan for a symposium on technology and the rules of evidence, which is scheduled for October 11, 2013 at the University of Maine School of Law.

II. Proposed Amendment to Rule 801(d)(1)(B)

At the Spring 2012 meeting the Committee voted to recommend that a proposed amendment to Evidence Rule 801(d)(1)(B) — the hearsay exemption for certain prior consistent statements — be released for public comment. 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.

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. The proposed amendment sought to prevent unnecessary confusion by providing for identical treatment of all prior consistent statements that are found by the court to be admissible to rehabilitate a witness.

The public comment on the proposed amendment was sparse, but largely negative. The Committee found two concerns expressed in the public comment to be meritorious and to require some kind of adjustment to the rule as issued for public comment. First, there was a concern that the phrase "otherwise rehabilitates the declarant's credibility as a witness" was vague and could lead to courts admitting prior consistent statements that have heretofore been excluded for any purpose — while that technically would not be possible because the proposal requires that a prior consistent statement must be admissible for rehabilitation under existing law in order to be admissible substantively, the expressed concern was that courts might somehow use the amendment as an excuse to admit more prior consistent statements. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness

had a motive to falsify, even though the statement was made *after* the motive to falsify arose. If that were so, it would mean that the Supreme Court's ruling in *Tome v. United States,* 513 U.S. 150 (1995), would be undermined, as the Court in that case held that admissibility of prior consistent statements under Rule 801(d)(1)(B) was limited to those consistent statements that were made *before* a motive to falsify arose.

In response to these concerns, the Chair proposed a change to the amendment as proposed for public comment. That change was as follows (blacklined from the existing rule):

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

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

* * *

(B) is consistent with the declarant's testimony and is offered:
(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; * * *

Committee members praised the Chair's proposal as a solution to the concerns addressed in the public comment. They concluded that the proposal preserves the *Tome* pre-motive rule as to consistent statements offered to rebut a charge of bad motive, while properly expanding substantive admissibility to statements offered to rehabilitate on other grounds — such as to explain an inconsistency or to rebut a charge of bad memory. And the proposal does so without resorting to the potentially vague "otherwise rehabilitates" language. Committee members also generally agreed that the Committee's initial reason for proposing a change to Rule 801(d)(1)(B) was a sound one — it makes no sense to provide that some prior consistent statements are admissible substantively and some only for rehabilitation, thus the current rule invites confusion for no good reason.

The Public Defender objected to the proposal on the ground that it provided an open door for admitting prior consistent statements that are made after a motive to falsify. The DOJ representative spoke in favor of the amendment, noting specifically that it preserved the *Tome* pre-motive requirement for statements offered to rebut a charge of bad motive, and that preservation evidenced the limited nature of the amendment.

Discussion then shifted to the Committee Note. The Reporter had suggested changes to the Note that was submitted for public comment, in order to accommodate the changes to the text that were proposed. Committee members suggested minor changes that were added to the working draft. Professor Coquillette mentioned that the Committee Note contained a citation to *Tome* and that some past members of the Standing Committee have looked askance at citing case law in Committee

Notes, on the ground that case law could be overruled and that subsequent overruling might diminish the Note. But members noted that the citation to *Tome* was not for the purpose of establishing the validity of the rule, but rather was to emphasize that the rule was not meant to change the existing limitation on admitting prior consistent statements to rehabilitate witnesses attacked for having a bad motive. Even if *Tome* were overruled, the validity of the amendment would be unimpaired. Moreover, it was noted that the citation to *Tome* was important because it would signal to the Supreme Court that the proposed amendment was *not* intended to overturn the Court's case law on the subject.

After discussion concluded, the Committee Note as proposed for approval read as follows:

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, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. 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 retains the requirement set forth in *Tome v. United States,* 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

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 be brought before the factfinder only 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 are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

A motion was made and seconded to approve the proposed amendment to Rule 801(d)(1)(B) and the accompanying Committee Note — both as set forth above. The Committee approved the motion with one dissent.

The Chair raised the question whether, given the changes to the proposal as issued for public comment, it would be necessary to submit the proposal for a new round of comment. Committee members concluded that a new round of public comment was not necessary, because the changes simply sharpened the proposal and did no more than effectuate the intent that the Committee had from the beginning: to retain the *Tome* pre-motive requirement for consistent statements offered to rebut a charge of bad motive, while expanding substantive admissibility to prior consistent statements that rehabilitated on other grounds. Accordingly, the Committee (with one dissent) voted to recommend the proposed amendment to Rule 801(d)(1)(B) and the accompanying Committee Note to the Standing Committee with the recommendation that it refer the proposal to the Judicial Conference.

In conclusion, Judge Sutton suggested that the supporting materials for the proposed amendment should include the famous statement by Judge Friendly that Rule 801(d)(1)(B) was problematic when enacted because it relied on an insubstantial distinction between substantive and rehabilitative use. *See United States v. Quinto*, 609 F.2d 66-67 (2d Cir. 1979) (Friendly, J., concurring) ("Before adoption of the Federal Rules of Evidence, there had been . . . little need to consider the use of prior consistent statements as affirmative evidence, since they were no more probative for that purpose than what the witness had said or could say on the stand.").

III. Proposed Amendment to Rules 803(6)-(8)

The Committee considered the proposed amendments to the trustworthiness clauses of Rules Rules 803(6)-(8) — the hearsay exceptions for business records, absence of business records, and public records — that had been issued for public comment. Those exceptions in original form set forth admissibility requirements and then provided that a record meeting those requirements was admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The restyling changed that language to "the opponent does not show" untrustworthiness. The rules do not specifically state which party

has the burden of showing trustworthiness or untrustworthiness, and there is some conflict in the case law on which party has that burden.

The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the Committee for the amendment are: 1) to resolve a conflict in the case law by providing a uniform rule; 2) to clarify a possible ambiguity in the rule as it was originally adopted and as restyled; and 3) to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met — requirements that tend to guarantee trustworthiness in the first place.

There were only two public comments on the proposed amendments. Both approved of the text, but one comment suggested that the Committee Note used language that failed to track the text of the rule. The Reporter, while noting that the language of the proposed Committee Note was completely in accord with the case law, agreed with the public comment that it is always better to track the text where possible. The Reporter proposed a slight change to each of the three Committee Notes.

Committee members commented that the amendment would promote uniformity and that imposing an untrustworthiness burden on the opponent is appropriate — as requiring the proponent to prove trustworthiness along with all the other admissibility requirements would be inconsistent with the thrust of each of the rules and would improperly narrow their scope.

As to the Note, Committee members suggested minor changes that were implemented by the Reporter into the working draft.

A motion was made to approve the proposed amendments as issued for public comment, and also the accompanying Committee Notes as adjusted to respond to the public comment and with minor suggestions from Committee members. That motion was unanimously approved by the Committee. What follows are the rules and respective Committee Notes as approved by the Committee:

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 <u>opponent does not show that the</u> source of information ~~nor~~ <u>or</u> 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 that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on 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. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

---

(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 that the possible source of the information or other circumstances indicate a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

———

(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 that the source of information or other circumstances indicate 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 opponent 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. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

IV. Self-Authentication of Documents Bearing the Seal of an Indian Tribe

In *United States v. Alvirez,* #11-10244 (March 14, 2013), the Ninth Circuit held that documents bearing the seal of a federally-recognized Indian tribe were not self-authenticating under Rule 902(1) of the Federal Rules of Evidence. That Rule provides as follows:

Rule 902. Evidence That Is Self-Authenticating
The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

The Ninth Circuit used a plain meaning approach and found that because Indian tribes were not mentioned, the sealed documents of Indian tribes could not be self-authenticating under the rule.

Judge Hurwitz, a judge of the Ninth Circuit and a former member of the Committee, suggested that the Committee might consider whether federally-regulated Indian tribes should be included in the list of public entities that issue self-authenticating documents under Rule 902. He suggested that it is anomalous that self-authentication is granted to cities and, for example, the Trust Territory of the Pacific Islands, but not to Indian tribes.

The question for the Committee at the meeting was whether the Reporter should prepare materials on a proposed amendment to 902 for some future meeting. The Committee engaged in a wide-ranging discussion about the possible merits of an amendment and more broadly about whether treatment of Indian tribes warranted a systematic, trans-substantive inquiry over all of the Rules.

Judge Sutton informed the Committee of the experience of the Appellate Rules Committee in reviewing whether Indian tribes should have the right to file amicus briefs in the circuit courts. After much discussion over many meetings the Committee put the proposal in abeyance, in order to monitor the Ninth Circuit's work on a local rule. Members of the Evidence Rules Committee recognized, however, that there could not be a local rule solution to a rule on the authenticity of evidence.

Committee members exchanged a number of ideas in the course of the discussion, among them:

- It was possible that any attempt to amend the rule to affect Indian tribes could not proceed before a process of consultation.

- Indian tribes might vary in their degree of rigor in maintaining public documents, but no rule of evidence should attempt to distinguish among Indian tribes.[1]

- The absence of Indian tribes from the list in Rule 902(1) does not raise a significant problem in practice. All it means is that the proponent would have to: 1) provide an accompanying certificate by a custodian under Rule 902(4); 2) call a witness to authenticate; or 3) provide circumstantial evidence or other indication of authenticity under Rule 901.

- Because the problem for trial practice is not significant, the real issue is one of dignity — as was the case with the right to file amicus briefs. Though the contrary argument was also made that what was presented was a gap in the Rules and the Committee should consider whether to fill that gap as it would any other.

---

[1] If the courts are considered departments or agencies of the United States, it would be illegal to promulgate a rule that would provide a different evidentiary result for records of some tribes and not others. *See* 25 USC 476 (f) ("Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination . . . with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.").

- If Indian tribes are added to the list in Rule 902(1), the Committee would also have to consider whether other public entities should be added to the list. That is, there should be a systematic inquiry.

- Any amendment would have to be limited to federally-recognized Indian tribes and the Committee would have to make sure that it crafted the right language to cover that classification.

- If there are issues of authenticity regarding tribal documents, a rule rendering all such documents self-authenticating might raise confrontation issues in criminal cases because the defendant may have difficulty in challenging such documents.

- There may well be many places in the national rules in which Indian tribes might be included, and it would be important to have uniform treatment across the rules. For example, Civil Rule 44, which parallels Rule 902 in many ways, makes no mention of Indian tribes.

- There may be other Evidence Rules that might warrant consideration of whether Indian tribal documents should be covered. One example is Rule 609, governing impeachment by prior convictions.

- The Committee might consider asking the FJC to do some research on the use of Indian tribal documents in federal litigation.

In the end, the Committee resolved unanimously that it would be unwise to proceed at this time with an amendment to Rule 902 that would cover tribal documents. The Committee unanimously determined that treatment of Indian tribal documents raised a question that spanned all the national rules, and therefore it would await the direction of the Standing Committee.

V. Proposed Amendment to the Bankruptcy Rules on Electronic Signatures.

The Bankruptcy Rules Committee asked the Evidence Rules Committee to review a proposed amendment to Bankruptcy Rule 5005, the rule on filing and signature. The proposal would add a new subdivision (3) to govern signatures on documents filed by electronic means. Proposed Subdivision (3)(A) provides that if a filer is registered with ECF, their username and password will serve as that filer's signature on any electronic document. Subdivision (3)(B) provides that if a document is signed by a person who is not registered on ECF, a scanned signature page can be filed with the document as a single filing, without any need for the filing user to retain the original document. Both subdivisions provide that a signature in accord with the rule "may be used with the same force and effect as a written signature for the purpose of applying these rules and for any other purpose for which a signature is required in proceedings before the court."

Judge Wizmur, the liaison from the Bankruptcy Committee, made the presentation on the proposal. She noted that the use of electronic signatures has been a matter for local rulemaking. It is basically standard practice that the username and password of a filing user constitutes a valid electronic signature. Thus proposed (3)(A) thus does not appear to be controversial. With respect to non-filing users, however, the local rules diverge, most importantly with respect to retention requirements. While most courts require the filing attorney to retain the original, retention periods vary widely. Moreover, many local rules require the signer to execute a declaration that is filed separately, and the filing and retaining requirements for that declaration vary widely. Concerns have also been expressed that requiring the filing attorney to retain the original is burdensome and could lead to ethical issues when, for example, the government requires the attorney to turn over the original as part of a fraud investigation. Yet it would also be burdensome to shift the retention requirements to the courts — when a model local rule on the subject was first being drafted, court clerks from across the country objected to a proposal that would require the courts to retain the originals of documents signed by non-filing users. Thus, proposed (3)(B) is intended to provide needed uniformity and also to remediate the burdens and other problems that come with retaining the originals.

In a wide-ranging discussion, members of the Committee provided preliminary feedback on the proposed amendment to Bankruptcy Rule 5005. Comments included the following:

- There was consensus that the amendment would not require any kind of corresponding amendment to the Evidence Rules. Questions of authenticity will arise but they can be handled by existing Rule 901. The Bankruptcy amendment does have an effect on the best evidence rule (Rule 1002) because it treats the scanned signatures as originals rather than duplicates. But no amendment to the Evidence Rules is required for that to happen, and it would not appear that treatment of scanned signatures as originals rather than duplicates would have any effect on the operation of Rule 1002 in practice.

- Because the document is separate from the signature, the signer may not have read the document but simply signed a signature page. Thus there is room for abuse because the filing party may act without proper authorization.

- The DOJ representative noted concerns about the effect of the proposal on criminal fraud prosecutions when the original document is not retained. There are indications that it is more difficult for experts to examine and compare electronic signatures. It also may be difficult to prove that the signer actually saw the documents or knew which ones were covered by the declaration.

- The question of electronic signatures is one that goes beyond Bankruptcy, and probably affects all the Rules. In that regard, Judge Sutton noted that the Standing Committee has just established a subcommittee on the effect of CM/ECF on the rules of practice and procedure — a subcommittee including members from each of the Advisory Committees, all the reporters, and a member of CACM. The Executive Office of the U.S. Attorney is also conducting a review of the impact of electronic signatures beyond bankruptcy cases.

In the end, Committee members agreed that any rule on electronic signatures by non-filing users should require some form of verification by the filing user that the scanned signature was part of the original document. That would not be a certification as to the truth of the contents of the original document, as such a certification would not necessarily be within the personal knowledge of the filing user. Rather it would be a certification only that the signature was a signature to the actual document that is filed. This could be done by a rule requiring either an actual certification, or verification by a notary public, to be filed with the document. Or the rule could state that the filing user's username and password is deemed to be a certification. Committee members thought that some kind of verification requirement was necessary to remediate the possibility of mischief inherent in filing a separate signature page.

