Agenda E-19 (Summary)
Rules
September 2018

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 2-6

2. a. Approve the proposed amendments to Bankruptcy Rules 4001, 6007, 9036, and 9037 as set forth in Appendix B and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve effective December 1, 2018 converting Director's Forms 4011A and 4011B to Bankruptcy Official Forms 411A and 411B for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date..... pp. 7-15

3. Approve proposed new Criminal Rule 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts as set forth in Appendix C and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 20-24

4. Approve the proposed amendments to Evidence Rule 807 as set forth in Appendix D and transmit them to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 25-26

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 12, 2018. All members were present.

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

Also participating in the meeting were: Judge Jeffrey S. Sutton, former Chair of the Standing Committee; Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor Catherine T. Struve, the Standing Committee's Associate Reporter; Professor Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Staff; Patrick Tighe, Law Clerk to the Standing Committee;

and Dr. Tim Reagan, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rule 25 (Filing and Service)

The proposed amendment to Rule 25(d)(1) eliminates unnecessary proofs of service when electronic filing is used. Because electronic filing of a document results in a copy of the document being sent to all parties who use the court's electronic filing system, separate service of the document on those parties, and accompanying proofs of service, are not necessary. A previous version of the Rule 25(d)(1) amendment was approved by the Judicial Conference and submitted to the Supreme Court but was withdrawn by the Standing Committee to allow for minor revisions. The revised amendment approved at the Committee's June 2018 meeting includes changes previously approved, but also covers the possibility that a document might be filed electronically and yet still need to be served on a party (such as a pro se litigant) who does not participate in the court's electronic-filing system.

Under the proposed amendment to Rule 25(d)(1), proofs of service will frequently be unnecessary. Accordingly, the Advisory Committee proposed technical amendments to certain rules that reference proof of service requirements, including Rules 5, 21, 25, 26, 26.1, 32, and 39, to conform those rules to the proposed amendment to Rule 25(d)(1). Rule 25(d)(1) was

originally published for comment; the Advisory Committee did not seek additional public comment on the technical and conforming amendments.

Rule 5 (Appeal by Permission)

The proposed amendments to Rule 5(a)(1) revise the rule to no longer require that a petition for permission to appeal "be filed with the circuit clerk with proof of service." Instead, it provides that "a party must file a petition with the circuit clerk and serve it on all other parties."

Rule 21 (Writs of Mandamus and Prohibition, and Other Extraordinary Writs)

Under the proposed amendment to Rule 21, in addition to various stylistic changes, the phrase "with proof of service" in Rule 21(a) and (c) is deleted and replaced with the phrases "serve it" and "serving it."

Rule 26 (Computing and Extending Time)

The proposed amendment to Rule 26 deletes the term "proof of service" from Rule 26(c). A stylistic change was also made to simplify the rule's description for when three days are added to the time computation: "When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a)."

Rule 39 (Costs)

The proposed amendment to Rule 39(d)(1) deletes the phrase "with proof of service" and replaces it with the phrase "and serve."

Rule 3 (Appeal as of Right—How Taken) and Rule 13 (Appeals from the Tax Court)

The proposed amendments to Rules 3 and 13 – both of which deal with the notice of appeal – are also designed to reflect the move to electronic service. Rules 3(d)(1) and (d)(3)

currently require the district court clerk to serve notice of the filing of the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words "mailing" and "mails" to "sending" and "sends," and deletes language requiring certain forms of service. Rule 13(a)(2) currently requires that a notice of appeal from the Tax Court be filed at the clerk's office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail. There were no public comments on the proposed amendments to Rules 3 and 13.

Rule 26.1 (Corporate Disclosure Statement)

The proposed amendments to Rule 26.1 revise disclosure requirements designed to help judges decide if they must recuse themselves: subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal; new subdivision (b) corresponds to the amended disclosure requirement in Criminal Rule 12.4(a)(2) and requires the government to identify, except on a showing of good cause, organizational victims of the alleged criminal activity; new subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals, and also imposes disclosure requirements concerning the ownership of corporate debtors.

There were four comments filed regarding the proposed amendments. One comment suggested that language be added to the committee note to help deter overuse of the government exception in the proposed subdivision (b) dealing with organizational victims in criminal cases. In response, the Advisory Committee revised the committee note to follow more closely the committee note for Criminal Rule 12.4.

Another comment suggested that language be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings and that petitioning creditors be identified in disclosure statements. The Advisory Committee on Appellate Rules consulted with the reporter for the

Advisory Committee on Bankruptcy Rules and ultimately determined to not make any changes in response to the comment. In response to a potential gap in the operation of Rule 26.1 identified by the reporter to the Advisory Committee on Bankruptcy Rules, however, the Advisory Committee on Appellate Rules revised Rule 26.1(c) to require that certain parties "must file a statement that: (1) identifies each debtor not named in the caption; and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a)."

A third comment objected that the meaning of the proposed 26.1(d) was not clear from its text, and that reading the committee note was required to understand it. The final comment suggested language changes to eliminate any ambiguity about who must file a disclosure statement. In response to these comments and to clarify the proposed amendment, the Advisory Committee folded subparagraph 26.1(d) dealing with intervenors into a new last sentence of 26.1(a). In addition, the phrase "wants to intervene" was changed to "seeks to intervene" in recognition of proposed intervenors who may seek intervention because of a need to protect their interests, but who may not truly "want" to intervene. Other stylistic changes were made as well.

Rule 28 (Briefs) and Rule 32 (Form of Briefs, Appendices, and Other Papers)

The proposed amendments to Rules 28 and 32 change the term "corporate disclosure statement" to "disclosure statement" to conform with proposed amendments to Rule 26.1, as described above.

There were no public comments on the proposed amendments to Rules 28(a)(1) and 32(f). The Advisory Committee sought approval of Rule 28 as published. The Advisory Committee sought approval of Rule 32 as published, with additional technical edits to conform subsection (f) with the proposed amendment to Rule 25(d)(1) regarding references to proofs of service. Rule 32(f) lists the items that are excluded when computing length limits, and one such

item is "the proof of service." To account for the frequent occasions in which there would be no such proof of service, the article "the" should be deleted. Given this change, the Advisory Committee agreed to delete all the articles in the list of items.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Appellate Procedure and committee notes are set forth in Appendix A, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing) with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's request.

The proposed amendments to Rules 35 and 40 create length limits applicable to responses to petitions for rehearing. Under the existing rules, there are length limits applicable to petitions for rehearing, but not for responses to those petitions. In addition, the Advisory Committee observed that Rule 35 (which deals with en banc determinations) uses the term "response," while Rule 40 (which deals with panel rehearing) uses the term "answer." The proposed amendment changes the term in Rule 40 to "response."

Information Items

The Advisory Committee's consideration of length limits for responses to petitions for rehearing led it to consider a more comprehensive review of Rules 35 and 40, perhaps drawing

on the structure of Rule 21, and a subcommittee was formed to evaluate possible amendments. Another subcommittee will consider whether any amendments are appropriate following the Supreme Court's decision in *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017), which distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). The subcommittee will also consider whether to align the rule with the statute, correcting for divergence that has occurred over time.

A subcommittee continues to work on Rule 3(c)(1)(B) and the merger rule, focusing on a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. A subcommittee also continues to examine Rule 42(b), which provides that a circuit clerk "may" dismiss an appeal on the filing of a stipulation signed by all parties. Some cases, relying on the word "may," hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The discretion found in Rule 42(b) can make settlement difficult, because litigants lack certainty, and it may result in a court issuing an advisory opinion.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 4001, 6007, 9036, 9037, and Official Forms 411A and 411B, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements)

The proposed amendment to Rule 4001(c), which applies to obtaining credit, makes that rule inapplicable to chapter 13 cases. Rule 4001(c) details the process for obtaining approval of postpetition credit in a bankruptcy case. The Advisory Committee proposed the amendment

after concluding that the rule's provisions are designed to address the complex postpetition financing issues particular to business debtor chapter 11 cases. Most members agreed that Rule 4001(c) did not readily address the consumer financing issues common in chapter 13 cases, such as obtaining a loan to purchase an automobile for family use.

There were no public comments on the proposed amendment. In giving final approval to the amendment at its spring meeting, the Advisory Committee added a title to the new paragraph (4), "*Inapplicability in a Chapter 13 Case*," and made stylistic changes to address suggestions from the style consultants.

Rule 6007 (Abandonment or Disposition of Property)

The amendments to Rule 6007(b) are designed to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b) of the Bankruptcy Code, and to make the rule consistent with Rule 6007(a) (dealing with abandonment by the trustee or debtor in possession).

Five public comments were submitted on the proposed amendments. Two comments addressed the last sentence of the proposed amendment, which stated that a court order granting a motion to compel abandonment "effects abandonment without further action by the court." The comments stated that this would be inconsistent with § 554(b), which provides for abandonment of property by the bankruptcy trustee, not the court. In response, the Advisory Committee inserted the words "trustee's or debtor in possession's" immediately before the word "abandonment." Two comments criticized as too burdensome the amendment language that requires both service and notice of the motion on all creditors. The Advisory Committee determined that ensuring all parties receive the notice of a motion to abandon property outweighed the concern of burdensomeness, and therefore made no change.

One comment noted that the 14-day period for parties to respond after *service* of a motion to compel abandonment under proposed Rule 6007(b) could be up to three days longer than the 14-day response period after a trustee voluntarily files *notice* of an intent to abandon property under Rule 6007(a). This is because of the extra time allowed for service of motions by mail. The comment suggested possible changes to Rule 6007(a) or Rule 9006(a) that would make the response periods under both subparts of Rule 6007 the same. The Advisory Committee declined to make any change at this time.

Rule 9036 (Notice by Electronic Transmission); Deferral of Action on Rule 2002(g) and Official Form 410.

Proposed amendments to Rules 2002(g), 9036, and Official Form 410 were published in 2017 as part of the Advisory Committee's ongoing study of noticing issues and were intended to expand the use of electronic noticing and service in the bankruptcy courts. Proposed amendments to Rule 2002(g) (Addressing Notices) allowed notices to be sent to email addresses designated on filed proofs of claims and proofs of interest, and a corresponding amendment to Official Form 410 (Proof of Claim) added a check box for opting into email service and noticing. Current Rule 9036 provides for electronic service and notice of certain documents by permission of the receiving party and court order. As amended, the rule would allow clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by means of the court's electronic-filing system on registered users of that system, without the need of a court order. The proposed amendments to Rule 9036 also allowed service or noticing on any person by any electronic means consented to in writing by that person.

Four sets of comments were submitted addressing the proposed amendments. Although the commenters were generally supportive of the effort to authorize greater use of electronic service and noticing, they raised implementation issues and therefore suggested a delayed

effective date of December 1, 2021 with respect to the proposed amendments to Rule 2002(g) and Official Form 410.

All four sets of comments stated that it is not currently feasible to implement the proposed email opt-in system. They said that without time-consuming software programming and testing, the Bankruptcy Noticing Center (BNC) would not be able to receive the email addresses that opting-in creditors would put on proofs of claim. Instead, this information would have to be manually retrieved and conveyed to the BNC by clerk's office personnel.

Three comments expressed concerns that conflicting addresses might be on file for a single creditor and that there needs to be clarity about how the proposed proof of claim email option fits into existing rules about which of the conflicting addresses should be used. This possibility exists because there are several provisions in the Bankruptcy Code and rules that allow a creditor to designate an address for notice and service. One comment suggested the following order of priorities: (a) CM/ECF email address for registered users; (b) BNC email address; and (c) proof of claim opt-in email address. This order of priorities was inconsistent, however, with the proposed committee note accompanying the amendments to Rule 2002(g), which stated that "[a] creditor's election on the proof of claim, or an equity security holder's election on the proof of interest, to receive notices in a particular case by electronic means supersedes a previous request to receive notices at a specified address in that particular case."

The Advisory Committee discussed the comments during its spring meeting. Members accepted the views of the commenters and AO personnel that current CM/ECF and BNC software would be unable to implement the email opt-in proposal and that considerable time would be required to do the necessary reprogramming and testing. The idea of approving the rule and form amendments now but delaying their effective date until 2021 provoked concern

that technological advances during that three-year period might result in better means of employing electronic service and noticing than is currently proposed.

Members were also persuaded that the comments about determining priorities among conflicting creditor email addresses show a need for further coordination with other groups and AO personnel who are working on overlapping electronic noticing issues. Therefore, the Advisory Committee concluded that the proposed amendments to Rule 2002(g) and Official Form 410 should be deferred for now.

The comments supported immediate implementation of the proposed amendments to Rule 9036. Those amendments (a) allow both clerks and parties to serve and give notice through CM/ECF to registered users; (b) allow other means of electronic service and noticing to be used for parties that give written consent to such service and noticing; and (c) provide that electronic service is complete upon filing or sending unless the sender receives notice that the transmission was not successful. Those changes are consistent with amended Civil Rule 5 (Serving and Filing Pleadings and Other Papers), which Rule 7005 makes applicable in bankruptcy proceedings, and the amendments to Rule 8011 (Filing and Service; Signature), which are on track to go into effect on December 1, 2018. Thus, the Advisory Committee recommended final approval of the amendments to Rule 9036, with minor non-substantive wording changes to clarify applicability and in response to suggestions from the Standing Committee's style consultants, and with the addition of the following sentences to the committee note:

> The rule does not make the court responsible for notifying a person who filed a paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service.

<u>Rule 9037 (Privacy Protection for Filings Made with the Court)</u>

The proposed amendment to Rule 9037 adds a new subdivision (h) to address the procedure for redacting personal identifiers in previously filed documents that are not in

compliance with Rule 9037(a). The Advisory Committee proposed the amendment in response to a suggestion submitted by the Committee on Court Administration and Case Management.

Three comments were submitted. The first suggested that the proposed amendment be expanded to allow parties to submit a redacted document as an alternative to the designation of sealed documents to be included in the record on appeal under Rule 8009(f). The Advisory Committee decided this suggestion was beyond the scope of the situation it was attempting to address with proposed Rule 9037(h), and therefore declined to make any change in response to this comment.

The second comment recommended that the amendment be revised to clarify that no fee need be collected, or replacement document filed, from a party seeking to redact his or her protected information unless it is the party who filed the previous (unredacted) document. In addition, the second comment pointed out two instances of the phrase "unless the court orders otherwise" that created ambiguity.

Judicial Conference policy already addresses the assessment of a redaction fee on a debtor or other person whose personal identifiers have been exposed. JCUS-SEP 14, pp. 9-10. Section 325.90 of the *Guide to Judiciary Policy*, Vol. 10 (Public Access and Records) provides that "[t]he court may waive the redaction fee in appropriate circumstances. For example, if a debtor files a motion to redact personal identifiers from records that were filed by a creditor in the case, the court may determine it is appropriate to waive the fee for the debtor." Because the judiciary policy already allows a waiver of the redaction fee in appropriate situations, the Advisory Committee concluded that there is no need for Rule 9037(h) to address the issue.

The Advisory Committee agreed that the rule was ambiguous concerning when a bankruptcy court may "order otherwise," and revised the proposal to clarify that any part of the rule may be modified by court order.

The final comment suggested that proposed Rule 9037(h) contained an inadvertent gap because the rule did not require the filing of a redacted version of the original document as a condition of the restrictions upon public access. Under the rule as published, the only redacted version of the original document is the one attached to the motion itself and that copy, along with the entire motion, is restricted from public view upon filing and before the court rules on the motion. The suggestion recommended that the motion to redact not be restricted from public view until the court rules on it.

When the Advisory Committee initially considered how best to provide for the redaction of already-filed documents, it strove to avoid the possibility that a publicly available motion to redact would highlight the existence in court files of an unredacted document. Accordingly, the proposed rule requires immediate restriction of public access to the motion and the unredacted original document. Access to those documents remains restricted if the court grants the motion to redact. Although not expressly stated, the intent and implication of the rule was that if the motion is granted, the redacted document, which was filed with the motion, would be placed on the record as a substitute for the original document that remained protected from public view. As explained in the committee note: "If the court grants the motion to redact, the redacted document should be placed on the docket, and public access to the motion and the unredacted document should remain restricted."

To eliminate any ambiguity, the Advisory Committee added language to the rule stating that "[i]f the court grants [the motion], the redacted document must be filed." The Advisory

Committee did not accept the suggestion that a restriction on access to the motion and unredacted document be delayed until the court grants the motion to redact.

Finally, stylistic changes were made in response to suggestions from the style consultants, and the committee note was revised to reflect the changes made to the rule.

Official Form 411A (General Power of Attorney) and Official Form 411B (Special Power of Attorney)

As part of the Forms Modernization Project, the power of attorney forms, previously designated as Official Forms 11A and 11B, were changed to Director's Forms 4011A (General Power of Attorney) and 4011B (Special Power of Attorney), the use of which is optional unless required by local rule. This change took effect on December 1, 2015. The Forms Modernization Project group recommended this change to allow greater flexibility in their use, in light of increased restrictions on making modifications to Official Forms under then pending amendments to Rule 9009 that became effective in 2017.