Committee members expressed thanks to Judge Wizmur and to the Bankruptcy Rules Committee for the opportunity to comment on the proposal.

VI. *Crawford* Developments — Presentation on *Williams v. Illinois*

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 Reporter noted that one of the most important areas of dispute among the courts is whether autopsy reports are testimonial. The courts have split about equally on the subject after the Supreme Court's fractious set of opinions in *Williams v. Illinois.*

Committee members noted that the law of Confrontation was in flux, especially after *Williams*, and it was not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. 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 Technology and the Federal Rules of Evidence

The Evidence Rules Committee is sponsoring a symposium on whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This Symposium is intended to follow the same process as the previous symposia on the Restyling and

Rule 502. The Committee has already invited a number of outstanding members of the bench, bar and legal academia to make presentations. The Committee also plans to invite some of the leading people in the area of electronic information management. This symposium will take place on the morning before the Fall 2013 meeting of the Committee, and the proceedings will be published in the Fordham Law Review. The Reporter and the Chair invited suggestions from the members for additional symposium panelists.

VIII. Privileges Report

Professor Broun, the Committee's consultant on privileges, presented his analysis of the clergy-penitent privilege and the trade secret privilege. This presentation was part of Professor Broun's continuing work to develop an article that he will publish 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 or implicit approval by the Standing Committee or the Advisory Committee.

Professor Broun noted that he would add to his analysis of the clergy-penitent privilege by discussing a possible crime-fraud exception. Committee members expressed gratitude to Professor Broun for keeping the Committee apprised of developments in the area of privileges.

IX. Next Meeting

The Fall 2013 meeting of the Committee is scheduled for Friday, October 11, in Portland, Maine.

Respectfully submitted,

Daniel J. Capra

THIS PAGE INTENTIONALLY BLANK

TAB 6

THIS PAGE INTENTIONALLY BLANK

TAB 6A

THIS PAGE INTENTIONALLY BLANK

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

From: Honorable Steven M. Colloton, Chair
Advisory Committee on Federal Rules of Appellate Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 22 and 23, 2013, in Washington, DC. The Committee gave final approval to proposed amendments to Appellate Rule 6. The Committee removed nine items from its study agenda and discussed various other agenda items.

Part II of this Report discusses the proposed amendments to Rule 6, for which the Committee seeks final approval. Part III discusses other matters.

The Committee has scheduled its next meeting for October 3-4, 2013, at the Seton Hall Law School in Newark, NJ.

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.

[1] The minutes have not yet been approved by the Committee.

II. Action Item for Final Approval: Proposed Amendments to Appellate Rule 6

As discussed in the report of the Bankruptcy Rules Committee, that Committee seeks final approval of 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 final approval of 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 (1) update that Rule's cross-references to the Bankruptcy Part VIII Rules, (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling, (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2), and (4) 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 expressly address permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). When Section 158(d)(2) was enacted 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, because BAPCPA established interim procedures for administering the new direct appeals mechanism. Some of those interim procedures were displaced by the 2008 addition of subdivision (f) in Bankruptcy Rule 8001. The Committee now considers it appropriate to specify how the Appellate Rules apply to direct appeals under Section 158(d)(2).

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 already will have been compiled for purposes of the appeal to the district court or the BAP. In a direct appeal, the record generally will be compiled from scratch. The closest model for the compilation and transmission of the bankruptcy court record is the set of rules chosen by the Bankruptcy Rules 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 were drafted on the assumption that the record on appeal would be available only in paper form. 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 adopted 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, in electronic files that can be sent to the court of appeals, or by means of electronic links. Such language seems 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.

A. Text of proposed amendments and Committee Note

The Committee recommends final approval of the proposed amendments to Rule 6 as set out in the enclosure to this report.

B. Changes made after publication and comment

The Committee received one comment on the proposed amendments to Rule 6, from Judge S. Martin Teel, Jr., a United States Bankruptcy Judge in the District of Columbia. Judge Teel's suggestions are described in the enclosure to this report. The Committee decided that the suggestions warrant further study, but that it was not advisable to implement them in the context of the current proposal. Instead, the Committee added Judge Teel's suggestions to its agenda for future consideration. The Committee made no change in the proposal as published.

III. Information Items

At its April 2013 meeting, the Committee reviewed, and removed from its agenda, a number of items that had lingered on the docket for some years. These items concerned the operation of Civil Rule 58(a)'s separate document requirement; the possibility of permitting 1.5-spaced or double-sided briefs; the use of audiorecordings in lieu of transcripts; appendices to petitions for permission to appeal; appellate costs; mandamus practice under the Crime Victims' Rights Act; and an inquiry from the Committee on Federal-State Jurisdiction concerning appellate review of remand orders. Each of these items is discussed in more detail in the minutes of the April meeting.

The Committee also discussed, and decided to remove from its agenda, an item that arose from *Chafin v. Chafin*, 133 S. Ct. 1017 (2013). The opinions in *Chafin* underscore the need for prompt disposition of proceedings under the International Child Abduction Remedies Act. The Committee felt, however, that this issue is best addressed by judicial education rather than by an attempt to establish docket priorities by court rule.

The Committee is considering two possible amendments to Rule 4's treatment of the deadlines for filing notices of appeal. One project arises from the circuits' differing interpretations of the term "timely" in Rule 4(a)(4) (which tolls the time to take a civil appeal "[i]f a party timely files" certain motions). A lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4), and the Committee is considering

whether and how to amend the Rule to answer this question.

A second project concerns Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The Committee is considering amendments to the Rule that might address, *inter alia*, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule.

The Committee is considering two projects that would address requirements for filings in the courts of appeals. The first concerns length limits. The Rules set length limits for briefs using a type/volume formula plus a safe harbor in the form of a (shorter) page limit. But the length limits for rehearing petitions and some other papers are set in pages. The Committee is considering two possible options. One option would replace the page limits with a type/volume-plus-safe-harbor provision modeled on the Rules' length limits for briefs. The other option would set type/volume limits for briefs prepared on computers and would set an equivalent limit, denoted in pages, for briefs prepared without the aid of a computer. The Committee's deliberation also brought to light the potential that the 1998 amendments to Rule 32(a)(7), adopting a type/volume limitation of no more than 14,000 words for a principal brief, may have caused an increase in the length of the average appellate brief. The Committee may consider whether that word count should be adjusted as part of the length-limit project.

The second brief-related project concerns the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. The proposal that is under consideration would not require a court of appeals to accept such filings, but would specify length and timing rules for those filings when a court chooses to permit them.

The Committee has on its docket two items concerning appellate jurisdiction that require coordination with other Advisory Committees. One item concerns the possibility of adopting a rule amendment to address the practice of "manufactured finality" – roughly speaking, the practice whereby an appellant seeks to render the ruling on its primary claim final and appealable by dismissing all other remaining claims. There is a conflict in authority about what procedure is sufficient to achieve finality, and this item was the subject of prior discussions in the Civil / Appellate Subcommittee. The Appellate Rules Committee reviewed the topic at its April meeting in an effort to reach a decision on how to proceed. A substantial majority of the committee favored an approach that would amend the Rules to make clear that a party can establish a final judgment only through Federal Rule of Civil Procedure 54(b) or by dismissing with prejudice all remaining claims and parties. This approach appears to be in accord with the majority of the circuits that have addressed dismissals without prejudice and dismissals with "conditional prejudice." The Committee resolved to ask the Civil Rules Committee to consider such a possible amendment.

The second appellate-jurisdiction item arises from the Court's observation in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the rulemaking process is the preferred means for determining whether and when prejudgment orders should be immediately appealable. The committee will perform initial research aimed at determining whether it would be useful and practical to undertake a larger project that might specify by rule the universe of interlocutory orders that should be appealable. Alternatively, the committee may deem it appropriate to consider only the appealability of particular categories of orders that are brought to the committee's attention, such as the attorney-client privilege ruling at issue in *Mohawk Industries*.

Another project that will entail close coordination with the Civil Rules Committee concerns a proposal to amend the Rules to address appeals by class-action objectors. At the April meeting, the Committee heard from proponents of two different approaches. The first proposal would amend Appellate Rule 42 to bar the dismissal of an objector appeal if the objector received anything of value in exchange for dismissing the appeal. The second proposal would authorize the requirement of a cost bond (and the later imposition of costs) reflecting the full costs of delay in implementation of the class settlement as a result of the appeal. Members of the Civil Rules Committee's Rule 23 Subcommittee have agreed that the topic deserves consideration, although they initially expressed reservations about both of these approaches. The Committee intends to study the matter further over the summer and to consult again with the Rule 23 Subcommittee.

THIS PAGE INTENTIONALLY BLANK

TAB 6B

THIS PAGE INTENTIONALLY BLANK

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

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;

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

18 (B) the reference in Rule 3(c) to "Form 1 in
19 the Appendix of Forms" must be read as a reference
20 to Form 5; ~~and~~
21 (C) when the appeal is from a bankruptcy
22 appellate panel, ~~the term~~ "district court," as used in
23 any applicable rule, means "appellate panel~~.~~"; and
24 (D) in Rule 12.1, "district court" includes a
25 bankruptcy court or bankruptcy appellate panel.
26 **(2) Additional Rules.** In addition to the rules made
27 applicable by Rule 6(b)(1), the following rules apply:
28 **(A) Motion for ~~r~~Rehearing.**
29 (i) If a timely motion for rehearing
30 under Bankruptcy Rule ~~8015~~ 8022 is filed,
31 the time to appeal for all parties runs from
32 the entry of the order disposing of the
33 motion. A notice of appeal filed after the
34 district court or bankruptcy appellate panel
35 announces or enters a judgment, order, or
36 decree – but before disposition of the motion
37 for rehearing – becomes effective when the
38 order disposing of the motion for rehearing
39 is entered.

40 (ii) ~~Appellate review of~~ If a party
41 intends to challenge the order disposing of
42 the motion – or the alteration or amendment
43 of a judgment, order, or decree upon the
44 motion – then ~~requires~~ the party, in
45 compliance with Rules 3(c) and 6(b)(1)(B),
46 ~~to amend a previously filed notice of appeal.~~
47 ~~A party intending to challenge an altered or~~
48 ~~amended judgment, order, or decree~~ must
49 file a notice of appeal or amended notice of
50 appeal. The notice or amended notice must
51 be filed within the time prescribed by Rule 4
52 – excluding Rules 4(a)(4) and 4(b) –
53 measured from the entry of the order
54 disposing of the motion.
55 (iii) No additional fee is required to
56 file an amended notice.
57 **(B) The ~~r~~Record on ~~a~~Appeal.**
58 (i) Within 14 days after filing the
59 notice of appeal, the appellant must file with
60 the clerk possessing the record assembled in
61 accordance with Bankruptcy Rule ~~8006~~
62 8009 – and serve on the appellee – a

63 statement of the issues to be presented on
64 appeal and a designation of the record to be
65 certified and ~~sent~~ made available to the
66 circuit clerk.
67 (ii) An appellee who believes that
68 other parts of the record are necessary must,
69 within 14 days after being served with the
70 appellant's designation, file with the clerk
71 and serve on the appellant a designation of
72 additional parts to be included.
73 (iii) The record on appeal consists of:
74 ● the redesignated record as
75 provided above;
76 ● the proceedings in the district court
77 or bankruptcy appellate panel; and
78 ● a certified copy of the docket
79 entries prepared by the clerk under
80 Rule 3(d).
81 **(C) ~~Forwarding~~ Making the ~~r~~Record**
82 **Available.**
83 (i) When the record is complete, the
84 district clerk or bankruptcy-appellate-panel
85 clerk must number the documents

86 constituting the record and ~~send~~ promptly
87 make it available ~~them promptly to the~~
88 ~~circuit clerk together with a list of the~~
89 ~~documents correspondingly numbered and~~
90 ~~reasonably identified~~ to the circuit clerk.
91 ~~Unless directed to do so by a party or the~~
92 ~~circuit clerk~~ If the clerk makes the record
93 available in paper form, the clerk will not
94 send ~~to the court of appeals~~ documents of
95 unusual bulk or weight, physical exhibits
96 other than documents, or other parts of the
97 record designated for omission by local rule
98 of the court of appeals, unless directed to do
99 so by a party or the circuit clerk. If ~~the~~
100 ~~exhibits are~~ unusually bulky or heavy
101 exhibits are to be made available in paper
102 form, a party must arrange with the clerks in
103 advance for their transportation and receipt.
104 (ii) All parties must do whatever else
105 is necessary to enable the clerk to assemble
106 the record and ~~forward the record~~ make it
107 available. When the record is made
108 available in paper form, t~~T~~he court of

109 appeals may provide by rule or order that a

110 certified copy of the docket entries be ~~sent~~

111 made available in place of the redesignated

112 record~~, b~~. But any party may request at any

113 time during the pendency of the appeal that

114 the redesignated record be ~~sent~~ made

115 available.

116 **(D) Filing the ~~r~~Record.** ~~Upon receiving the~~

117 ~~record – or a certified copy of the docket entries~~

118 ~~sent in place of the redesignated record – the circuit~~

119 ~~clerk must file it and immediately notify all parties~~

120 ~~of the filing date~~ When the district clerk or

121 bankruptcy-appellate-panel clerk has made the

122 record available, the circuit clerk must note that fact

123 on the docket. The date noted on the docket serves

124 as the filing date of the record. The circuit clerk

125 must immediately notify all parties of the filing

126 date.

127 **(c) Direct Review by Permission Under 28 U.S.C. §**

128 **158(d)(2).**

129 **(1) Applicability of Other Rules.** These rules

130 apply to a direct appeal by permission under 28 U.S.C. §

131 158(d)(2), but with these qualifications:

132 (A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c),
133 9-12, 13-20, 22-23, and 24(b) do not apply;
134 (B) as used in any applicable rule, "district
135 court" or "district clerk" includes – to the extent
136 appropriate – a bankruptcy court or bankruptcy
137 appellate panel or its clerk; and
138 (C) the reference to "Rules 11 and 12(c)" in
139 Rule 5(d)(3) must be read as a reference to Rules
140 6(c)(2)(B) and (C).
141 **(2) Additional Rules.** In addition, the following
142 rules apply:
143 **(A) The Record on Appeal.** Bankruptcy
144 Rule 8009 governs the record on appeal.
145 **(B) Making the Record Available.**
146 Bankruptcy Rule 8010 governs completing the
147 record and making it available.
148 **(C) Stays Pending Appeal.** Bankruptcy
149 Rule 8007 applies to stays pending appeal.
150 **(D) Duties of the Circuit Clerk.** When the
151 bankruptcy clerk has made the record available, the
152 circuit clerk must note that fact on the docket. The
153 date noted on the docket serves as the filing date of

154 the record. The circuit clerk must immediately

155 notify all parties of the filing date.