The Advisory Committee later realized, however, that using Director's Forms for powers of attorney, rather than Official Forms, created a conflict with Rule 9010(c). That rule provides that "[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*" (emphasis added). In revisiting this matter, the Advisory Committee concluded that its earlier decision to convert the forms to Director's Forms was unnecessary. Rule 9009 allows modifications of Official Forms "as provided in these rules." The relevant rule here – Rule 9010(c) – only requires substantial, not exact, conformity with the appropriate Official Form. Other rules requiring a document that "conforms substantially" to an Official Form have been interpreted to permit modifications of those forms and are included in the chart of Alterations Permitted by Bankruptcy Rules that was approved at the Advisory Committee's fall 2017 meeting and is available on the AO website. Treating Rule 9010(c) as permitting

modifications of the power of attorney forms would be consistent with the interpretation of Rules 3001(a), 3007, 3016(d), 7010, 8003(a)(3), 8005(a)(1), and 8015(a)(7)(C)(ii). Accordingly, to bring the rule and forms into conformity, the Advisory Committee recommended designating the power of attorney forms as Official Forms 411A and 411B, in keeping with the new numbering system for forms, with an effective date of December 1, 2018.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Bankruptcy Procedure and the proposed revisions to the Official Bankruptcy Forms and committee notes are set forth in Appendix B, with an excerpt from the Advisory Committee's report.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 4001, 6007, 9036, and 9037 as set forth in Appendix B and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

b. Approve effective December 1, 2018 converting Director's Forms 4011A and 4011B to Bankruptcy Official Forms 411A and 411B for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 2002, 2004, and 8012 with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

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)

Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Advisory Committee recommended publication for public comment of amendments to three of the rule's subdivisions. This package of amendments would (i) require

giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Rule 2004 (Examination)

Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c) of the rule, the attendance of a witness and the production of documents may be compelled by means of a subpoena. The Business Law Section of the American Bar Association, on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process, submitted a suggestion that Rule 2004(c) be amended to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information (ESI). The Advisory Committee discussed the suggestion at its fall 2017 and spring 2018 meetings. By a close vote, the Advisory Committee decided not to add a proportionality requirement to the rule, but it decided unanimously to propose amendments to Rule 2004(c) to refer specifically to ESI and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

Rule 8012 (Corporate Disclosure Statement)

Rule 8012 sets forth the disclosure requirements for a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel. It is modeled on Appellate Rule 26.1. The Advisory Committee on Appellate Rules has proposed amendments to Rule 26.1 that were published for comment in August 2017, including one that is specific to bankruptcy appeals. The Advisory Committee on Bankruptcy Rules therefore proposed publication of conforming amendments to Rule 8012 this summer.

Information Item

The Advisory Committee has created a Restyling Subcommittee and charged it with recommending whether to embark upon a project to restyle the Federal Rules of Bankruptcy Procedure, similar to the restyling projects that produced comprehensive amendments to the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011.

To inform its recommendation, the subcommittee is seeking input from those who would be affected by such a restyling. The subcommittee worked with the Standing Committee's style consultants to produce a draft restyled version of Rule 4001 that illustrates changes that would likely occur should the restyling project proceed.

At its spring meeting, the Advisory Committee decided to seek comment on one section of the restyled rule, Rule 4001(a), and it approved a cover memo and a set of survey questions to be distributed to interested parties, such as all bankruptcy judges and clerks and various professional bankruptcy organizations. The cover memo explains that the exemplar is not being proposed for adoption, nor is the Advisory Committee seeking substantive comments on its revisions, but rather that input is sought on the threshold issue of whether restyling should be undertaken. Additional language was added to emphasize that substance and "sacred words" will prevail over style rules. The deadline for making comments was set at June 15, 2018. The subcommittee will analyze the responses over the summer in preparation for making a recommendation to the Advisory Committee at its September meeting.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an

organization, with a request that they be published for comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendments to Rule 30(b)(6) are the result of over two years of work by the Advisory Committee. In April 2016, a subcommittee was formed to consider a number of suggestions proposing amendments to the rule. By way of background, this is the third time in twelve years that Rule 30(b)(6) has been on the Advisory Committee's agenda. In the past, the Advisory Committee ultimately concluded that the problems reported by both plaintiffs' and defendants' counsel involve behavior that could not be effectively addressed by a court rule.

The initial task of the subcommittee formed in 2016 was to reconsider whether it is feasible (and useful) to address by rule amendment problems identified by bar groups. The subcommittee worked on initial drafts of more than a dozen possible amendments that might address the problems reported by practitioners and, in the summer of 2017, invited comment on a narrowed down list of six potential amendment ideas. More than 100 comments were received. In addition, members of the subcommittee participated in conferences around the country to receive input from the bar. The focus eventually narrowed on imposing a duty to confer in good faith between the parties. The Advisory Committee determined that such a requirement was the most promising way to improve practice under the rule. The proposed amendment requires the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.

As drafted, the duty to confer requirement is meant to be iterative and recognizes that a single interaction will often not suffice to satisfy the obligation to confer in good faith. The committee note also explicitly states that "[t]he duty to confer continues if needed to fulfill the requirement of good faith." The duty to confer is also bilateral – it applies to the responding organization as well as to the noticing party.

Information Items

The Advisory Committee met on April 10, 2018. Among the topics on the agenda were updates from two subcommittees tasked with long-term projects. As previously reported, a subcommittee has been formed to consider a suggestion by the Administrative Conference of the United States that the Judicial Conference develop uniform procedural rules "for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." With input and insights from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee has developed draft rules. The three draft rules are for discussion purposes only and do not represent any decision by the subcommittee to recommend adoption of these or any other rules.

Another subcommittee has been formed to consider three suggestions that the Advisory Committee develop specific rules for multidistrict litigation proceedings. Among the many proposals are early procedures to address plainly meritless cases and broadened mandatory interlocutory appellate review for important issues. This subcommittee will also consider a suggestion that initial disclosures be expanded to include third party litigation financing agreements, which are used in multidistrict litigation proceedings as well as other contexts. With assistance from the Judicial Panel on Multidistrict Litigation, the subcommittee has begun gathering information and identifying issues on which rules changes might focus. The subcommittee's work is at a very early stage – the list of issues and topics for study is still being developed.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted a proposed new Criminal Rule 16.1, and amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts, with a recommendation that they be approved and transmitted to the Judicial Conference.

New Rule 16.1 (Pretrial Discovery Conference; Request for Court Action)

The proposed new rule originated with a suggestion that Rule 16 (Discovery and Inspection) be amended to address disclosure and discovery in complex cases, including cases involving voluminous information and ESI. While the subcommittee formed to consider the suggestion determined that the original proposal was too broad, it determined that a need might exist for a narrower, targeted amendment. A mini-conference was held in Washington, D.C. on February 7, 2017. Participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. Consensus developed during the mini-conference regarding what sort of rule was needed. First, the rule should be simple and place the principal responsibility for implementation on the lawyers. Second, it should encourage the use of the ESI Protocol.[1] Participants did not support a rule that would attempt to specify the type of case in which this attention was required. The prosecutors and Department of Justice attorneys also felt strongly that any rule must be flexible given the variation among cases.

[1]The "ESI Protocol" is shorthand for the "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases" published in 2012 by the Department of Justice and the Administrative Office in connection with the Joint Working Group on Electronic Technology in the Criminal Justice System.

Guided by the discussion and feedback received at the mini-conference, as well as examples of existing local rules and orders addressing ESI discovery, the subcommittee drafted proposed new Rule 16.1. Because it addresses activity that is to occur well in advance of discovery, shortly after arraignment, the subcommittee concluded it warrants a separate position in the rules. A separate rule will also draw attention to the new requirement.

The proposed rule has two sections. Subsection (a) requires that, no later than 14 days after the arraignment, the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Subsection (b) states that after the discovery conference the parties may "ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial." The phrase "determine or modify" contemplates two possible situations. First, if there is no applicable order or rule governing the schedule or manner of discovery, the parties may ask the court to "determine" when and how disclosures should be made. Alternatively, if the parties wish to change the existing discovery schedule, they must seek a modification. In either situation, the request to "determine or modify" discovery may be made jointly if the parties have reached agreement, or by one party. The proposed rule does not require the court to accept the parties' agreement or otherwise limit the court's discretion. Courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and through local rules and standing orders.