156 **(E) Filing a Representation Statement.**

157 Unless the court of appeals designates another time,

158 within 14 days after entry of the order granting

159 permission to appeal, the attorney who sought

160 permission must file a statement with the circuit

161 clerk naming the parties that the attorney represents

162 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.

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

12-AP-001: Judge S. Martin Teel, Jr. Judge Teel, a United States Bankruptcy Judge in the District of Columbia, suggested that Appellate Rule 6(b)(2)(B)(iii)'s list of the contents of the record on appeal be revised by deleting the Rule's current reference to "a certified copy of the docket entries prepared by the clerk under Rule 3(d)" and inserting "the docket entries maintained by the clerk of the district court or bankruptcy appellate panel." Judge Teel stated that the reference to certification is unnecessary, that the lower-court clerk maintains rather than prepares the docket entries, and that the cross-reference to Appellate Rule 3(d) is superfluous. Turning to Appellate Rule 3(d) itself, Judge Teel also questioned why the lower-court clerk should be required to transmit a copy of the docket entries to the court of appeals now that docket entries are available electronically.

TAB 6C

THIS PAGE INTENTIONALLY BLANK

Advisory Committee on Appellate Rules
Table of Agenda Items — May 2013

FRAP Item	Proposal	Source	Current Status
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 Discussed and retained on agenda 04/13
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 Discussed and retained on agenda 04/13
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 Discussed and retained on agenda 04/13
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 Approved by Standing Committee 06/12 Approved by Judicial Conference 09/12 Approved by Supreme Court 04/13

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 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
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 Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 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 Approved by Standing Committee 06/12 Approved by Judicial Conference 09/12 Approved by Supreme Court 04/13
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 Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 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 Discussed and retained on agenda 04/13
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 Approved by Standing Committee 06/12 Approved by Judicial Conference 09/12 Approved by Supreme Court 04/13
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13

FRAP Item	Proposal	Source	Current Status
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Discussed and retained on agenda 04/13
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)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12
12-AP-E	Consider treatment of length limits for petitions for rehearing en banc under Rule 35	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13
13-AP-D	Revise Rule 6(b)(2)(B)(iii)'s list of contents of record on appeal, and revise Rule 3(d)(1) in light of electronic filing	Hon. S. Martin Teel, Jr.	Awaiting initial discussion
13-AP-E	Consider treatment of audiorecordings of appellate arguments	Appellate Rules Committee	Awaiting initial discussion
13-AP-F	Consider items included for purposes of length limit in Rule 35(b)(2)	Gregory G. Garre, Esq.	Awaiting initial discussion
13-AP-G	Consider clarifying which items can be excluded when calculating length under Rule 28.1(e)	Appellate Rules Committee	Awaiting initial discussion

TAB 6D

THIS PAGE INTENTIONALLY BLANK

DRAFT

Minutes of Spring 2013 Meeting of Advisory Committee on Appellate Rules April 22 and 23, 2013 Washington, D.C.

I. Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 22, 2013, at 9:00 a.m. at the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building 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, Judge Richard G. Taranto, Professor Amy Coney Barrett, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice ("DOJ"), and Mr. H. Thomas Byron III, also of the Civil Division, were present representing the Solicitor General. Mr. Gregory G. Garre, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees; Ms. Julie Wilson, Attorney Advisor in the Administrative Office ("AO"); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center ("FJC") were also present. Professor Daniel R. Coquillette, Reporter for the Standing Committee, participated by telephone. On the second day of the meeting, Professor John E. Lopatka and Professor Brian T. Fitzpatrick participated in the discussion of one agenda item, and Ms. Holly Sellers, Staff Attorney with the Judicial Conference Committee on Federal-State Jurisdiction, was present for the discussion of another item.

Judge Colloton opened the meeting – his first as the Committee's Chair – by noting that he looked forward to working with the Committee. He congratulated Judge Taranto on his recent confirmation as a Judge of the U.S. Court of Appeals for the Federal Circuit. He welcomed Mr. Garre, who was replacing Mr. Colson as the liaison from the Standing Committee. Mr. Garre, Judge Colloton noted, served as the forty-fourth Solicitor General of the United States and now is a partner at Latham & Watkins. Judge Colloton also welcomed Mr. Gans, who first joined the Eighth Circuit Clerk's Office in 1983 and who now replaces Mr. Green as the liaison from the appellate clerks.

At 2:50 p.m. on the first day of the meeting, the Committee joined Professor Coquillette in Boston in observing a moment of silence in honor of the victims of the Boston Marathon bombing.

II. Approval of Minutes of September 2012 Meeting

A motion was made and seconded to approve the minutes of the September 2012 meeting. The motion passed by voice vote without dissent.

III. Report on January 2013 Meeting of Standing Committee

Judge Colloton reported that the Standing Committee, at its January meeting, had paid tribute to the memory of Judge Mark R. Kravitz, who died on September 30, 2012. Judge Kravitz is deeply missed.

IV. Other Information Items

Judge Colloton noted that the Supreme Court has approved the proposed amendments to Appellate Rules 28 and 28.1 (concerning the statement of the case), Appellate Rules 13, 14, and 24 (concerning appeals from the United States Tax Court), and Appellate Form 4 (concerning applications to proceed in forma pauperis). Absent contrary action by Congress, those amendments are on track to take effect on December 1, 2013.

V. For Final Approval: Item Nos. 08-AP-L and 09-AP-C

Judge Colloton invited the Reporter to introduce these items, which concern proposed amendments to Appellate Rule 6. The Reporter reminded the Committee that these amendments were designed to dovetail with the Bankruptcy Rules Committee's package of amendments to Part VIII of the Bankruptcy Rules (concerning bankruptcy appellate practice). The amendments would update Rule 6's cross-references to certain Part VIII Rules; amend Rule 6(b)(2)(A)(ii) to remove an ambiguity that resulted from the restyling of the Appellate Rules; and add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2). The amendments also revise Rule 6 to account for the range of possible methods for handling the record on appeal.

A great many comments were submitted on the proposed amendments to the Part VIII Rules; by contrast, only one comment was submitted on the proposal to amend Rule 6. The Reporter noted that the Appellate Rules Committee's agenda materials included a redline showing possible changes that were proposed to the Bankruptcy Rules Committee in light of the public comments. At its spring 2013 meeting, the Bankruptcy Rules Committee had approved many of those changes, had rejected others, and had made a few additional changes. Thus, the proposed Part VIII package, as finally approved by the Bankruptcy Rules Committee, differed in some respects from the version reproduced in Volume II of the Appellate Rules Committee's agenda materials; the Reporter assured the Committee that none of those differences would affect the operation of Rule 6, and she offered to share the as-approved version with any Committee members who wished to review it.

Among the post-publication changes to the Part VIII package, the most interesting change, from the perspective of practice in the courts of appeals, concerns proposed Bankruptcy Rule 8007 (which addresses stays pending appeal). Under proposed Appellate Rule 6(c)(2)(C), Rule 8007 will apply to direct appeals to the courts of appeals

under Section 158(d)(2). Proposed Rule 8007(a), like Appellate Rule 8(a)(1), requires that a litigant seeking a stay must ordinarily move first in the lower court; Rule 8007(a)(2) states that this "motion may be made either before or after the notice of appeal is filed." As published, Rule 8007(b)(1) provided that "[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." However, a commentator questioned the authority of the appellate court to entertain such a motion prior to the filing of a notice of appeal. In response to this comment, the Bankruptcy Rules Committee decided to delete "or where it will be taken" from Rule 8007(b)(1). The Reporter stated that this change seems to bring the proposed Rule into conformity with Section 158(d)(2)(D), which provides: "An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal." In sum, the Reporter suggested, this change seems like an improvement, as do the other post-publication changes that the Bankruptcy Rules Committee made to the proposed Part VIII Rules.

The sole comment on the proposed amendments to Appellate Rule 6 was submitted by Judge S. Martin Teel, Jr., a United States Bankruptcy Judge in the District of Columbia. Judge Teel suggested deleting from Rule 6(b)(2)(B)(iii)'s list of the contents of the record on appeal the phrase "a certified copy of the docket entries prepared by the clerk under Rule 3(d)" and substituting "the docket entries maintained by the clerk of the district court or bankruptcy appellate panel." Judge Teel stated that the reference to certification is unnecessary, that the lower-court clerk maintains rather than prepares the docket entries, and that the cross-reference to Appellate Rule 3(d) is superfluous. Judge Teel also questioned why Appellate Rule 3(d) requires the lower-court clerk to transmit a copy of the docket entries to the court of appeals now that docket entries are available electronically. The Reporter suggested that Judge Teel's comments warrant consideration, but that it would be preferable to add them to the Committee's agenda as a separate item rather than trying to take account of them in the currently-proposed amendments to Rule 6.

A member moved to approve the Rule 6 proposal as published. The motion was seconded, and it passed by voice vote without dissent.

VI. Discussion Items

A. Items Proposed for Removal from Agenda

Judge Colloton explained that, upon becoming Chair of the Committee, he had decided to take a fresh look at long-pending items on the Committee's docket. He invited the Reporter to present to the Committee six items that appeared to be ripe for removal from the docket.

1. Item No. 07-AP-H (separate document requirement)

The Reporter reminded the Committee that this item arose from the observation that, where Civil Rule 58(a) requires a judgment to be set out in a separate document, and the district court fails to comply with this requirement, under Civil Rule 58(c)(2) the time limit for making postjudgment motions does not start to run until 150 days after entry of the judgment on the docket. This creates the possibility that a litigant might make a very belated postjudgment motion that – because it was still technically timely – would suspend the effectiveness of any previously-filed notice of appeal pending disposition of the motion.

In 2008, the Committee considered possible ways to address this scenario. Initially, it discussed whether to adopt a time limit within which tolling motions must be filed when a separate document was required but not provided. After consulting with the Civil Rules Committee, however, the Committee decided that it was preferable to raise awareness of Rule 58's requirements in the hopes of improving district court compliance. Since 2008, this item has lain dormant.

By consensus, the Committee decided to remove this item from the docket.

2. Item No. 08-AP-N (FRAP 5 / appendix)

The Reporter noted that this item arose from Peder Batalden's suggestion that the Committee amend Rule 5 to permit litigants to submit an appendix of key record documents along with a petition for permission to appeal (or along with an answer to such a petition). The concern is that courts might count the appendix toward the length limit set by Rule 5(c). (Rule 5(c) excludes the items required by Rule 5(b)(1)(E), but that list of items does not include an appendix.)

When the Committee discussed this proposal in 2009, members observed that when the filings in the district court are electronic, the court of appeals can usually access those documents via the CM/ECF system. Admittedly, as the Committee noted, pro se litigants continue to make paper filings, and some sealed filings are not available in CM/ECF. But, the Reporter suggested, now that all of the courts of appeals have completed the shift to electronic filing, the rationale for this proposal seems weaker than it was in 2009.

Mr. Gans reported that each district court sets its own parameters concerning the access of court of appeals personnel to filings in the district court; some districts, for example, do not permit electronic access to sealed documents.

An appellate judge member asked whether anyone had reported instances in which a court of appeals forbade the filing of an appendix to a petition or an answer. If not, he suggested, it would be a good idea to remove this item from the agenda.

By consensus, the Committee removed this item from the agenda.

3. Item No. 08-AP-P (FRAP 32 / line spacing)

The Reporter stated that this item arose from Mr. Batalden's proposal that the Committee amend the Rules to permit the use of 1.5-spaced, rather than double-spaced, briefs. When the Committee discussed this proposal, members also considered the possibility of amending the Rules to permit double-sided briefs. There was some support for each of these proposals during the Committee's discussion. However, other participants had predicted that judges would oppose such changes. Moreover, it was suggested that the shift to electronic filing would eventually render the question of double-sided printing moot.

An appellate judge member stated that the judges of the Eleventh Circuit prefer double-spaced, single-sided briefs. Another appellate judge member asked whether some units within the DOJ had, in the past, filed double-sided briefs. Mr. Letter responded that the DOJ had periodically raised the possibility of submitting double-sided briefs but that the courts had never acceded to that suggestion. Another appellate judge recalled that Iowa lawyers were known in the Eighth Circuit for attempting to file double-sided briefs – and the explanation was that the Iowa Supreme Court required double-sided briefs.

Mr. Letter said that, in his view, the key question is what judges prefer. However, he also noted that moving to double-sided printing would save a lot of paper and a lot of storage space. Commercially printed briefs, he observed, are printed double-sided, as are books and newspapers. He urged the Committee to consider permitting double-sided printing.

Another appellate judge stated that he preferred the Rules' current approach; he reported that he writes on the blank side of the pages. An attorney participant stated that he had become accustomed to printing documents double-sided for his own use, and that this practice does consume a lot less paper. Mr. Letter added that double-sided briefs are lighter.

An appellate judge asked Mr. Gans whether his office stores appellate briefs. Mr. Gans responded that his office keeps the briefs for a period of time and then recycles them. He observed that sometimes there are copies of briefs that were never used; on the other hand, in other instances his office runs out of copies and has to print more. A member asked whether the Committee could encourage circuits to lower the number of required copies of briefs.

An appellate judge predicted that judges would resist the adoption of double-sided printing. A motion was made to remove this item from the agenda. The motion was seconded and passed by voice vote without dissent.

4. Item No. 08-AP-Q (use of audiorecordings in lieu of transcript)

Judge Colloton introduced this item, which arose from a suggestion by Judge Michael M. Baylson that the Committee consider amending the Appellate Rules to permit the use of audiorecordings in lieu of a transcript for purposes of the record on appeal.

Professor Coquillette observed that any proposal that would affect court reporters would become highly political. An appellate judge member suggested that searching an audio file would be more difficult and time consuming than looking through a written transcript. A motion was made and seconded to remove this item from the agenda. The motion passed by voice vote without dissent.