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure in cases involving ESI. The committee note draws attention to this point and states that counsel "should be aware of best practices" and cites the ESI Protocol.

Six public comments were submitted, and each comment supported the general approach of requiring the prosecution and defense to confer. The Advisory Committee made some

changes in response to concerns raised by the comments. First, the Advisory Committee agreed to revise proposed Rule 16.1(b)'s reference to "timing, manner, or other aspects of disclosure" to mirror Rule 16(d)(2)(A)'s reference to "time, place, or manner, or other terms and conditions of disclosure." Second, the Advisory Committee emphasized in the committee note that the proposed rule does not modify statutory safeguards. Finally, in response to two comments that addressed the applicability of the proposed rule to pro se parties, the Advisory Committee made two changes: amending the rule to make it clearer that government attorneys are not required to meet with pro se defendants; and adding to the committee note a statement about the courts' existing discretion to manage discovery and their responsibility to ensure that pro se defendants "have full access to discovery." The Advisory Committee also made several non-substantive changes recommended by the Committee's style consultants.

Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply)

Proposed amendments to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts make clear that the petitioner has an absolute right to file a reply.

As previously reported, a member of the Standing Committee drew the Advisory Committee's attention to a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings. That rule – as well as Rule 5(e) of the Rules Governing Section 2254 Cases – provides that the petitioner/moving party "may submit a reply . . . within a time period fixed by the judge." Although the committee note and history of the rule make clear that this language was intended to give the petitioner a right to file a reply, the Advisory Committee determined that the text of the rule itself has contributed to a misreading of the rule by a

significant number of district courts. Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the reference to filing "within a time fixed by the judge" as allowing a petitioner to file a reply only if the judge determines a reply is warranted and sets a time for filing.

The proposed amendments confirm that the moving party has a right to file a reply by placing the provision concerning the time for filing in a separate sentence, providing that the moving party or petitioner "may file a reply to the respondent's answer or other pleading. The judge must set the time to file, unless the time is already set by local rule." The committee note states that the proposed amendment "retains the word 'may,' which is used throughout the federal rules to mean 'is permitted to' or 'has a right to.'" The proposal does not set a presumptive time for filing, recognizing that practice varies by court, and the time for filing is sometimes set by local rule.

Three comments were submitted, two of which addressed issues fully considered before publication: the need for an amendment, and whether to replace "may" with a phrase such as "has a right to" or "is entitled to." The Advisory Committee considered these two issues at length prior to publication and determined not to revisit the Advisory Committee's resolution.

A third comment supported the proposal but suggested additional rule amendments that would require that inmates be informed about the reply and when it should be filed at the time the court orders the respondent to file a response. Although the Advisory Committee declined to expand the scope of the proposed amendments to the rules, it did approve the addition of the following sentence to the committee notes: "Adding a reference to the time for filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties." In the Advisory Committee's view, this additional language will serve as a helpful reinforcement of best practices.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts and committee notes are set forth in Appendix C, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve proposed new Criminal Rule 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts as set forth in Appendix C and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Item

The Advisory Committee met on April 24, 2018. At that meeting, the Advisory Committee added to its agenda two suggestions from district judges recommending that pretrial disclosure of expert testimony in Rule 16 (Discovery and Inspection) be amended to parallel Civil Rule 26. While there is consensus among members of the Advisory Committee that the scope of pretrial disclosure of expert testimony is an important issue that should be addressed, members also agree that there is no simple solution. There are many different types of experts, and criminal proceedings are of course not parallel in all respects to civil proceedings. Additionally, the DOJ has adopted new internal guidelines calling for significantly expanded disclosure of forensic expert testimony; it will take some time for the effects of those guidelines to be fully realized. The Advisory Committee will gather information from a wide variety of sources (including the Advisory Committee on Rules of Evidence) and also plans to hold a mini-conference.

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

The Advisory Committee on Rules of Evidence submitted proposed amendments to Rule 807, with a recommendation that they be approved and transmitted to the Judicial Conference.

The project to amend Rule 807 (Residual Exception) began with exploring the possibility of expanding it to admit more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation, the Advisory Committee determined that it would not seek to expand the breadth of the exception. But in conducting its review of cases decided under the residual exception, and in discussions with experts at a conference at Pepperdine Law School, the Advisory Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems addressed by the proposed amendment to Rule 807 are as follows:

1. The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions.

2. Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Advisory Committee determined that an amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception, and substantively, that amendment should specifically allow the court to consider corroborating evidence, because corroboration provides a guarantee of trustworthiness.

3. The requirements in Rule 807 that the hearsay must be proof of a "material fact" and that admission of the hearsay be in "the interests of justice" and consistent with the "purpose

of the rules" have not served any good purpose. The Advisory Committee determined that the rule will be improved by deleting the references to "material fact" and "interest of justice" and "purpose of the rules."

4. The notice requirement in current Rule 807 is problematic because it does not contain a good cause exception, it does not require the notice to be provided in writing, and its requirements of disclosure of the "particulars" of the statement and the name and address of the declarant are difficult to implement.

Proposed amendments to Rule 807 were published for comment in August 2017. The Advisory Committee received nine public comments. It carefully considered those comments, most of which were positive, and made some changes. The Advisory Committee also implemented some of the suggestions made by members of the Standing Committee at its June 2017 meeting, including adding references to Rule 104(a) and to the Confrontation Clause to the committee note. Finally, the Advisory Committee addressed a dispute in the courts about whether the residual exception could be used when the hearsay is a "near-miss" of a standard exception. A change to the text and committee note as issued for public comment provides that a statement that nearly misses a standard exception can be admissible under Rule 807 so long as the court finds that there are sufficient guarantees of trustworthiness.

The Standing Committee voted unanimously to adopt the recommendation of the Advisory Committee. The proposed amendments to the Federal Rules of Evidence and committee note are set forth in Appendix D, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rule 807 as set forth in Appendix D and transmit them to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 404(b) (Crimes, Wrongs, or Other Acts) with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The Advisory Committee has monitored significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. Several circuits have suggested that the rule needs to be more carefully applied and have set forth criteria for that more careful application. The focus has been on three areas:

1. Requiring the prosecutor not only to articulate a proper purpose but to explain how the bad act evidence proves that purpose without relying on a propensity inference.

2. Limiting admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements.

3. Limiting the "inextricably intertwined" doctrine, under which bad act evidence is not covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the charged crime.

Over several meetings, the Advisory Committee considered several textual changes to address these case law developments. At its April 2018 meeting the Advisory Committee decided against proposing extensive substantive amendments to Rule 404(b), based on its conclusion that such amendments would add complexity without rendering substantial improvement. The Advisory Committee did recognize that some protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under Rule 404(b). The Department of Justice proffered language that would require the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the

evidence and the reasoning that supports the purpose." In addition, the Advisory Committee determined that the current requirement that the prosecutor must disclose only the "general nature" of the bad act should be deleted, given the prosecution's expanded notice obligations under the Department of Justice proposal. The Advisory Committee also unanimously agreed that the requirement that the defendant must request notice be deleted, as that requirement simply leads to boilerplate requests.

Finally, the Advisory Committee determined that the restyled phrase "crimes, wrongs, or other acts" should be restored to its original form: "other crimes, wrongs, or acts." This would clarify that Rule 404(b) applies to other acts and not the acts charged.

Information Items

At its April 26-27, 2018 meeting, the Advisory Committee discussed the results of the symposium held at Boston College School of Law in October 2017 regarding Rule 702. The symposium consisted of two separate panels. The first panel included scientists, judges, academics, and practitioners, exploring whether the Advisory Committee could and should have a role in assuring that forensic expert testimony is valid, reliable, and not overstated in court. The second panel, of judges and practitioners, discussed the problems that courts and litigants have encountered in applying *Daubert* in both civil and criminal cases. The panels provided the Advisory Committee with extremely helpful insight, background, and suggestions for change.

The Advisory Committee is considering whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement that would correct the misimpression. Judge Paul Grimm submitted a suggestion that Rule 106 should be amended in two respects: 1) to provide that a completing

statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements.

The Advisory Committee continues to consider the possibility of amending Rule 606(b) to reflect the Supreme Court's 2017 holding in *Pena-Rodriguez v. Colorado*. The Court in *Pena-Rodriguez* held that application of Rule 606(b) barring testimony of jurors on deliberations violated the defendant's Sixth Amendment right where the testimony concerned racist statements made about the defendant and one of the defendant's witnesses during deliberations. When it first considered the issue in April 2017, the Advisory Committee at that time declined to pursue an amendment for the time being due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding. The Advisory Committee revisited the question at its April 2018 meeting and came to the same conclusion but will continue to monitor the case law applying *Pena-Rodriguez.*

The Advisory Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

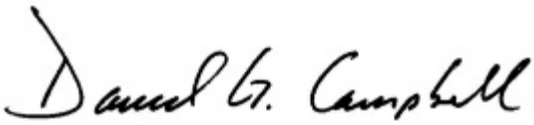
Finally, the Advisory Committee determined not to go forward with possible amendments to Rules 609(a), 611, and 801(d)(1)(A).

JUDICIARY STRATEGIC PLANNING

Chief Judge Carle E. Stewart, the judiciary's planning coordinator, asked Judicial Conference committees to provide an update on the initiatives they are pursuing to implement the strategies and goals of the *Strategic Plan for the Federal Judiciary*. The judiciary's long-range planning officer addressed the Committee on how its feedback on the *Strategic Plan* and reporting of its long-term initiatives helps foster communication between the Executive

Committee and Judicial Conference committees. The Committee will provide an update to Chief Judge Stewart on the rules committees' progress in implementing initiatives in support of the *Strategic Plan*.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Daniel C. Girard	Carolyn B. Kuhl
Robert J. Giuffra Jr.	Rod J. Rosenstein
Susan P. Graber	Amy J. St. Eve
Frank M. Hull	Srikanth Srinivasan
Peter D. Keisler	Jack Zouhary

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)
Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms (proposed amendments and supporting report excerpts)
Appendix C – Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings for the United States District Courts (proposed amendments and supporting report excerpt)
Appendix D – Federal Rules of Evidence (proposed amendments and supporting report excerpt)

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant~~, either by personal service or by mail addressed to the defendant~~. The clerk must promptly send a copy of the notice of appeal and

[1] New material is underlined; matter to be omitted is lined through.

of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~sends copies, with the date of ~~mailing~~sending. Service is sufficient despite the death of a party or the party's counsel.

* * * * *

Committee Note

Amendments to Subdivision (d) change the words "mailing" and "mails" to "sending" and "sends," and delete language requiring certain forms of service, to allow for electronic service. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition ~~for permission to appeal. The petition must be filed~~ with the circuit clerk ~~with proof of service~~and serve it on all other parties to the district-court action.

* * * * *

Committee Note

Subdivision (a)(1) is amended to delete the reference to "proof of service" to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when service is completed using a court's electronic filing system.

Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

* * * * *

(2) **Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by ~~mail addressed~~sending it to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

* * * * *

Committee Note

The amendment to subdivision (a)(2) will allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. Other rules determine when a party must send a notice electronically or non-electronically.

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file ~~a~~the petition with the circuit clerk ~~with proof of service~~ and serve it on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

* * * * *

(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk ~~with proof of service~~and serving it on the respondents. Proceedings on the application must

conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

* * * * *

Committee Note

The term "proof of service" in subdivisions (a)(1) and (c) is deleted to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when service is completed using a court's electronic filing system.

Rule 25. Filing and Service

* * * * *

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(A)(ii)*, the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

* * * * *

Committee Note

The amendment conforms Rule 25 to other federal rules regarding proof of service. As amended, subdivision (d) eliminates the requirement of proof of service or acknowledgment of service when service is made through a court's electronic-filing system. The notice of electronic filing generated by the court's system serves that purpose.

* This anticipates adoption of the proposed amendment transmitted to Congress on April 26, 2018.

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time ~~a~~After Certain Kinds of Service. When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a)~~, unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is treated as delivered on the date of service stated in the proof of service~~.

Committee Note

The amendment in subdivision (c) simplifies the expression of the current rules for when three days are added. In addition, the amendment revises the subdivision to conform to the amendments to Rule 25(d).

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) ~~Who Must File~~Nongovernmental Corporations. Any nongovernmental ~~corporate~~corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) Organizational Victims in Criminal Cases. In a criminal case, unless the government shows good cause, it must file a statement that identifies any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a) to the extent it can be obtained through due diligence.

(c) Bankruptcy Cases. In a bankruptcy case, the debtor, the trustee, or, if neither is a party, the appellant must file a statement that:

(1) identifies each debtor not named in the caption; and

(2) for each debtor that is a corporation, discloses the information required by Rule 26.1(a).

~~(b)~~**(d) Time for Filing; Supplemental Filing.** ~~A party must file t~~The Rule 26.1~~(a)~~ statement must:

(1) be filed with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing~~.~~;

(2) ~~Even if the statement has already been filed, the party's principal brief must include the statement~~ be included before the table of contents~~.~~ in the principal brief; and

(3) ~~A party must supplement its statement~~be supplemented whenever the information ~~that must be disclosed~~required under Rule 26.1~~(a)~~ changes.

~~(c)~~**(e) Number of Copies.** If the Rule 26.1~~(a)~~ statement is filed before the principal brief, or if a supplemental statement is filed, ~~the party must file~~an original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

These amendments are designed to help judges determine whether they must recuse themselves because of an "interest that could be affected substantially by the outcome of the proceeding." Code of Judicial Conduct, Canon 3(C)(1)(c) (2009).

Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) corresponds to the disclosure requirement in Criminal Rule 12.4(a)(2). Like Criminal Rule 12.4(a)(2), subdivision (b) requires the government to identify organizational victims to help judges comply with their obligations under the Code of Judicial Conduct. In some cases, there are many organizational victims, but the

effect of the crime on each one is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "affected substantially by the outcome of the proceedings."

New subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals. Subdivision (c) also imposes disclosure requirements concerning the ownership of corporate debtors.

Subdivisions (d) and (e) (formerly subdivisions (b) and (c)) apply to all the disclosure requirements in Rule 26.1.

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a ~~corporate~~disclosure statement if required by Rule 26.1;

* * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of Rule 26.1.

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- ~~the~~cover page;
- ~~a corporate~~disclosure statement;
- ~~a~~table of contents;
- ~~a~~table of citations;
- ~~a~~statement regarding oral argument;
- ~~an~~addendum containing statutes, rules, or regulations;
- certificate~~s~~ of counsel;
- ~~the~~signature block;
- ~~the~~proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of Rule 26.1. The other amendment to subdivision (f) does not change the substance of the current rule, but removes the articles before each item because a document will not always include these items.

Rule 39. Costs

* * * * *

(d) Bill of Costs: Objections; Insertion in Mandate.

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk~~, with proof of service,~~ and serve an itemized and verified bill of costs.

* * * * *

Committee Note

In subdivision (d)(1) the words "with proof of service" are deleted and replaced with "and serve" to conform with amendments to Rule 25(d) regarding when proof of service or acknowledgement of service is required for filed papers.

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

MEMORANDUM

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

FROM: Hon. Michael A. Chagares, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 22, 2018

I. Introduction

The Advisory Committee on the Appellate Rules met on Friday, April 6, 2018, in Philadelphia, Pennsylvania. * * * * *

First, it approved proposed amendments previously published for comment for which it seeks final approval. These proposed amendments, discussed in Part II of this report, relate to (1) electronic service (Rules 3 and 13) and (2) disclosure statements (Rules 26.1, 28, and 32).

Second, it approved a proposed amendment that had previously been submitted to the Supreme Court but withdrawn for revision and for which it now seeks final approval. This proposed amendment, discussed in Part III of this report, relates to proof of service (Rule 25(d)).

Third, it approved proposed amendments, not previously published for comment, that it views as conforming and technical amendments for which it seeks final approval. These proposed amendments, discussed in Part IV of this report, relate to proof of service (Rules 5, 21, 26, 32, and 39).

* * * * *

II. Action Item for Final Approval After Public Comment

The Committee seeks final approval for proposed amendments to Rules 3, 13, 26.1, 28, and 32. These amendments were published for public comment in August 2017.

The proposed amendments to Rules 3 and 13—both of which deal with the notice of appeal—are designed to reflect the move to electronic service. Rule 3 currently requires the district court clerk to serve notice of the filing of the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words "mailing" and "mails" to "sending" and "sends," and deletes language requiring certain forms of service. Rule 13 currently requires that a notice of appeal from the Tax Court be filed at the clerk's office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail.

There were no public comments on the proposed amendments to Rules 3 and 13, and the Committee seeks final approval for them as published.

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant~~, either by personal service or by mail addressed to the defendant~~. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~sends copies, with the date of ~~mailing~~sending. Service is sufficient despite the death of a party or the party's counsel.