An attorney participant asked whether the Committee had ever considered drafting a rule concerning the release of audiorecordings of appellate arguments. Some courts, he reported, are very slow to release them – in contrast with recent Supreme Court practice. Mr. Letter stated that he did not recall such a proposal. Professor Coquillette stressed that it would be important for the Committee to confer with the Judicial Conference Committee on Court Administration and Case Management ("CACM") before commencing such a project. Mr. McCabe noted that CACM is in charge of pilot programs concerning audiorecordings and videorecordings of trial-court proceedings. A member stated that he favored approaching CACM to discuss practices concerning the release of appellate argument audiorecordings. He noted that there is a strong public interest in open access, and also that the recordings are very useful to advocates who are preparing for their own arguments. Mr. Gans asked whether the FJC has studied this issue. By consensus, the Committee resolved to investigate this matter further.

5. Item No. 10-AP-D (FRAP 39 / *Snyder v. Phelps*)

Judge Colloton introduced this item, which related to a bill – the "Fair Payment of Court Fees Act of 2010" – which would have amended Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs in *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). At the Committee's request, Ms. Leary prepared a study concerning the circuits' practices with respect to appellate costs. Judge Sutton, as chair of this committee, sent Ms. Leary's report to the Chief Judges of each circuit, and the Fourth Circuit subsequently reduced the ceiling on the permissible reimbursement per page of copies. The bill has not been reintroduced since then.

A motion was made to remove this item from the Committee's agenda. The motion was seconded, and passed by voice vote without dissent.

6. Item No. 10-AP-H (appellate review of remand orders)

The Reporter reminded the Committee that this item relates to an inquiry the Committee received in 2010 from Karen Kremer, an attorney at the AO who works with the Judicial Conference's Committee on Federal-State Jurisdiction. Ms. Kremer had asked whether the Appellate Rules Committee was considering questions relating to appellate review of remand orders. The Committee discussed this inquiry at its fall 2010 meeting and noted that this topic falls within the primary jurisdiction of the Federal-State

Jurisdiction Committee. Committee members expressed willingness to assist with a project in this area if the Federal-State Jurisdiction Committee decided to undertake one. The Committee did not hear anything further on the matter from the Federal-State Jurisdiction Committee.

A motion was made, and seconded, to remove this item from the Committee's agenda. The motion passed by voice vote without dissent.

B. Items for Further Discussion

1. Item No. 05-01 (FRAP 21 & 27(c) / Justice for All Act of 2004)

Judge Colloton and the Reporter introduced this item, which concerned the possibility of amending the Appellate Rules to account for the mandamus procedures set by the Crime Victims' Rights Act ("CVRA") (which was part of the Justice for All Act of 2004). If a district court denies relief sought by a crime victim under the CVRA, the CVRA authorizes the victim to seek a writ of mandamus from the court of appeals. The statute authorizes the issuance of the mandamus writ "on the order of a single judge" and sets a 72-hour deadline for the court of appeals to reach a decision on the application. Then-Professor Schiltz, the Committee's Reporter at the time, identified three problems arising from the CVRA. One is that Rule 27(c) (which provides that a circuit judge acting alone "may not dismiss or otherwise determine an appeal or other proceeding") prevents individual judges from issuing mandamus writs and Rule 47(a)(1) forecloses local rules that are inconsistent with the Appellate Rules. A second is that the 72-hour deadline would be extremely hard to meet. A third was that, as of 2005, the Rules provided no method for computing time periods set in hours. The third of these problems was removed by the adoption, in 2009, of Rule 26(a)(2)'s provision for counting time periods stated in hours. When the committee last considered this matter, it was left that the Department of Justice would monitor practice under the Act and notify the committee of any difficulties. Judge Colloton asked Mr. Letter whether he could report on how the first and second problems identified by Professor Schiltz have played out in practice.

Mr. Letter reported that he had consulted the Solicitor General, the Criminal Appellate Office at DOJ, and various United States Attorney's Offices. Those consultations produced no sense that a rule change is warranted. Mr. Letter surveyed judicial opinions that deal with the CVRA. There are, he reported, some procedural issues that are being litigated in the circuits, but those issues are likely to be resolved through judicial decisionmaking more quickly than they could be resolved by means of a rule change. There has been litigation over whether review of a district court ruling is available via an appeal, or whether mandamus is the only avenue; most courts say the latter. Mr. Letter suggested that this question is probably not appropriate for treatment through rulemaking.

Mr. Letter noted that the 72-hour deadline is not typically observed by courts. Some courts view the issue in terms of waiver; there is some question whether the deadline is waivable by the litigants. In any event, no court has ruled that a failure to

meet this deadline deprives the court of the power to act. Mr. Letter also observed that courts do not all apply the same standard of review when deciding CVRA petitions. However, Mr. Letter's office was unable to identify a case in which the choice (among the different standards of review that are in use in different courts) would have produced a difference in outcome. An appellate judge stated his impression that none of the courts of appeals directs CVRA petitions to a single judge for resolution; rather, all of the circuits use three-judge panels. Mr. Letter agreed.

Judge Colloton asked whether there is any sense that delays in resolving CVRA appeals are causing harm to victims. Mr. Letter responded that he is not aware of any such instances. Mr. Letter noted that although a rule adopted under the Rules Enabling Act will supersede any existing statutory provisions that conflict with it, it would be odd to try to supersede the CVRA's 72-hour deadline through rulemaking. Judge Colloton noted that, during the Committee's prior discussions of this topic, then-Professor Schiltz had raised the possibility of amending the Appellate Rules to permit a single judge to act on CVRA petitions (as a way of expediting them and to conform to the statute's contemplated procedure).

Mr. McCabe pointed out that the statute requires the AO to report to Congress every year on any instances in which a court denied a victim's request for relief under the CVRA. There are, he said, very few such instances per year. Mr. Letter noted that there is a developing circuit split concerning restitution awards against downloaders of child pornography, but that is unrelated to the issues raised by this docket item.

By consensus, the Committee decided to remove this item from its agenda.

2. Item No. 07-AP-E (*Bowles v. Russell*)

Judge Colloton invited the Reporter to introduce this item, which arose from a suggestion that the Committee consider possible responses to the Supreme Court's holding, in *Bowles v. Russell*, 551 U.S. 205 (2007), that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional.

Starting in 2007, the Committee discussed a number of possible approaches. It considered the idea of altering the law to specify which appeal-related deadlines were or were not jurisdictional, and the idea of reinstating the "unique circumstances" doctrine (which had provided an avenue for excusing noncompliance with a deadline). After discussing questions of the scope of rulemaking authority, the Committee turned to the possibility of developing proposed legislation that would set a method for determining whether statutory deadlines were jurisdictional. However, after considering the potential scope of that project, the Committee decided to reassess how big a problem *Bowles*-related issues really were in practice. This question proved difficult to assess; the caselaw showed that some litigants were losing the opportunity for appellate review because an appeal deadline was deemed jurisdictional under *Bowles*, but it was hard to tell how frequently this was happening. In addition, some doctrines were available to

mitigate the effect of *Bowles* – for example, the possibility of treating, as the notice of appeal, another document that was the substantial equivalent of such a notice.

After years of comprehensive consideration, it seemed that this item might be ripe for removal from the Committee's agenda. However, there were a couple of loose ends that merited the Committee's attention. Since *Bowles*, the lower courts are treating statutory deadlines for taking an appeal from the district court to the court of appeals as jurisdictional, but they are treating non-statutory appeal deadlines as non-jurisdictional claim-processing rules. This dichotomy gives rise to a difficulty in instances where a basic appeal deadline is set by statute but the Rules fill in statutory gaps; should such a gap-filling rule be viewed as jurisdictional?

In particular, two questions have arisen concerning the treatment under Rule 4(a)(4) of motions that toll the time to take a civil appeal. 28 U.S.C. § 2107 does not mention such motions, but the tolling effect of certain postjudgment motions was recognized even prior to that statute's enactment. Rule 4(a)(4) refers to the tolling effect of specified "timely" motions. A number of circuits have concluded that the Civil Rules' non-extendable deadlines for post-judgment motions are claim-processing rather than jurisdictional rules. In this view, if the district court purports to extend such a deadline, and no party objects, the district court has authority to decide the late-filed motion on its merits. But is such a motion "timely" under Rule 4(a)(4), such that it tolls the time to take an appeal? The majority view in the circuits is that such a motion does not qualify for tolling effect – but the Sixth Circuit has taken the opposite view.

Another question concerns the nature of Rule 4(a)(4)'s requirements themselves: is Rule 4(a)(4)'s requirement of a "timely" motion itself a jurisdictional requirement, or merely a claim-processing rule? Drafting a rule change to address this second question, the Reporter suggested, could be more challenging. An appellate judge member suggested looking at other Rules, if any, that refer to the waivability of a requirement set by Rule. This member wondered whether addressing the waivability of one requirement would give rise to any negative implications for the treatment of other such requirements. The Reporter made a note to look at other rules that refer to timeliness, and also to consider the possible implications (of any proposed change concerning Rule 4(a)(4)) for Rule 4(b)(3)'s tolling provision. The appellate judge member also noted the possible relevance of Rule 4(a)(7)(B) (which states that failure to comply with Civil Rule 58(a)'s separate document requirement "does not affect the validity of an appeal").

Judge Colloton asked Committee members for their views on whether the Committee should propose an amendment to clarify the meaning of "timely" in Rule 4(a)(4). An appellate judge member said that it would be worthwhile to clarify the Rule. Another appellate judge member agreed.

A district judge member noted that it might be useful to gather data on how frequently district courts mistakenly grant a litigant's request to extend one of the non-extendable deadlines for post-judgment motions. He observed that, in criminal cases, the

deadlines for some postjudgment motions *are* extendable and requests for extensions are routinely granted.

By consensus, the Committee decided to keep this item on its agenda. The Reporter undertook to work with Judge Dow, Mr. Letter, and Mr. Byron to draft illustrative alternatives for an amendment to Rule 4(a)(4) – one draft that would implement the majority view concerning the meaning of "timely," and another that would implement the Sixth Circuit's view.

3. Item No. 07-AP-I (FRAP 4(c) / inmate filing)

Judge Colloton invited the Reporter to introduce this item, which concerns the operation of Rule 4(c)(1)'s inmate-filing provision. The first sentence of Rule 4(c)(1) applies the prison-mailbox rule to notices of appeal. The second sentence states that the inmate, to receive the benefit of this rule, must use the "system designed for legal mail" if the institution has one. The third sentence states that timeliness "may be shown" by a declaration or notarized statement setting out the date of deposit and attesting that first-class postage was prepaid. Judge Diane Wood asked the Committee to consider clarifying whether this Rule requires prepayment of postage as a condition of timeliness. Research revealed that there also may be confusion in the law about whether the declaration discussed in the third sentence is required in all instances and, if so, when it must be furnished.

The doctrinal backdrop for this inquiry includes prisoners' constitutional right of access to court under *Bounds v. Smith*, 430 U.S. 817 (1977). The Court has ruled that *Bounds* requires that inmates be provided with the "tools … to attack their sentences, directly or collaterally, and … to challenge the conditions of their confinement." *Lewis v. Casey*, 518 U.S. 343, 355 (1996). Although courts have recognized (or assumed) that there is a federal constitutional right to some amount of free postage for an indigent inmate's legal mail, the constitutionally required amount may be relatively small. The Reporter noted that the Sixth Circuit, in a 2010 decision, found a *Bounds* violation where a defendant's attempt to file a direct appeal of his state-court judgment of conviction was thwarted by prison officials' delay in mailing his appeal papers and by the absence of a prison-mailbox rule under state law.

The Committee's agenda materials set forth some possible drafting alternatives for amendments to Rule 4(c)(1). The Rule could be amended to extend clearly the postage-prepayment requirement to all prison-mailbox filings. An argument in favor of such a change is that it could speed the processing of appeals by preventing delays in the transit of the notice of appeal; counter-arguments would stem from the facts that inmates have fewer opportunities to earn money than non-inmates and that inmates lack the alternative of delivering the notice of appeal to the court by hand. The latter concerns would suggest that if the Committee were to propose an amendment cementing a postage-prepayment requirement, it should also consider including a provision for excusing compliance in appropriate circumstances. The materials also sketched a possible amendment that would restrict the postage-prepayment requirement to instances

when the inmate does not use a legal mail system, but it is unclear why such a choice would be desirable. Another possible type of amendment would make clear whether the declaration or notarized statement is always required, and, if so, whether it must be included with the notice of appeal or whether it can be provided later. Another question is whether it would be possible to clarify what is meant by a "system designed for legal mail"; but a clearer alternative seems difficult to formulate. Finally, another possible type of amendment would clarify whether Rule 4(c)(1) applies to filings by an inmate who has a lawyer.

Judge Colloton observed that the 1993 Committee Note to Rule 4(c) stated that this inmate-filing provision was "similar to that in Supreme Court Rule 29.2." There may have been some ambiguity in the original Rule, he suggested, with respect to the requirement of a declaration. In 1998 the second sentence of Rule 4(c)(1) – referring a "system designed for legal mail" – was added. The 1998 Committee Note to Rule 4(c) explained: "Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc." Judge Colloton pointed out that "often" is different from "always." He asked whether it is always the case that a piece of mail processed through an institution's legal mail system will have a date stamp, such that it would be unnecessary to have a declaration by the inmate concerning the date of deposit.

Mr. Gans stated that simplicity is key for rules concerning inmate filings. He reported that inmates tend to assume that all of their filings are governed by *Houston v. Lack*, 487 U.S. 266 (1988). Judge Colloton asked whether the Clerk's Office checks inmate mailings for a date stamp. Mr. Gans responded that his office does typically look at the envelope, which is usually scanned in as a PDF file by the District Clerk's Office. The Federal Bureau of Prisons, he noted, does mark the envelopes containing inmate mailings. He reported that his office typically does not see a declaration by the inmate concerning the date of deposit of the mailing; usually the issue does not arise unless the appellee moves to dismiss the appeal. Sometimes the court of appeals remands the case to the district court for the district court to make a finding concerning when the notice of appeal was filed.

An appellate judge member suggested that the provision concerning legal mail systems adds complexity. Another member questioned why the Rule should require payment of postage, and why the institution should not be required to cover the cost of postage for a notice of appeal. Covering the cost of postage, this member suggested, would be cheaper than litigating the question of whether there was good cause to excuse the inmate from paying the postage. Mr. Letter summarized the Federal Bureau of Prisons policy. Under this policy, inmates are generally responsible for paying their own postage costs, but the institution will provide stamps for legal mail (subject to possible limitation by the warden). Mr. Gans noted that, before inmates arrive in a Federal Bureau of Prisons facility, they may be held temporarily in a facility (such as a county jail) where different mail practices apply. An appellate judge agreed that it would be very rare for an inmate to arrive in an institution run by the Federal Bureau of Prisons within the 14-day period for filing a notice of appeal. Mr. Letter observed that federal public defenders file

notices of appeal on behalf of their clients as a matter of course. Mr. Gans responded, though, that retained or appointed counsel might not follow this practice.

An appellate judge member observed that the Committee is not in a position to require an institution to pay the cost of postage for inmates filing a notice of appeal. Another member responded that the Rule could be amended to address the question that does fall within the Committee's purview – namely, whether a notice of appeal that was timely deposited in the institution's mail system is considered timely filed despite subsequent delays caused by nonpayment of postage. If the Rule were amended to provide that such a notice is timely, this member conceded, the effect would likely be that the institution would decide to pay the postage costs itself. This member expressed concern at the possibility that a defendant's appeal might fall through the cracks, and he questioned why the system requires criminal defendants to file a notice of appeal rather than assuming that they will wish to take an appeal. Another participant noted that Rule 4(c)(1) applies to both civil and criminal cases.

An attorney participant stated that he favored making the rules clearer and easier to apply. However, he asked whether the Supreme Court has encountered difficulties in applying its Rule 29.2. A member responded that the filing of certiorari petitions presents different issues because a certiorari petition (unlike a notice of appeal) is not a one-page document.

Mr. Letter questioned whether a Rule could require the government to pay inmates' postage costs; such a requirement, he suggested, could raise questions of sovereign immunity. An appellate judge member responded that a Rule could address the issue by stating that a notice of appeal could be timely even if the lack of postage delayed its arrival at the courthouse. Another appellate judge asked why such a filing should be timely if the inmate had the money to pay for postage and failed to do so. The other appellate judge responded that a bright-line rule providing for timeliness would allow courts to avoid expending judicial efforts on the question of whether the inmate had the resources to pay for postage. Another member added that, under such an approach, the inmate would still need to deposit the notice of appeal in the institution's mail system within the filing deadline.

A district judge member observed that, in civil cases, inmates who lose in the district court are typically litigating pro se. Another member suggested holding this item on the Committee's agenda and conducting research on the origins of the postage-prepayment requirement. An appellate judge suggested that it would also be useful to research whether any similar issues have arisen under the Supreme Court's Rule 29.2. Another appellate judge noted that while the second sentence in Supreme Court Rule 29.2 refers to the statement or declaration noting the date the document was deposited in the mail system and stating that postage has been prepaid, the third sentence provides further steps for the Clerk to take if "[i]f the postmark is missing or not legible." An attorney participant stated that inmates do not have a constitutional right to require the government to pay for postage; he suggested that it would be useful to see whether other Rules discuss prepayment of postage. An appellate judge asked whether there is

information on the frequency with which inmates lose their appeal rights because of the wording of the current Rule 4(c)(1). The Reporter responded that the caselaw provides some examples; for instance, in *United States v. Ceballos-Martinez*, 371 F.3d 713 (10th Cir. 2004), the defendant's notice of appeal was postmarked with a date prior to the deadline for filing the notice of appeal, but the court held his appeal untimely because he had failed to provide a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attesting that first-class postage was pre-paid.

An appellate judge member suggested that it would be useful to revise the Rule to clarify the idea that the declaration *suffices*, but is not required, to show compliance with the Rule. The Reporter suggested that Rule 32(a)(7)(C)(ii) might provide a useful model.

An appellate judge member asked whether amending the Rule to make clear that there is no postage-prepayment requirement would touch off conflicts between inmates and prison authorities. An attorney participant suggested that it would be odd to eliminate the postage-prepayment requirement for notices of appeal but not for briefs. The Reporter noted that the deadline for filing a notice of appeal is jurisdictional in civil cases. Mr. Gans observed, however, that if a litigant fails to meet an appellate briefing deadline, the litigant only receives one opportunity to show cause why the appeal should not be dismissed.

With respect to the effects of amending the Rule to clarify that there is no postage-prepayment requirement, the Reporter suggested that it might be useful to study how practice has developed in the Seventh and Tenth Circuits, where the caselaw provides that prepayment of postage is not required if the inmate uses the legal mail system. An appellate judge member asked why the Rule should *require* an inmate to use an institution's legal mail system in order to get the benefit of the inmate-filing rule. Another appellate judge agreed that this is a good question.

Judge Colloton observed that several possibilities may be on the table. First, the discussion touched upon the possibility of amending Rule 4(c)(1) to eliminate any requirement that postage be prepaid. Second, the discussion raised the question whether the second sentence of Rule 4(c)(1) (requiring use of an institution's legal mail system) makes sense. There was also the question of the declaration referred to in the third sentence of Rule 4(c)(1); participants in the discussion did not seem to think that the declaration should be required if there was another way to tell that the notice was timely deposited in the mail system. Another approach might focus on bringing Rule 4(c)(1) into closer parallel with Supreme Court Rule 29.2.

A district judge member suggested that one approach could be to provide that the notice of appeal is timely whether or not postage is paid by the inmate, and that if institution pays the postage on the inmate's behalf, the institution can debit the postage cost from the inmate's institutional account. To get the benefit of such a provision, this member suggested, the inmate could be required to certify that he or she is indigent. Almost all such litigants, the member stated, are proceeding *in forma pauperis*.

Judge Colloton asked whether any Committee members would be willing to work with the Reporter to draft alternatives in advance of the next meeting. Justice Eid, Professor Barrett, and Mr. Letter volunteered to assist with this task.

4. Item Nos. 08-AP-A, 08-AP-C, 11-AP-C, 11-AP-D (possible amendments relating to electronic filing)

Judge Colloton reported that the Standing Committee was in the process of convening a subcommittee to consider possible amendments to each set of national Rules to take further account of electronic filing issues. Professor Coquillette stated that he would be coordinating the subcommittee's efforts, and that Professor Capra would serve as the subcommittee's reporter. Most of the other Advisory Committees, he noted, were appointing a representative to serve on the subcommittee.

Judge Colloton invited the Reporter to introduce the collection of existing agenda items that relate to electronic filing. The Reporter reminded the Committee that all of the circuits had completed their transition to the CM/ECF system. She observed that the project to revise Part VIII of the Bankruptcy Rules (which the Committee had discussed earlier in the day) provided a model for ways in which the Rules could be amended to take account of electronic filing. With input from the other Circuit Clerks, Mr. Green (who was Mr. Gans's predecessor as the Circuit Clerks' representative on the Committee) had prepared a list of Appellate Rules that could be considered in this connection. Relevant topics included requirements for service by the clerk; filing or service by parties; the treatment of the record; the treatment of the appendix; the format of briefs and other papers; and the number of required copies. One issue that had been raised by a number of commentators concerned the "three-day rule" in Appellate Rule 26(c), which adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service.

Judge Colloton invited the Committee members to suggest topics that might be ripe for study. The three-day rule might be one such topic. With respect to the appendix, there may be varying views; some judges may prefer an electronic appendix while others will continue to prefer paper.

As to the three-day rule, Mr. Letter pointed out that eliminating this provision in instances where the paper is served electronically could cause problems for lawyers whose opponents electronically serve them at 11:59 p.m. Perhaps, he suggested, the rule could be amended to eliminate the three-day rule for electronically served papers but to provide one extra day for responding to a paper that is electronically served after noon. Mr. Gans responded that such a rule would be difficult for clerks to enforce; moreover, if late-night electronic service causes a problem in a given case the court could grant a one-day extension. In the Eighth Circuit, he noted, the Clerk's Office serves some documents electronically on behalf of inmate litigants; but this practice is not universal among other circuits. Pro se prisoner litigation, Mr. Gans reported, constitutes roughly a third of the Eighth Circuit's docket. Mr. Gans suggested that the three-day rule is no longer

necessary but that if the Rule were amended the change would result in some transition costs.

A member stated that, although lawyers have an ingrained habit of relying on the three-day rule, it does not make sense in the case of electronically served papers. An appellate judge asked how often service is accomplished by U.S. Mail. Mr. Gans reported that, in the Eighth Circuit, over a period of years, only a handful of lawyers had been exempted from using the CM/ECF system. Mr. Letter pointed out that in a number of circuits there will continue to be papers served in paper form by pro se litigants. Those papers are typically delayed in reaching federal-government lawyers because all mail that comes to the DOJ is screened on its way in for security reasons.

An appellate judge member noted two possible ways of amending Rule 26(c) to address the question of electronic service. One option would be to delete the last sentence of the Rule, which currently states that "[f]or purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service." An alternative would be to revise that sentence by deleting the "not." Mr. Gans stated that he preferred the latter approach.

The Reporter observed that, although the application of the three-day rule to electronically-served papers has garnered the most criticism, Chief Judge Easterbrook also has voiced a more general objection to the three-day rule – namely, that it interferes with the Rules' general preference for setting time periods in multiples of seven days. Mr. Gans stated that the continuing prevalence of paper filings by pro se litigants provides a valid argument in favor of maintaining the three-day rule for documents served by mail. An appellate judge asked whether such pro se papers typically require an extensive response by opposing counsel. Mr. Letter predicted that if the three-day rule is eliminated altogether, the change will require the government to file more motions for extension of time.

Mr. Byron pointed out that the Standing Committee's electronic-filing subcommittee would no doubt consider the question of what to do about the three-day rules in the Appellate, Bankruptcy, Civil, and Criminal Rules. Mr. Gans noted that it is important for the three-day rule to function the same way in all of these sets of Rules.

Judge Colloton asked Committee members for their views concerning the treatment of the appendix. The Reporter observed that circuits vary widely in their practices, with some requiring appendices and some requiring "record excerpts" instead. There is a question whether it is possible for the Rules to nudge circuits toward the use of electronic appendices. Mr. Gans observed that court employees do not want to be the ones to print the appendix.

Judge Colloton encouraged Committee members to share any additional thoughts on this topic, and to let him know if they were interested in serving on the newly-formed subcommittee.

5. Item No. 08-AP-H (manufactured finality)

Judge Colloton introduced this topic, which concerns the efforts of a would-be appellant to "manufacture" appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. Judge Colloton reminded the Committee that, as of fall 2012, it had appeared possible that the Court would shed light on this topic when deciding *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). As it turned out, however, the Court's decision in *Gabelli* did not speak to the manufactured-finality issue.

Judge Colloton had chaired the Civil / Appellate Subcommittee, which previously considered this topic. He noted that a majority of the Subcommittee members had agreed that it would be desirable to bring clarity to this question of appellate jurisdiction, and had felt that this was an appropriate topic for rulemaking. However, the Subcommittee had failed to reach consensus on how to clarify the law in this area. A majority of the circuits have ruled that a dismissal of the remaining claims without prejudice does not suffice to render the judgment final. And a majority of circuits to consider the question have ruled that a dismissal of the remaining claims with conditional prejudice (i.e., a dismissal that is final as to the remaining claims unless the appellant wins on appeal as to the central claim) does not suffice to render the judgment final. Some circuits look at whether the appellant dismissed the remaining claims with the intent to manipulate appellate jurisdiction – a standard that presents problems of administrability.

Judge Colloton pointed out that the agenda materials included some sketches that Professor Cooper had prepared for the Civil / Appellate Subcommittee's consideration. As a basis for discussion, Judge Colloton suggested considering the possibility of an amendment that would adopt the strict view that a dismissal without prejudice does not achieve finality. Such an approach would help to avoid piecemeal litigation; and avenues for taking an immediate appeal are already provided by Civil Rule 54(b) and by 28 U.S.C. § 1292(b). Judge Colloton drew the Committee's attention to one of Professor Cooper's sketches: "A party asserting a claim for relief can establish a final judgment by voluntary dismissal only by dismissing with prejudice all claims and parties remaining in the action." He asked the Committee members to comment on this possibility.

An appellate judge member stated that he liked the idea of having a clear rule. An attorney member expressed agreement, and stated that some of the existing approaches to manufactured finality felt like methods for gaming the system; an attorney participant concurred in this view. Another member, however, questioned how big a problem the current caselaw is posing in practice; are there many abuses, or are lawyers using existing caselaw to serve the legitimate needs of their clients? Mr. Letter noted that the issue comes up frequently and has generated plenty of caselaw. An appellate judge stated that he did not know how often appellants use the vehicle of manufactured finality in order to take an appeal; he observed that the Second Circuit first recognized conditional prejudice as an avenue for creating finality a decade ago, in *Purdy v. Zeldes*, 337 F.3d 253 (2d Cir. 2003).

Mr. Letter pointed out that some district judges may be unwilling to direct entry of judgment as to fewer than all claims or parties under Civil Rule 54(b). An appellate judge member suggested that it would be worthwhile to understand the reasons why circuits that take a relatively permissive approach to manufactured finality have decided to do so. In complex patent cases, this member noted, there may be an interest in clearing the way for appellate review on the main issue in the case. A district judge member noted that he has directed entry of judgment under Civil Rule 54(b) in cases where the appeal would be taken to the Federal Circuit.

An appellate judge member stated that he favored the sketch pointed out by Judge Colloton. The district judge member agreed.

It was determined that the Chair and the Reporter would contact Judge Campbell and Professor Cooper and ask if the Civil Rules Committee would give consideration to the possibility of adopting a rule amendment along the lines of the sketch.

Later in the meeting, the discussion returned to the topic of manufactured finality. Mr. Letter pointed out that in False Claims Act cases, the government frequently files both a False Claims Act claim (which carries treble damages) and a common-law claim (which does not). If the False Claims Act claim is dismissed, the case may or may not be worth trying on the common-law claim by itself. If an appeal is taken and the court of appeals upholds the dismissal of the False Claims Act claim, sometimes the government might wish to pursue the common-law claim (though in many cases it would instead simply dismiss that claim). Mr. Letter reported that some district judges may be unwilling to direct entry of final judgment as to the False Claims Act claim under Civil Rule 54(b), because they do not wish to try the common-law claim. Mr. Letter stated that he would need to verify the DOJ's position concerning the manufactured-finality issue, but that he suspected that the DOJ would not support a rule change modeled on the sketch.

An appellate judge member expressed skepticism about the value of permitting appeals in the type of scenario described by Mr. Letter. Another appellate judge member asked whether any court has explored an approach that would permit a dismissal without prejudice to result in finality so long as it is clear that the statute of limitations continues to run while the appeal is litigated. The statute of limitations on the voluntarily-dismissed claims, he suggested, could provide some discipline for parties who seek to use manufactured finality to take an appeal.