* * * * *

Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

* * * * *

(2) **Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by ~~mail addressed~~sending it to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

* * * * *

The proposed amendment to Rule 26.1 would change the disclosure requirements designed to help judges decide if they must recuse themselves. The proposed amendments to Rules 28 and 32 would change the term "corporate disclosure statement" to "disclosure statement."

There were no public comments on the proposed amendments to Rules 28 and 32. The Committee seeks final approval for Rule 28 as published and Rule 32 in a slightly-modified form discussed in Part IV, *infra*.

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a ~~corporate~~ disclosure statement if required by Rule 26.1;

* * * * *

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a ~~corporate~~ disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

There were four comments, however, regarding the proposed amendment to Rule 26.1. First, the National Association of Criminal Defense Lawyers (NACDL) suggested that language be added to the Committee Note to help deter overuse of the government exception in the proposed subsection (b) dealing with organizational victims in criminal cases. Second, Charles Ivey suggested that language be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings and that petitioning creditors be identified in disclosure statements. Professor Elizabeth Gibson, the reporter to the Bankruptcy Rules Committee, was consulted in response to this comment. Third, journalist John Hawkinson objected that the meaning of the proposed 26.1(d) was not clear from its text, and that reading the Committee Note was required to understand it. Finally, Aderant CompLaw suggested language changes to eliminate any ambiguity about who must file a disclosure statement.

The Committee revised the proposed amendment to Rule 26.1 and accompanying Committee Note, in response to these comments.

The Committee Note was revised to follow more closely the Committee Note for Criminal Rule 12.4 and account for the NACDL comment.

Professor Gibson suggested that no change was needed in response to the Ivey comment, but did suggest that Rule 26.1(c) be revised to address a potential gap in the proposed amendment, and the Committee agreed. In particular, the published proposal required that certain parties "must file a statement that identifies each debtor not named in the caption. If the debtor is a corporation, the statement must" provide particular information. That language was changed to require that certain parties "must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a)."

In an effort to clarify the proposed amendment in response to the Hawkinson and Aderant CompuLaw comments, the Committee took what in the published version had been a separate subparagraph 26.1(d) dealing with intervenors and folded it into a new last sentence of 26.1(a). In addition, the phrase "wants to intervene" was changed to "seeks to intervene" in recognition of proposed intervenors who may seek intervention because of a need to protect their interests, but not truly "want" to intervene. Other stylistic changes were made as well.

The Committee seeks final approval for Rule 26.1 as revised.

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) ~~Who Must File~~Nongovernmental Corporations and Intervenors. Any nongovernmental ~~corporate~~ corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) Organizational Victim in a Criminal Case. In a criminal case, unless the government shows good cause, it must file a statement that identifies any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a) to the extent it can be obtained through due diligence.

(c) Bankruptcy Cases. In a bankruptcy case, the debtor, the trustee, or, if neither is a party, the appellant must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a).

~~(b)~~(d)Time for Filing; Supplemental Filing. ~~A party must file the~~The Rule 26.1~~(a)~~ statement must:

(1) be filed with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing~~.~~;

(2) ~~Even if the statement has already been filed, the party's principal brief must include the statement~~ be included before the table of contents~~.~~ in the principal brief; and

(3) ~~A party must supplement its statement~~ be supplemented whenever the information ~~that must be disclosed~~ required under Rule 26.1~~(a)~~ changes.

~~(c)~~(e)Number of Copies. If the Rule 26.1~~(a)~~ statement is filed before the principal brief, or if a supplemental statement is filed, ~~the party must file~~ an original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

These amendments are designed to help judges determine whether they must recuse themselves because of an "interest that could be affected substantially by the outcome of the proceeding." Code of Judicial Conduct, Canon 3(C)(1)(c) (2009).

Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

> New subdivision (b) corresponds to the disclosure requirement in Criminal Rule 12.4(a)(2). Like Criminal Rule 12.4(a)(2), subdivision (b) requires the government to identify organizational victims to help judges comply with their obligations under the Code of Judicial Conduct. In some cases, there are many organizational victims, but the effect of the crime on each one is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "affected substantially by the outcome of the proceedings."
>
> New subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals. Subdivision (c) also imposes disclosure requirements concerning the ownership of corporate debtors.
>
> Subdivisions (d) and (e) (formerly subdivisions (b) and (c)) apply to all the disclosure requirements in Rule 26.1.

Attachment B1 to this report contains the text of the proposed amendments to Rules 3, 13, 26.1, 28, and 32.

III. Action Item for Final Approval After Withdrawal and Revision

The Committee seeks final approval for a proposed amendment to Rule 25(d). This proposed amendment had previously been approved by the Standing Committee and submitted to the Supreme Court, but after discussion at the January 2018 meeting was withdrawn for revision with the expectation that a revised version would be presented at the June 2018 meeting.

This proposed amendment to Rule 25(d) is designed to eliminate unnecessary proofs of service in light of electronic filing. A prior version was withdrawn in order to take account of the possibility that a document might be filed electronically but still need to be served other than through the court's electronic filing system on a party (e.g., a pro se litigant) who does not participate in electronic filing. The prior version provided, "A paper presented for filing <u>other than through the court's electronic-filing system</u> must contain either of the following: * * * " As revised, the proposed amendment provides, "A paper presented for filing must contain either of the following <u>if it was served other than through the court's electronic filing system</u>: * * * "

Rule 25. Filing and Service

* * * * *

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with [Rule 25(a)(2)(A)(ii)][1], the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

* * * * *

Attachment B2 to this report contains the text of the proposed amendment to Rule 25(d).

IV. Action Item for Final Approval Without Public Comment

Rules 5 (appeals by permission), 21 (extraordinary writs), 26 (computing time), Rule 32 (form of papers), and 39 (costs), all currently contain references to "proof of service." If the proposed amendment to Rule 25(d) is approved, proofs of service will frequently be unnecessary. Accordingly, the Committee seeks final approval of what it views as technical and conforming amendments to these Rules. Some stylistic changes are proposed as well.

These amendments were also discussed at the January 2018 meeting of the Standing Committee, and comments were provided by the style consultants at that meeting, with the expectation that revised versions would be presented at the June 2018 meeting.

Rule 5 would no longer require that a petition for permission to appeal "be filed with the circuit clerk with proof of service." Instead, it would provide that "a party must file a petition with the circuit clerk and serve it on all other parties ***."

[1] An amendment to include this corrected citation has been approved by the Supreme Court.

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition ~~for permission to appeal. The petition must be filed~~ with the circuit clerk ~~with proof of service~~ and serve it on all other parties to the district-court action.

* * * * *

Similarly, the phrase "proof of service" in Rule 21(a) and (c) would be deleted and replaced with the phrase "serve it on" and "serving it."

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file ~~a~~ the petition with the circuit clerk ~~with proof of service on~~ and serve it on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

* * * * *

(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service and serving it on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

* * * * *

The term "proof of service" would also be deleted from Rule 26(c). Stylistically, the expression of the current rules for when three days are added would be simplified: "When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a)."

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time ~~a~~After Certain Kinds of Service. When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a) ~~, unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that~~

~~is served electronically is treated as delivered on the date of service stated in the proof of service~~.

* * * * *

Rule 32(f) lists the items that are excluded when computing any length limit. One such item is "the proof of service." To take account of the frequent occasions in which there would be no such proof of service, the article "the" is proposed to be deleted. And given that change, the Committee agreed that it made sense to delete all of the articles in the list of items. If both this proposed amendment and the other proposed amendment to Rule 32 (discussed in Part II above) are approved, the two sets of changes should be merged.

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- ~~the~~ cover page;
- ~~a [corporate]~~[2] disclosure statement;
- ~~a~~ table of contents;
- ~~a~~ table of citations;
- ~~a~~ statement regarding oral argument;
- ~~an~~ addendum containing statutes, rules, or regulations;
- certificate~~s~~ of counsel;
- ~~the~~ signature block;
- ~~the~~ proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

The phrase "with proof of service" would also be deleted from Rule 39 and replaced with the phrase "and serve ***."

Rule 39. Costs

* * * * *

(d) Bill of Costs: Objections; Insertion in Mandate.

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk~~, with proof of service,~~ and serve an itemized and verified bill of costs.

* * * * *

Attachment B3 to this report contains the text of the proposed amendments to Rules 5, 21, 26, 32, and 39.

[2] The word "corporate" is proposed to be deleted in another amendment submitted concurrently to the Standing Committee.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

* * * * *

(c) OBTAINING CREDIT.