6. Item No. 12-AP-E (length limits)

Judge Colloton turned the Committee's attention to this item, which concerns the question of how to formulate length limits in the Appellate Rules. Most of the Appellate Rules that set length limits, Judge Colloton observed, set those limits in terms of pages rather than type/volume limits. The Reporter pointed out that the Committee's agenda materials included a chart showing possible ways to reformulate the length limits that are currently set in pages. One column showed a type/volume limit designed to roughly

approximate the current page limit, coupled with the alternative of a shorter page limit. The next column showed a type/volume limit that would provide greater length than the current page limit, coupled with the alternative of the current page limit. And the final column showed a type/volume limit – for papers produced using a computer – that was designed to approximate the current page limit; for papers produced without the aid of a computer, the final column showed the current page limit.

Judge Colloton expressed doubt about the viability of the approaches sketched in the first two columns. Professor Katyal stated that the Supreme Court's switch (in 2007) to using word counts was a great move. Setting length limits in pages invites litigants to game the system and also wastes lawyers' time. Professor Katyal suggested that the approach illustrated in the third column – setting length limits in pages only for typewritten briefs – was an elegant solution. An attorney participant stated a preference for page limits and expressed nostalgia for the prior version of the Supreme Court Rules. Judge Colloton noted that Professor Katyal, in raising this issue, had focused on rehearing petitions; he asked Professor Katyal whether he felt that other page limits, such as those for motion papers, were also problematic. Professor Katyal responded that in his experience it is the rehearing petition page limits that have posed problems, but that it would be best to express all the Rules' length limits in the same units.

Mr. Byron noted that although it is impracticable for a litigant to count the words in a typewritten paper, it is possible to use the alternative type/volume method by counting the number of lines of text in the paper. Mr. Byron queried whether courts would want to treat motions the same way as rehearing petitions for purposes of the length limits. The Supreme Court's rules, he suggested, treat motions differently from rehearing petitions. Professor Katyal responded that the Supreme Court's Rules do not set page limits for motions or applications. There are page limits, he reported, for certiorari-stage pleadings that are prepared on letter-size paper pursuant to Supreme Court Rule 33.2(b); that is because most of those documents are in *in forma pauperis* cases and many are prepared by prisoners who may hand-write their petitions.

The discussion turned to the basis for developing the numbers shown in the columns in the chart. The Reporter explained that, for illustrative purposes, she had assumed the correctness of the statement in the 1998 Committee Note to Rule 32(a)(7) that the type/volume limits in Rule 32(a)(7)(B) "approximate the current 50-page limit," and had divided those limits by 50 to obtain the word and line equivalents of a single page. Mr. Letter stated, however, that the Committee Note was incorrect in suggesting that a length of 14,000 words was equivalent to a length of 50 pages. As he recalled, 50 pages was the equivalent of some 12,500 words. An appellate judge member suggested that perhaps the difference reflected the fact that additional lines might be included (when length limits are set in pages) by placing material in a footnote instead of in the text.

Mr. Letter suggested that, while litigants are tempted to manipulate the length of briefs, the temptation is less with respect to rehearing petitions and motions because those documents are shorter. He also suggested that clerks may prefer page limits because they are easier to administer. He reported that he had seen lawyers manipulate the length

limits for rehearing petitions, but that this occurred less frequently with such petitions than it had with briefs. Professor Katyal responded that, especially when a litigant is seeking rehearing en banc, the brevity of the page limit generates an incentive to manipulate the limit. Mr. Letter asked Professor Katyal whether he advocated a word limit, for rehearing petitions, that would yield petitions longer than the current 15 pages. Professor Katyal responded that the limit should be equivalent to 15 pages.

A member asked Mr. Gans whether the burden – for the Clerk's Office – of verifying compliance with type/volume limits would be less for papers filed electronically. Mr. Gans responded that electronic word counts work differently for PDF documents than for Word or WordPerfect documents. To count the words in a PDF, it becomes necessary to convert the file to another format; rather than do so, the Clerk's Office asks the attorney to submit a version in either Word or WordPerfect. Participants discussed the possibility that a filer could manipulate the performance of the word-counting software. Mr. Letter suggested that word limits, too, could lead lawyers to waste time cutting words in order to fit within a given limit. Professor Katyal responded, however, that at least the activity of cutting words to comply with a word limit affects the substance of the filing, whereas the activity of fitting more words on a page to comply with a page limit bears no relation to the substance of the filing.

Mr. Garre noted a question that has arisen concerning the operation of the length limit for petitions for rehearing en banc: Does the statement required by Rule 35(b)(1) count for purposes of the 15-page limit set by Rule 35(b)(2)? He reported that the circuits take varying approaches to this question; the Federal Circuit requires the statement to count. Mr. Garre agreed to survey circuit practices on this issue in preparation for the Committee's next meeting. The Chair wondered what is the basis for excluding the statement from the length limit, since the "petition" must not exceed fifteen pages and the "petition must *begin with*" the statement.

Mr. Letter suggested that frequent Rule amendments are undesirable, and he noted that Rule 32(a)(7)'s provisions are still relatively new. An appellate judge member expressed agreement with this view. Justice Eid noted that the Colorado Supreme Court uses word limits and periodically checks briefs for compliance with those limits. She undertook to provide a comparison with the Colorado Supreme Court's rules for the next meeting.

An appellate judge asked whether setting length limits in words creates more work for the Clerk's Office. Mr. Gans predicted that attorneys would in some instances fail to file the required certification. He asked whether the proposal on the table related only to petitions for rehearing or to all of the documents for which length limits are currently set in pages. Professor Katyal responded that it would make sense for all the length limits to take a consistent approach. Although the rule change would give rise to some transition problems, he suggested, the switch to type/volume limits is inevitable. An attorney member agreed that consistency is desirable.

Judge Colloton noted that, if the frequency of rule changes is a concern, proposed amendments can be held for bundling with other proposals. Turning to the option of switching to a type/volume limit, he asked Committee members whether they favored the model used in Rule 32(a)(7), where in effect the length limits for handwritten briefs were shortened, or whether they instead favored the approach shown in the rightmost column of the chart, that is, a model that seeks equivalence between documents prepared on computers and documents prepared on typewriters or by hand. One participant expressed support for the approach shown in the final column of the chart, which would set limits using different methods for typewritten papers than for papers prepared on a computer. An attorney participant asked how one would operationalize that approach; would the litigant have to certify that a computer had not been used in preparing the paper? He suggested that one could avoid making a distinction between papers that were or were not prepared on a computer by instead requiring those submitting typewritten papers to comply with the line-counting option in a type/volume limit. An appellate judge noted, however, that the latter expedient would not address the issue of handwritten briefs; he asked whether concerns over handwritten briefs had been discussed during the development of the 1998 amendments. Mr. Byron stated that rules concerning CM/ECF typically require litigants to obtain a waiver in order to avoid using the CM/ECF system, and he asked whether the Rules concerning length limits could distinguish among filers based on whether they were CM/ECF users or not.

Judge Colloton suggested that it would be useful to prepare alternative drafts of amendments – one set that would impose length limits modeled on Rule 32(a)(7)'s approach (as shown in the leftmost of the three columns) and another set that would track the approach illustrated in the rightmost column. He also asked whether, if the approach in the rightmost column were adopted for the provisions that currently employ page limits, that approach should be considered for Rule 32(a)(7) as well. An appellate judge member responded that it is important to avoid undue length in briefs, and that it would not bother him if the length limits for briefs were set using a different method than the length limits for other papers.

A district judge member observed that the approach shown in the rightmost column would treat pro se filings more similarly to filings by counsel in terms of length; under Rule 32(a)(7)'s approach, by contrast, a pro se filer who uses the page limits option gets less space. On the other hand, this member said, many pro se filers may not need the extra length. An appellate judge member noted that attorneys tend to use the entire permitted length even when a shorter paper would suffice. An attorney participant questioned why short length limits would unduly burden pro se litigants. Mr. Letter observed that pro se briefs tend to be less complicated than briefs prepared by counsel, and suggested that this might render Rule 32(a)(7)'s 30-page limit less of a hardship than it might otherwise appear.

The attorney participant suggested that it might be useful to research whether briefs filed under Rule 32(a)(7)'s 14,000-word length limit are longer than than they were before. An appellate judge member recalled that the way that lawyers fit additional words into the old page limits was by moving portions of the brief from the text into the

footnotes. Mr. Gans stated that the CM/ECF system includes a field for word counts, which he could search in order to produce figures from which to derive an average length. An appellate judge member suggested that the attorney members might be able to survey documents in their firms' archives. Another appellate judge member suggested looking on Westlaw at petitions for rehearing. Judge Colloton asked Mr. Letter whether he recalled this question being studied during the late 1990s by any local rules committees. Mr. Letter responded that word-counting software was at a relatively early stage then.

The Reporter raised one additional issue concerning length limits. Unlike Rule 32(a)(7)(B), Rule 28.1(e) – which sets length limits for briefs in connection with cross-appeals – does not include a list of items that can be excluded for purposes of calculating length. Rule 28.1(a) excludes Rule 32(a)(7)(B) from applying to cross-appeals. Judge Colloton asked the Committee members whether it would be useful to clarify the Rule. Two attorney members stated that they have assumed the same exclusions apply to briefs on cross-appeals. Judge Colloton suggested that the question concerning Rule 28.1(e) be kept on the Committee's docket for future consideration as a housekeeping amendment.

7. Item No. 12-AP-F (class action objector appeals)

Judge Colloton reminded the Committee that he had invited Professor John E. Lopatka, who is the A. Robert Noll Distinguished Professor of Law at Pennsylvania State University Law School, and Professor Brian T. Fitzpatrick, who is a Professor of Law at Vanderbilt Law School, to speak with the Committee about the topic of appeals by class action objectors. Judge Colloton invited the Reporter to briefly introduce this topic.

The Reporter observed that the basics of the problem are well known. In reviewing class action settlements, judges need good information concerning the quality of the settlement. Discussions over the last decade or so have focused on various ways of producing that information, whether through the opt-out mechanism or through encouraging objectors. During the discussions that led to the 2003 amendments to Civil Rule 23, participants noted the difficulty of crafting rules that distinguish between good objectors – who improve the quality of the settlement – and undesirable objectors – who seek merely to extract payments for themselves. There are reports that objectors routinely take appeals from orders approving class settlements. The Court's decision in *Devlin v. Scardelletti*, 536 U.S. 1 (2002) – which allowed a class member to take an appeal even if the member had not intervened below – has facilitated the practice of objector appeals. As a practical matter, such an appeal has the effect of staying the implementation of the settlement. Class counsel may end up offering the objector a payment in order to drop the appeal – a practice that some class action lawyers characterize as a tax on their activities.

The 2003 amendments to Civil Rule 23 included some measures designed to address the behavior of objectors in the district court. Civil Rule 23(e)(5) permits a class member to object to a proposed settlement, and provides that the objection may be withdrawn only with the court's approval. (Interestingly, Civil Rule 23(h)(2), which

permits a class member to object to a request for attorney fees, does not include a requirement of court approval for the withdrawal of such an objection.) The 2003 Committee Note to Civil Rule 23(e) included a passage that seemed apposite to the Committee's current inquiry:

> Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.
>
> Approval … may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.
>
> Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

This Committee Note, thus, discussed in general terms the topic of objector appeals. The Reporter noted that the Civil Rules Committee – during the discussions that led up to the 2003 amendments – had considered the possibility of addressing the question of objector appeals in the rule text, but had decided not to do so. The Reporter suggested that the dynamics that had been present at the district court level, and which may now be held in check by Rule 23(e)(5)'s requirement of court review for the withdrawal of objections, may be replicating themselves during the appeal.

Judge Colloton noted that he had asked Ms. Leary to conduct some research on the frequency of objector appeals and their disposition, and he invited Ms. Leary to summarize her preliminary findings. Ms. Leary explained that she had decided to focus on appeals from class settlements in districts within the Seventh Circuit because the district courts in that circuit have an average representative level of class action filings. Ms. Leary used an electronic search of the CM/ECF system in the relevant districts in

order to identify all class action cases in which final approval of a Rule 23-certified class action settlement was granted between January 1, 2008, and March 19, 2013, and after which one or more appeals were taken. Through further analysis, Ms. Leary identified those settled class actions from which an appeal was taken by one or more class members who had objected to the settlement in the district court prior to final approval. Ms. Leary identified 27 appeals by objectors in eight class actions. The appeals were concentrated in a few districts. All 27 of the appeals were voluntarily dismissed on motion under Rule 42(b). Among 21 of those appeals, the average time from inception to dismissal was less than three months. In many of those appeals, the appeals were dismissed before the appellant filed a brief. In many of the appeals, the class representatives asked the district court to require the objector to post a cost bond. In one case, the court ordered the objectors to post cost bonds of $4,500 each; in another case, the court refused to require a bond; and in other cases, the objectors dismissed their appeals before a ruling was made on the bond request.

Judge Colloton expressed the Committee's appreciation for Ms. Leary's research. An appellate judge asked if the data reflected the number of class settlements that were approved in the district court and from which no appeal was taken. Ms. Leary stated that she had not gathered those data, but stated her impression that objections to settlements are relatively rare, and appeals from settlements are likewise relatively rare.

Judge Colloton reminded the Committee that Professor Fitzpatrick, along with Professor Brian Wolfman and Dean Alan Morrison, had submitted a proposal concerning Rule 42 to the Committee in 2012. Professor Lopatka and Judge Brooks Smith, he noted, had coauthored an article in the Florida State University Law Review that proposed amendments to the Rules concerning costs and cost bonds. Judge Colloton had invited Professor Fitzpatrick and Professor Lopatka to present their ideas to the Committee. He turned first to Professor Fitzpatrick, as the proponent of the proposal that was formally pending before the Committee.

Professor Fitzpatrick began by commenting on the empirical data concerning class action objector appeals. Professor Fitzpatrick, in researching his article, *The End of Objector Blackmail?*, 62 Vanderbilt Law Review 1623 (2009), reviewed every class settlement that was approved by a federal district court in 2006. Roughly 10 percent of those settlements were appealed. He suggested that the reason why the other settlements are not appealed is that it is not worthwhile for an objector to seek to hold up a settlement unless the settlement carries the prospect of substantial attorney fees. It is the class counsel, he noted, who would pay the objector to abandon the objection. Accordingly, objections are typically made to the big settlements, where the attorney fees will be large.

Professor Fitzpatrick advocated the adoption of a rule that would entirely bar an objector from dropping an appeal in exchange for anything of value. He argued that Rule 23(e)(5) – which does not bar the dropping of objections but does require court approval for their withdrawal – does not go far enough. Responding to the argument that sometimes objectors might raise an objection that is specific to them rather than generally applicable to the members of the class, Professor Fitzpatrick stated that he has never seen

such an objection. If an objector has an objection that is unique to him, then why is he legitimately a member of the class? Dropping an objector appeal, he asserted, affects all of the class members, by depriving them of positive changes that might have been made to the settlement in response to the objection. In addition, he noted, requiring court approval for dropping an appeal would create a lot of work for the court. Professor Fitzpatrick noted that when class counsel pay objectors to drop their appeals, the effect is equivalent to a tax on class action plaintiffs' lawyers. There are no good data on how big that tax is. But he has heard informal reports from class action lawyers of numbers that range from $ 50,000 to $ 1 million per objector. Addressing possible concerns about his proposal, Professor Fitzpatrick stated that the biggest concern is what would happen if an objector filed an appeal but then reached an agreement with class counsel and simply failed to prosecute the appeal.

Professor Fitzpatrick observed that Professor Lopatka and Judge Smith criticize the idea of banning the dismissal of objectors' appeals on the ground that such a ban would merely alter the timing of objectors' demands, by leading them to bargain with class counsel during the 30-day window between the entry of judgment and the deadline for the notice of appeal. But, Professor Fitzpatrick argued, a ban on the withdrawal of appeals would remove the objector's leverage because the threat to file the appeal would no longer be credible.

Responding to the appeal-bond proposal by Professor Lopatka and Judge Smith, Professor Fitzpatrick asserted that requiring an appeal bond would not prevent meritorious objector appeals from being settled in exchange for a payoff to the objector. He stated that appeal bonds are currently an available tool under Rule 7 and yet they have not curtailed objector blackmail. Moreover, he said, even if the district court imposes an appeal bond, it is possible to appeal the imposition of the bond. An approach that would bar the objector from appealing the bond without first posting the bond would, Professor Fitzpatrick argued, likely violate Due Process. In addition, if would-be appellants lack an effective avenue for securing review of the imposition of a bond requirement, then district judges may become too ready to require such bonds. A bond requirement could prevent a good objector, such as Public Citizen Litigation Group, from taking a meritorious appeal.

Judge Colloton thanked Professor Fitzpatrick, and turned next to Professor Lopatka. Professor Lopatka observed that everyone is in agreement about the nature of the problem concerning objector appeals. As to the scope of the problem, he agreed with Professor Fitzpatrick that data are hard to obtain. Looking only at the number of appeals taken may undercount the problem, because such a count would omit appeals that are threatened but then foregone. In addition, while it would be helpful to know more about the scope of the problem, the fact that such extortionate behavior occurs at all offends the purposes of the justice system.

The interaction between objector and class counsel, he stated, is a bargaining game. Taking an appeal is not costly because the appellate briefs typically do not require

much work. There is a need to change the framework so that objectors' threats to take an appeal become less credible.

Professor Lopatka stated that the cost and appeal bond measures that he and Judge Smith advocated would not eliminate the possibility of extortionate behavior by objectors, but that those measures would change the terms of the bargaining. Responding to Professor Fitzpatrick's point that the current appeal bond requirement has not stemmed objector appeals, Professor Lopatka observed that the circuits currently disagree about the items that can be taken into account when a court sets the amount of a Rule 7 bond. Professor Lopatka and Judge Smith propose amending the Rules to make clear the district court's authority to require a bond in the full amount of all projected costs of delay attributable to the appeal, and to bar the objector from appealing the bond order without first posting the bond. Otherwise, Professor Lopatka argued, an appeal from the bond order would give the objector the same bargaining advantage as an appeal from the underlying settlement approval. But the district court would have discretion, under the proposal, to reduce the amount of the bond if the grounds for appeal seemed legitimate and if a bond in the full amount would effectively bar the appeal.

Professor Lopatka argued that Professor Fitzpatrick's proposal, though ingenious, would likely fail to deprive objectors of their leverage. Professor Lopatka offered a hypothetical: Suppose that an objector files an objection in the district court. The district court rejects the objection. The objector uses the thirty days after entry of judgment to put class counsel to a choice: Either the class counsel can pay the objector, in which event the objector will forgo filing a notice of appeal, or class counsel can refuse, in which event the objector will file the notice of appeal. True, once the objector files the notice of appeal, Professor Fitzpatrick's proposal would prevent the objector from dismissing it in exchange for money. But the appeal would not be very costly for the objector to litigate, and it would impose substantial delay costs on class counsel.

Judge Colloton thanked Professor Lopatka for his comments, and invited the Reporter to summarize some feedback that she had informally obtained from members of the Civil Rules Committee's Rule 23 Subcommittee. The Reporter stated that the Subcommittee took the view that this is a serious issue that is worth attention, and one on which it is important for the two Committees to coordinate their efforts. Subcommittee members believed that the bond mechanism proposed by Professor Lopatka and Judge Smith was too blunt a tool. The Subcommittee also expressed a preference for court review of the withdrawal of an objector appeal, rather than an outright ban on dismissals; but the Subcommittee noted that court review carried the possibility of delay. Individual subcommittee members had provided further feedback, some of which the Reporter highlighted without attempting to provide attribution. One question, she noted, concerned instances in which an objector's appeal is dismissed in return for *both* a payment to the individual objector *and* modification of the settlement that results in better terms for the class. Another question concerned the possibility that banning the withdrawal of an appeal in exchange for payment might shift the time for such withdrawals to the certiorari-petition stage. At least one participant did, though, suggest that Professor Fitzpatrick's proposal was appealing because it took a structural,

incentives-based approach rather than relying on ad hoc decisionmaking by a district judge.

Professor Fitzpatrick responded that, if class counsel and the defendant believe that there are grounds for improving the settlement, they can ask the court of appeals to remand the case so that the district court can review and approve the settlement modification. In such an event, the district court could, if appropriate, award fees to the objector for having produced the improvement in the settlement. Turning to the specter of "zombie appeals" (i.e., appeals that the appellant refuses to pursue but that the court is barred from dismissing), Professor Fitzpatrick stated that the problem would only arise if someone actually accedes to an objector's demands. So long as class counsel has refused to pay anything to the objector, then if the objector fails to prosecute the appeal, the appellees can move for dismissal of the appeal and can provide the required certification that they have paid nothing of value to the objector. As for the possibility that a ban on dismissal of appeals to the court of appeals would simply move the bargaining process to the certiorari-petition stage, Professor Fitzpatrick stated that his impression was that the Supreme Court acts fairly quickly on petitions for certiorari.

Professor Lopatka conceded that raising the cap on the permissible size of appeal bonds might create an obstacle to some legitimate appeals. However, he expressed optimism that district judges would not overuse a more robust appeal-bond tool. As evidence that judges do not seek to insulate their rulings from review, Professor Lopatka noted that district judges sometimes certify interlocutory rulings for immediate appellate review under 28 U.S.C. § 1292(b).

An appellate judge asked Professor Lopatka how he would suggest handling appeals from an order imposing a cost bond. Professor Lopatka suggested that allowing the objector to appeal the cost bond order would be tantamount to allowing the objector to appeal the settlement itself, in the sense that it would permit the objector to hold the settlement hostage. On the other hand, he conceded, perhaps the appeal from the cost bond order could be disposed of more quickly.

An appellate judge member asked whether there are other means to control the conduct of objectors, such as suspending membership in the court's bar for an objector's attorney who behaves unethically. Professor Lopatka responded that district judges have sometimes employed such measures, but that they tend not to want to spend judicial time on it. In addition, he stated, class counsel have sometimes sought sanctions against objectors' attorneys; but that, too, has failed to solve the problem. Professor Coquillette observed that disciplinary proceedings are a blunt instrument for addressing a problem of this nature. ABA Model Rules 3.4 and 8.4 provide a basis for discipline, but people are reluctant to pursue it.

A member stated that he agreed that objector conduct can become salient by affecting the big class action settlements, even if those settlements are a small percentage of the total number of class settlements. But he suggested that, even though the amounts mentioned by Professor Fitzpatrick were large numbers, they were very small in

comparison to the typical amount of attorney fees received by class counsel in connection with a large class action settlement. Professor Fitzpatrick noted that the figures he had cited ($ 50,000 to $ 1 million) were settlements with *single objectors*; in connection with any large class action settlement, there are typically multiple objectors.

A member asked whether an objector might find a way around the proposed ban on appeal dismissals by arguing that, when and if class counsel pay the objector a satisfactory settlement, the objector's appeal becomes moot. Professor Fitzpatrick noted Supreme Court precedents holding that when a district court certifies a class action (or erroneously denies such certification), the class gains its own legal status such that subsequent events mooting the individual plaintiff's claim do not thereby moot the class action.[1] The member observed, however, that the Court had recently refused to apply those precedents in the context of a collective action brought by an employee under the Fair Labor Standards Act on behalf of similarly situated employees.[2]

A district judge member observed that by the time a class settlement is on appeal, the district judge has reviewed and addressed the objections in detail. In the habeas context, this member pointed out, the district judge must grant or deny a certificate of appealability ("COA") at the time that he or she enters a final judgment denying the habeas petition. The member stated that he is forthright in giving an accurate view of the merits of the petitioner's claims when he drafts the ruling on the COA. Perhaps, he suggested, it would be useful to require class action objectors to obtain a COA in order to appeal a class settlement. Such a requirement would leverage the district judge's expertise. Professor Lopatka responded that, when he and Judge Smith first started work on their proposal, they considered advocating a COA requirement. However, they turned to a bond requirement instead because a COA is binary (it does or does not issue) while a bond is more nuanced (because the amount can be adjusted). Also, he suggested, if the district court's denial of the COA is reviewable in the court of appeals, then that too could provide an objector with an opportunity to hold up the settlement. An appellate judge asked why appealing the denial of a COA would differ from appealing the imposition of an appeal bond requirement. Professor Lopatka responded that, in either of those instances, it would make a difference whether the appeal of the preliminary matter could be quickly disposed of. Professor Fitzpatrick suggested that the rule could impose a time limit for the disposition of such appeals; but participants noted the Judicial Conference policy against imposing such time limits by rule.

Mr. Letter stated that the discussion thus far suggested to him that the reason objector appeals can cause problems is that the appeal stays the implementation of the settlement. He asked whether one could address this problem by providing that the implementation will proceed, despite the pending appeal, unless the would-be appellant posts a bond. Professor Fitzpatrick responded that if the order approving the settlement is reversed on appeal, it will be hard to unwind an already-implemented settlement if the payments have already gone to the class members. One measure that partly fills this

[1] *See* Sosna v. Iowa, 419 U.S. 393 (1975), and United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).
[2] *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013).

function, Professor Fitzpatrick noted, is the use of "quick-pay provisions" – i.e., a provision in the settlement that entitles class counsel to receive their fees upon settlement approval despite the pendency of an appeal (but subject to the return of the fees if the order is reversed on appeal). Quick-pay provisions can provide a fairly good solution, he reported, but defendants are reluctant to agree to such provisions unless they receive security that assures the repayment of the fees if the judgment is reversed on appeal. Mr. Letter observed that the difficulty of recouping amounts paid pursuant to a judgment that is ultimately reversed on appeal is not unique to class suits. Professor Fitzpatrick responded that in a large class suit, the costs of administering the settlement can themselves run into the millions of dollars.

Mr. Letter also suggested that this topic seems to present questions of policy that seem more suitable for treatment by Congress than by the rulemaking process. Congress, he observed, would have the power to subpoena repeat objectors and to question them about their practices. Mr. Letter also noted that one could view this topic as a subset of the broader category of instances in which litigants settle nuisance suits because it makes more sense to settle them than to litigate them. Professor Lopatka responded that, even if addressing objector appeals would leave other nuisance litigation unaddressed, that should not be a reason to reject measures that could address objector appeals. As to quick pay provisions, Professor Lopatka stated that it is not yet clear whether they will catch on; some defendants are unwilling to front money to the class counsel before it is clear whether the settlement will be upheld in the event of an appeal. Mr. Letter asked whether a "partial quick pay" mechanism would provide a useful compromise – i.e., whether objectors would lose their leverage if the defendant paid class counsel a portion of their fee pending disposition of the appeal. Professor Lopatka responded that such a measure would reduce the size of the "tax" objectors can impose on class counsel, but would not eliminate it.

An attorney participant asked whether there exist any other rules that prohibit a party from settling a claim in exchange for money. Professor Fitzpatrick stated that he did not know of any. The attorney participant asked Professor Fitzpatrick to clarify whether the court of appeals would have to approve the settlement as well as the dismissal. If the parties can settle something without needing the court to review the settlement, the settlement could then have possible mootness consequences that would affect the question of dismissal.

Professor Fitzpatrick argued that the proposed Rule 42 amendment would yield a framework that the Clerk's Office could readily administer: If the movant filed the required certification, the appeal would be dismissed, and if the certification were not provided, the appeal would not be dismissed. An attorney participant suggested that an alternative approach could require court approval for the dismissal of an appeal and could direct the court, in reviewing a request for approval, to consider whether the appellant received anything of value in exchange for seeking to dismiss the appeal. Professor Fitzpatrick responded that the courts of appeals would likely be unwilling to scrutinize the arrangements that lead an objector to seek dismissal of an appeal. An appellate judge asked whether the task of reviewing the request to dismiss an appeal could be assigned to

the district judge. An attorney participant asked whether it would be useful to require an objector to certify that the appeal was taken in good faith. Professor Fitzpatrick expressed doubt that such a requirement would be effective in addressing abuses.

The Reporter noted that while Rule 23(e)(5) requires court approval for the withdrawal of an objection to a class action settlement, Rule 23(h)(2) does not include a similar provision requiring court approval for the withdrawal of an objection to an award of attorney fees. She asked whether any difference had arisen in practice between objections focused on settlements and objections focused on attorney fees. Professor Fitzpatrick responded that he had not perceived a difference. Ms. Leary pointed out that objectors typically object to both the settlement and the fee award.

An appellate judge member stated that he was concerned by the potential sweep of proposed solutions that had been discussed. He stated that it was important to avoid chilling appeals by good objectors. Professor Lopatka agreed that this is a key concern. The question, he suggested, is whether the district court can distinguish appeals that have merit from those that do not. He reported that district judges tend to think that they can spot professional objectors.