* * * * *

(4) *Inapplicability in a Chapter 13 Case*. This subdivision (c) does not apply in a chapter 13 case.

* * * * *

Committee Note

Subdivision (c) of the rule is amended to exclude chapter 13 cases from that subdivision. This amendment does not speak to the underlying substantive issue of whether the Bankruptcy Code requires or permits a chapter 13 debtor not engaged in business to request approval of postpetition credit.

[1] New material is underlined; matter to be omitted is lined through.

Rule 6007. Abandonment or Disposition of Property

* * * * *

(b) MOTION BY PARTY IN INTEREST. A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate. Unless otherwise directed by the court, the party filing the motion shall serve the motion and any notice of the motion on the trustee or debtor in possession, the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. A party in interest may file and serve an objection within 14 days of service, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct. If the court grants the motion, the order effects the trustee's or debtor in

possession's abandonment without further notice, unless otherwise directed by the court.

Committee Note

Subdivision (b) of the rule is amended to specify the parties to be served with the motion and any notice of the motion. The rule also establishes an objection deadline. Both of these changes align subdivision (b) more closely with the procedures set forth in subdivision (a). In addition, the rule clarifies that no further action is necessary to notice or effect the abandonment of property ordered by the court in connection with a motion filed under subdivision (b), unless the court directs otherwise.

Rule 9036. Notice and Service Generally~~by Electronic Transmission~~

Whenever these rules require or permit sending a notice or serving a paper by mail, the clerk, or some other person as the court or these rules may direct, may send the notice to—or serve the paper on—a registered user by filing it with the court's electronic-filing system. Or it may be sent to any person by other electronic means that the person consented to in writing. In either of these events, service or notice is complete upon filing or sending but is not effective if the filer or sender receives notice that it did not reach the person to be served. This rule does not apply to any pleading or other paper required to be served in accordance with Rule 7004.~~the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be~~

~~contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission. Notice by electronic means is complete on transmission.~~

Committee Note

The rule is amended to permit both notice and service by electronic means. The use and reliability of electronic delivery have increased since the rule was first adopted. The amendments recognize the increased utility of electronic delivery, with appropriate safeguards for parties not filing an appearance in the case through the court's electronic-filing system.

The amended rule permits electronic notice or service on a registered user who has appeared in the case by filing with the court's electronic-filing system. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service by filing with the court's system unless the court provides otherwise. The rule does not make the court responsible for notifying a person who filed a paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service.

With the consent of the person served, electronic service also may be made by means that do not use the court's system. Consent can be limited to service at a prescribed address or in a specified form, and it may be limited by other conditions.

Rule 9037. Privacy Protection For Filings Made with the Court

* * * * *

(h) MOTION TO REDACT A PREVIOUSLY FILED DOCUMENT.

(1) *Content of the Motion; Service.* Unless the court orders otherwise, if an entity seeks to redact from a previously filed document information that is protected under subdivision (a), the entity must:

(A) file a motion to redact identifying the proposed redactions;

(B) attach to the motion the proposed redacted document;

(C) include in the motion the docket or proof-of-claim number of the previously filed document; and

(D) serve the motion and attachment on the debtor, debtor's attorney, trustee (if any), United

States trustee, filer of the unredacted document, and any individual whose personal identifying information is to be redacted.

(2) *Restricting Public Access to the Unredacted Document; Docketing the Redacted Document.* The court must promptly restrict public access to the motion and the unredacted document pending its ruling on the motion. If the court grants it, the court must docket the redacted document. The restrictions on public access to the motion and unredacted document remain in effect until a further court order. If the court denies it, the restrictions must be lifted, unless the court orders otherwise.

Committee Note

Subdivision (h) is new. It prescribes a procedure for the belated redaction of documents that were filed without complying with subdivision (a).

Generally, whenever someone discovers that information entitled to privacy protection under subdivision (a) appears in a document on file with the court—regardless of whether the case in question remains open or has been closed—that entity may file a motion to redact the document. A single motion may relate to more than one unredacted document. The moving party may be, but is not limited to, the original filer of the document. The motion must identify by location on the case docket or claims register each document to be redacted. It should not, however, include the unredacted information itself.

Subsection (h)(1) authorizes the court to alter the prescribed procedure. This might be appropriate, for example, when the movant seeks to redact a large number of documents. In that situation the court by order or local rule might require the movant to file an omnibus motion, initiate a miscellaneous proceeding, or proceed in another manner directed by the court.

Unless the court orders otherwise, the motion must identify the proposed redactions, and the moving party must attach to the motion the proposed redacted document. The attached document must otherwise be identical to the one previously filed. The court, however, may relieve the movant of this requirement in appropriate circumstances, for example when the movant was not the filer of the unredacted document and does not have access to it. Service of the motion and the attachment must be made on all of the following individuals who are not the moving party: debtor, debtor's attorney, trustee, United States trustee, the filer of the unredacted document, and any individual whose personal identifying information is to be redacted.

Because the filing of the motion to redact may call attention to the existence of the unredacted document as maintained in the court's files or downloaded by third parties, courts should take immediate steps to protect the motion and the document from public access. This restriction may be accomplished electronically, simultaneous with the electronic filing of the motion to redact. For motions filed on paper, restriction should occur at the same time that the motion is docketed so that no one receiving electronic notice of the filing of the motion will be able to access the unredacted document in the court's files.

If the court grants the motion to redact, the court must docket the redacted document, and public access to the motion and the unredacted document should remain restricted. If the court denies the motion, generally the restriction on public access to the motion and the document should be lifted.

This procedure does not affect the availability of any remedies that an individual whose personal identifiers are exposed may have against the entity that filed the unredacted document.

Official Form 411A (12/18)

United States Bankruptcy Court

_____ District Of _____

In re _____ Case No. _____
Debtor

Chapter _____

GENERAL POWER OF ATTORNEY

To _____ of * _____ , and

_____ of * _____ .

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned and with full power of substitution, to vote on any question that may be lawfully submitted to creditors of the debtor in the above-entitled case; [if appropriate] to vote for a trustee of the estate of the debtor and for a committee of creditors; to receive dividends; and in general to perform any act not constituting the practice of law for the undersigned in all matters arising in this case.

Dated: _____

Signed: _____

By: _____

as _____

Address: _____

_____

[*If executed by an individual*] Acknowledged before me on _____ .

[*If executed on behalf of a partnership*] Acknowledged before me on _____ ,
by _____ who says that he [*or* she] is a member of the partnership named above and is authorized to execute this power of attorney in its behalf.

[*If executed on behalf of a corporation*] Acknowledged before me on _____ ,
by _____ who says that he [*or* she] is _____
of the corporation named above and is authorized to execute this power of attorney in its behalf.

_____

_____

[*Official character.*]

* State mailing address.

Committee Note

This form replaces Director's Bankruptcy Form 4011A, which, in turn, was derived from former Official Form 11A in 2015 as part of the Bankruptcy Forms Modernization project.

Parties routinely modify the General Power of Attorney form to conform to state law, the needs of the case, or local practice. Because the exact language of the form is not needed, and Rule 9009, as amended on December 1, 2017, generally restricts alteration of the Official Forms, the form was abrogated as an Official Bankruptcy Form and reissued as a Director's Bankruptcy Form.

Bankruptcy Rule 9010(c), however, requires that "[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*" (emphasis added). The form is therefore reissued as an Official Form. Because only substantial conformity to the Official Form is required by Rule 9010(c), parties will be able to continue modifying the form as needed to conform to state law, the needs of the case, or local practice.

Official Form 411B (12/18)

United States Bankruptcy Court

_____ District Of _____

In re _____ Case No. _____
Debtor

Chapter _____

SPECIAL POWER OF ATTORNEY

To _____ of * _____ , and

_____ of * _____ .

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned [*if desired*: and with full power of substitution,] to attend the meeting of creditors of the debtor or any adjournment thereof, and to vote in my behalf on any question that may be lawfully submitted to creditors at such meeting or adjourned meeting, and for a trustee or trustees of the estate of the debtor.

Dated: _____

Signed: _____

By: _____

as _____

Address: _____

_____

[*If executed by an individual*] Acknowledged before me on _____ .

[*If executed on behalf of a partnership*] Acknowledged before me on _____ ,
by _____ who says that he [*or* she] is a member of the partnership named above and is authorized to execute this power of attorney in its behalf.

[*If executed on behalf of a corporation*] Acknowledged before me on _____ ,
by _____ who says that he [*or* she] is _____
of the corporation named above and is authorized to execute this power of attorney in its behalf.