Judge Colloton thanked Professor Fitzpatrick and Professor Lopatka for their contributions to a very helpful discussion. He invited them to share any suggestions for the direction of future empirical research. Professor Fitzpatrick suggested that it could be useful to perform a confidential survey of class action lawyers and ask them about the size of any side payments they have made to objectors; one could perform a similar survey of the objectors' attorneys as well. The Reporter noted the Committee's debt to Ms. Leary for her research, which had been very labor-intensive due to the lack of ready methods for locating the relevant appeals.

8. Item Nos. 09-AP-D & 11-AP-F (response to Mohawk Industries)

Judge Colloton introduced these items, which arise from proposals concerning the possibility of amending the Rules – in the wake of *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009) – to provide for appellate review of attorney-client privilege rulings.

Judge Colloton observed that the Supreme Court had indicated, both in *Mohawk Industries* and in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the preferred method for determining whether interlocutory orders should be immediately appealable is the Rules Committee process, not further caselaw expansion of the collateral order doctrine. In 1990, Congress amended the Rules Enabling Act to add 28 U.S.C. § 2072(c), which authorizes the rulemakers to "define when a ruling of a district court is final for the purposes of appeal under section 1291." In 1992, Congress amended 28 U.S.C. § 1292 by adding Section 1292(e), which authorizes the rulemakers "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)."

Judge Colloton asked the Committee members for their views on whether it would make sense to tackle this general area. Should a project focus on appeals from attorney-client privilege rulings? On other areas where there are conflicts in the caselaw? Judge Colloton suggested that it would be useful to perform research concerning the status of the caselaw; a member agreed with this view. An appellate judge member asked about the Committee's prior discussions of this topic. The Reporter stated that the Committee had considered whether there were areas in addition to attorney-client privilege – for example, qualified immunity – where the law concerning interlocutory review might warrant clarification. But the Committee had decided to start by focusing on attorney-client privilege appeals and to consult the other Advisory Committees for their views. The project had not developed momentum in the other Advisory Committees, but the Evidence Rules Committee had stressed the need for consultation if the Appellate Rules Committee were to proceed in this area.

Professor Coquillette expressed concern about the possible scope of a research project on the law of interlocutory appeals, and suggested the importance of prioritizing the Reporter's tasks. An appellate judge member noted that changes in this area could alter the landscape of appeals. Another appellate judge member suggested consulting academics who have already been writing on this topic.

By consensus, the Committee retained this item on its agenda.

VII. New Business

A. Item No. 13-AP-A (FRAP 29(a) / government amici)

Judge Colloton invited the Reporter to introduce this item, which arises from a suggestion by Dr. Roger I. Roots that Rule 29(a) be amended "to require that *any* party seeking to file an *amicus curiae* brief must obtain leave of court or state that all parties have consented to the filing." Dr. Roots asserts that Rule 29(a)'s current exemptions for certain government amici improperly favor those government entities.

The Reporter noted that governmental amici have always been treated specially under Rule 29. The only change in Rule 29's list of exempt governmental filers came in 1998, with the addition of the District of Columbia. The 1968 Committee Note to Rule 29 does not explain why the Rule exempted governmental filers from the requirement of party consent or court leave. The Committee Note cited five local circuit rules and then stated that Rule 29 "follows the practice of a majority of circuits in requiring leave of court to file an amicus brief except under the circumstances stated therein. Compare Supreme Court Rule 42." Perhaps, the Reporter suggested, the exemption for governmental amici can be explained by considerations of separation of powers and federalism.

Mr. Letter observed that the federal Rules treat the government specially in a number of ways. The federal government makes more filings in federal court than any other litigant. It would be undesirable, he suggested, for the Rules to require the

government to move for leave to file. Not only do comity considerations apply, but also the quality of the government's briefing is high. In fact, the courts of appeals often request briefing from the United States. The DOJ, he noted, litigates on behalf of the people of the United States, and its filings in the courts of appeals require authorization from the Solicitor General.

A member moved to remove this item from the Committee's agenda. The United States, this member agreed, is different from non-governmental litigants both substantively and procedurally. It represents the people, and comity considerations support the exemption. An attorney participant agreed, stating that courts have good reasons to wish to hear from sovereigns as amici and that those sovereigns are not abusing the privilege afforded them by Rule 29(a). The motion was seconded and passed by voice vote without dissent.

B. Item No. 13-AP-B (amicus briefs on rehearing)

Judge Colloton invited Judge Chagares to introduce this item, which arises from a proposal by Roy T. Englert, Jr., that the Committee consider amending the Appellate Rules to address amicus filings with respect to petitions for rehearing and/or rehearing en banc. Judge Chagares stressed that the proposal would not require a court of appeals to permit such amicus filings, but rather it would govern procedural questions (such as length and deadlines) in a circuit chooses to permit them. The circuits, he noted, vary in their treatment of such questions. Adopting a rule that addresses the timing and length of amicus filings with respect to rehearing would foster predictability and uniformity. The courts of appeals review rehearing petitions relatively quickly; thus, Judge Chagares suggested, it is important that amicus filings not lengthen the schedule for filing papers. The amicus should coordinate with the petitioner. If a rule concerning these amicus filings were to follow the model set by Rule 29(d), then one would give the amicus half as much length as the petitioner – which would yield a length of seven and a half pages for the amicus filing.

An appellate judge member stated that it would be useful to provide clear rules on length and timing. Another appellate judge noted that, during past discussions, some had suggested that adopting rules on these topics (even rules that merely addressed timing and length) would encourage amicus filings at the rehearing stage. Another appellate judge member reported that, in the Federal Circuit, there is a slightly greater expectation that a rehearing petition might be granted, given the Federal Circuit's unique role in shaping patent law. The judges are interested, he said, in knowing whether the questions at issue in the appeal have broad importance. Amicus filings can be informative on this point, both because the identity of the amicus can shed light on the perceived importance of the issue and because amici can make points that the petitioner may be unable to include in the petition (due to space constraints and the need to cover technical points). A seven-and-a-half page limit for amicus filings, this member suggested, would often be too short. But, he noted, that does not necessarily mean that the issue must be addressed in the Appellate Rules.

Judge Chagares asked Mr. Gans what the Eighth Circuit's practice is. Mr. Gans responded that his office frequently receives questions on these issues and is unable to provide clear guidance. He observed that if a rule allowed a time lag between the petition and the amicus filing, this might be inefficient from the judges' perspective because it might require them to take two looks at the briefing. An appellate judge noted that such a time lag could also interfere with the timing of a response to the petition (if the court orders a response). An attorney member reported that the Fifth Circuit lacks a local rule on point; this produces uncertainty on the lawyers' part and leads them to take the most conservative approach with respect to length and timing. An appellate judge asked whether members would favor requiring the amicus to file at the same time as the party whose position the amicus supports. The attorney member responded that such an approach would not be ideal from the amicus's perspective but that he would not oppose it. Mr. Gans observed that the court can extend the time to file a petition for rehearing or rehearing en banc. Another member stated that amicus filings with respect to rehearing can add value; thus, he suggested, it would be beneficial to adopt rules on this topic, and such rules would be unlikely to cause a flood of amicus filings. This member agreed that seven and a half pages would be too short a limit; 15 pages would be preferable.

Mr. Letter agreed that certainty on these questions would be valuable. But, he suggested, circuit practices may vary widely, such that local rules would make more sense than a national rule. Some circuits, he noted, grant rehearing en banc much more frequently than others. The United States sometimes files amicus briefs with respect to rehearing. To avoid redundancy between the party's filing and the amicus filing, he suggested, it would be better to have a time lag of two to three days rather than requiring the amicus to file on the same day as the party it supports. Amici, he observed, do not always coordinate their filings with the party whose position they support. Mr. Letter suggested a length limit of eight or ten pages rather than fifteen, on the ground that judges might find longer filings burdensome.

An attorney participant stated that, in recent years, amici have become more likely to coordinate their efforts with those of the party whom they support – especially in briefing before the Supreme Court. Thus, he suggested, it should not be problematic to require amici to meet the same deadline as the party whom they support. He stated that seven pages seemed like an adequate length for amicus filings.

An appellate judge noted that the Ninth Circuit has a local rule providing that the amicus must file its brief no later than ten days after the petition. There are at least a couple of circuits, he suggested, that would not like such a rule. The Reporter recalled that – during the Committee's prior discussions of this general topic – Judge Sutton had informally consulted with judges in several circuits, focusing on circuits that did not have local rules on point. Customarily, Judge Colloton observed, the Rules Committees are wary of encouraging the adoption of local rules. Professor Coquillette agreed that the rulemakers have a policy against doing so. A member pointed out that amicus filings with respect to rehearing may be particularly key where no one anticipated the panel's ruling.

Mr. Gans noted that the Eleventh Circuit has a local rule that sets a length limit of fifteen pages and a time limit of ten days after the filing of the petition. An appellate judge member observed that when amici are briefing issues in the Supreme Court, it is already evident what the questions presented are; by contrast, at the stage of rehearing in the court of appeals, amici may be unsure of the precise nature of the questions and it may not be easy for them to coordinate with the party whose position they are supporting. Mr. Letter noted that, in criminal appeals, Rule 40 sets a presumptive 14-day deadline for rehearing petitions. It may be difficult, he suggested, for amici to prepare their filings within that short time period.

Professor Coquillette reminded the Committee that an Appellate Rule will abrogate inconsistent local rules. The Judicial Conference has delegated to the Standing Committee the task of reviewing local rules for consistency with the national Rules. On the occasions when the Standing Committee points out local rules that are inconsistent with a national Rule, controversy results. Mr. Letter asked whether it would be useful for Judge Colloton to poll the Chief Judges of each Circuit to ask whether they favor adoption of a national Rule. Judge Chagares added that it might be useful to poll the Circuit Clerks concerning their local practices.

Judge Colloton proposed that further information be gathered in advance of the Committee's next meeting.

C. Item No. 13-AP-C (*Chafin v. Chafin* / ICARA appeals)

Judge Colloton invited the Reporter to introduce this item, which arises from the suggestion by Justice Ginsburg (joined by Justices Scalia and Breyer), in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), that the Civil and Appellate Rules Committees consider adopting uniform rules to expedite proceedings under the Hague Convention on the Civil Aspects of International Child Abduction ("Convention").[3] Congress has implemented the Convention by enacting the International Child Abduction Remedies Act ("ICARA"). The Convention requires U.S. courts to order the return of children to their country of habitual residence under specified circumstances. In *Chafin*, the Court held that a child's return to her country of habitual residence did not render moot an appeal from the order directing that return. The Court in *Chafin* stressed the need for speedy disposition of ICARA proceedings, and cited an FJC study which noted that courts have already followed a practice of expediting such proceedings. The cases highlighted in the FJC study were cases in which the court expedited the disposition of a particular appeal; none of those opinions cited a local circuit rule requiring speedy processing of this particular category of appeal, and a quick search by the Reporter did not disclose any such provisions. Rule 2 authorizes a court of appeals to "suspend any provision of [the Appellate Rules] in a particular case and order proceedings as it directs," in order, inter alia, "to expedite its decision." Thus, the courts of appeals currently possess authority to expedite ICARA appeals. The question, the Reporter suggested, is whether to mandate deadlines for such appeals or to leave the matter to the courts' discretion.

---

[3] *See* Chafin v. Chafin, 133 S. Ct. 1017, 1029 n.3 (2013) (Ginsburg, J., joined by Scalia & Breyer, JJ., concurring).

Professor Coquillette expressed appreciation for the Justices' willingness to refer matters to the Rules Committees. However, he suggested that there are reasons for the Rules Committees to hesitate before attempting to implement specific pieces of legislation. Judge Sutton had discussed this matter with the Civil Rules Advisory Committee, which had decided to take no action. Judge Sutton was contemplating an informal communication with members of the Supreme Court about the matter, but would welcome the Appellate Rules Committee's views on it.

Mr. Letter reported that the United States has filed amicus briefs in a fair number of ICARA cases. To his surprise, the parties in those cases often failed to move to expedite the proceedings. Perhaps, he suggested, the decision in *Chafin* will produce an improvement in the processing of such cases by encouraging the parties to make more motions to expedite. Article 11 of the Convention, he noted, sets a goal of six weeks for the court to reach a decision. Mr. Letter also stated that it is important to make a distinction between the need to expedite the proceedings and the standards for obtaining a stay; the usual standards should govern the question of the stay. A district judge member reported that, in his experience, the parties usually move quickly to commence the proceeding, but that once the proceeding has commenced, there is often an informal stay in order to give the judge time to rule. Mr. Letter noted that Article 12 of the Convention directs the relevant authority, under specified circumstances, to "order the return of the child forthwith."

A member asked whether there are any Rules that set time limits for judicial action. Mr. Robinson said that he was not aware of any; Professor Coquillette agreed. Judge Colloton asked whether there are any data on how long ICARA appeals take. Mr. Letter stated that his impression is that sometimes they can take a surprisingly long time. Ms. Leary observed that it was unlikely that there would be any code that would enable researchers to readily identify ICARA appeals.

An appellate judge reported that, in his circuit, the clerk alerts the judges if an ICARA appeal is filed, and the court then hears that appeal at the next argument panel. Mr. Gans reported that ICARA cases tend to move very quickly in the district court. Ms. Sellers stated that the Judicial Conference Committee on Federal-State Jurisdiction was monitoring the Rules Committees' discussions of ICARA matters so as to be able to update the Committee's state-court representatives concerning the federal courts' approach. Mr. Robinson reported that Judge Fogel (the Director of the FJC) is aware of the issue raised by the *Chafin* Court. Mr. Robinson suggested the possibility of asking the FJC to raise judicial awareness of the need to expedite ICARA proceedings. Judge Colloton suggested that this was an issue on which judicial education would be useful.

An attorney participant asked whether the Committees ever produce commentary without amending a Rule. The closest example that the Reporter could think of was a 2000 pamphlet by Professor Capra, the Reporter for the Evidence Rules Committee, concerning caselaw that had diverged from the text of the Evidence Rules. Professor

Coquillette noted that in that instance, Professor Capra authored the pamphlet and the FJC published it.

A motion was made to remove this item from the Committee's agenda and to notify the Chair of the Standing Committee that the advisory committee concurs in the idea of coordinating through the Standing Committee a response to Members of the Court. The motion was seconded and passed by voice vote without dissent.

VIII. Adjournment

The Appellate Rules Committee adjourned at noon on April 23, 2013.

Respectfully submitted,

____

Catherine T. Struve
Reporter

THIS PAGE INTENTIONALLY BLANK