_____

_____

[*Official character.*]

* State mailing address.

Committee Note

This form replaces Director's Bankruptcy Form 4011B, which, in turn, was derived from former Official Form 11B in 2015 as part of the Bankruptcy Forms Modernization project.

Parties routinely modify the Special Power of Attorney form to conform to state law, the needs of the case, or local practice. Because the exact language of the form is not needed, and Rule 9009, as amended on December 1, 2017, generally restricts alteration of the Official Forms, the form was abrogated as an Official Bankruptcy Form and reissued as a Director's Bankruptcy Form.

Bankruptcy Rule 9010(c), however, requires that "[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*" (emphasis added). The form is therefore reissued as an Official Form. Because only substantial conformity to the Official Form is required by Rule 9010(c), parties will be able to continue modifying the form as needed to conform to state law, the needs of the case, or local practice.

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

MEMORANDUM

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

FROM: Hon. Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 21, 2018

I. Introduction

The Advisory Committee on Bankruptcy Rules met in San Diego, California, on April 3, 2018. *****

At the meeting the Committee considered comments that were submitted in response to the publication in August 2017 of proposed amendments to five rules and one Official Form. After making some changes in response to comments, the Committee gave final approval to four of the published rules. It voted to hold in abeyance the proposed amendments to the other published rule and to the Official Form. It also voted to seek final approval without publication of the reestablishment of two power-of-attorney forms as Official Forms, rather than Director's Forms.

* * * * *

The action items presented by the Committee are discussed below in Part II, organized as follows:

A. Items for Final Approval

(A1) Rules and Official Forms published for comment in August 2017—

- Rule 4001(c);
- Rule 6007(b);
- Rule 9036; and
- Rule 9037(h).

(A2) Approval without publication—

- Reestablishment of Director's Forms 4011A and 4011B as Official Forms.

* * * * *

II. Action Items

A. Items for Final Approval

(A1) Rules published for comment in August 2017.

The Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule amendments that were published for public comment in August 2017 and are discussed below. Bankruptcy Appendix A includes the rules and forms that are in this group.

Action Item 1. Rule 4001(c) (Obtaining Credit). The proposed amendment to Rule 4001(c) would make that rule inapplicable to chapter 13 cases. Rule 4001(c) details the process for obtaining approval of postpetition credit in a bankruptcy case. It requires a motion, in accordance with Rule 9014 (governing contested matters), that contains specific disclosures and information. A suggestion received by the Committee posited that many of the required disclosures are unnecessary in and unduly burdensome for most chapter 13 cases and that they should be made inapplicable in chapter 13. The Committee reviewed the history of Rule 4001(c), which showed that the provision was designed to address issues particular to chapter 11 cases. Most members agreed that Rule 4001(c) did not readily address issues pertinent to chapter 13 cases.

There were no comments on the proposed amendment. In giving final approval to the amendment at the spring meeting, the Committee added a title to the new paragraph (4), "*Inapplicability in a Chapter 13 Case*," and subsequently made stylistic changes in response to the comments of the style consultants.

Action Item 2. Rule 6007(b) (Abandonment or Disposition of Property). The amendments to Rule 6007(b) are designed to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b), and to make the rule consistent with Rule 6007(a) (dealing with abandonment by the trustee or debtor in possession).

Five comments were submitted on the proposed amendments. Two of them, submitted by Judge Robert Kressel of the U.S. Bankruptcy Court for the District of Minnesota, and by Chief Judge Kathy Surratt-States, writing on behalf of the judges of the Eastern District of Missouri bankruptcy court and the clerk of that court, expressed concern about the last sentence of the proposed amendments, which states that the court order "effects the abandonment." They noted that the court was not abandoning the property but was merely granting a motion to compel the abandonment by the trustee or debtor in possession. In response to the comments, the Committee inserted the words "trustee's or debtor in possession's" immediately before the word "abandonment" in the last sentence of the amendments.

Two comments, submitted by Kelly Black, a bankruptcy attorney from Mesa, Arizona, and by Ryan W. Johnson, Clerk of the Bankruptcy Court for the Northern District of West Virginia, criticized the language of the second sentence in the proposed amendments that requires both service and notice of the motion on all creditors because they believe these requirements to be too burdensome. The Committee noted that there are many local practices with respect to service and notice, and it decided that requiring service on all parties, although occasionally more burdensome, is the only way to ensure all parties get the appropriate notice. Therefore, the Committee declined to make any change in response to those comments.

Comments from Aderant CompuLaw made suggestions relating to the 14-day period for objecting to the motion to compel abandonment. They pointed out the different beginning point for the 14-day period in Rule 6007(a) (notice of the proposed abandonment) and proposed Rule 6007(b) (service of the motion to compel abandonment) and noted that under Rule 9006(a), the period under Rule 6007(b) would be increased by three days, unlike under Rule 6007(a). They therefore suggested that either Rule 6007(a) should be changed to require service, or Rule 9006(a) should be changed to increase the period by three days after mailing. They also suggested that both Rule 6007(a) and Rule 6007(b) should read "within 14 days after" instead of "within 14 days of." The Committee declined to make any change in response to those comments because no amendment is proposed either to Rule 6007(a) or to Rule 9006(a).

The style consultants suggested numerous changes to Rule 6007(b). Because the current amendment is intended to parallel the text of Rule 6007(a) (which is not being amended at this time), the Committee declined to accept the suggestions, but will revisit the issue if the restyling project goes forward.

Action Item 3. Rule 9036 (Notice and Service Generally); Deferral of Action on Rule 2002(g) and Official Form 410. On the Committee's recommendation, the Standing Committee in August

2017 published for public comment proposed amendments to two rules and to one Official Form that were intended to expand the use of electronic noticing and service in the bankruptcy courts. These proposals were made as part of the Committee's ongoing study of noticing issues in bankruptcy cases. The published amendments to Rule 2002(g) (Addressing Notices) were proposed to allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest. The Committee Note explained that a "creditor's election on the proof of claim, or an equity security holder's election on the proof of interest, to receive notices in a particular case by electronic means supersedes a previous request to receive notices at a specified address in that particular case."

The published amendments to Rule 9036 allowed not only clerks but also parties to provide notices or serve documents (other than those governed by Rule 7004) by means of the court's electronic-filing system on registered users of that system. They also allowed service or noticing on any person by any electronic means consented to in writing by that person. Under the proposed amendment, electronic service would be complete upon filing or sending, but it would not be effective if the filer or sender received notice that the electronic service was not received by the person to be served.

The proposed amendments to these two rules were published along with proposed amendments to Official Form 410 (Proof of Claim), which added a check box for opting into email service and noticing. The form, as proposed for amendment, instructed the creditor to check the box "if you would like to receive all notices and papers by email rather than regular mail."

Four sets of comments were submitted addressing these proposed amendments. They were submitted by Ryan Johnson (Clerk, Bankr. N.D.W. Va.); Chief Judge Kathy Surratt-States (Bankr. E.D. Mo.); Eva Roeber (Chief Deputy Clerk, Bankr. D. Neb.) (on behalf on the Bankruptcy Noticing Working Group); and jointly by the Bankruptcy Judges Advisory Group and the Bankruptcy Clerks Advisory Group ("BJAG/BCAG"). Although the commenters were generally supportive of the effort to authorize greater use of electronic service and noticing, they raised several substantial issues about the published amendments. Those issues fall into three groups: (1) technological feasibility; (2) priorities if there are different email addresses for the same creditor; and (3) miscellaneous wording suggestions.

Based on its careful consideration of the comments and the logistics of implementing the proposed email opt-in procedure, the Committee voted unanimously to hold the amendments to Rule 2002(g) and Official Form 410 in abeyance, but to approve the amendments to Rule 9036 with some minor revisions.

Technological Feasibility—All four sets of comments stated that it is not currently feasible to implement the proposed email opt-in system. They said that without time-consuming software programming and testing, the Bankruptcy Noticing Center ("BNC"), which is responsible for sending court notices by means other than CM/ECF, would not be able to receive the email addresses that opting-in creditors would put on proofs of claim. Instead, this information would

have to be manually retrieved and conveyed to BNC by clerk's office personnel, and, as Judge Surratt-States stated, "With no work measurement credit to accompany this workload increase, it is unrealistic to assume that courts will take on these duties without considerable difficulty."

Writing on behalf of the Bankruptcy Noticing Working Group, Ms. Roeber explained the technology problem as follows:

> To effectuate the Committee's proposed amendments, the judiciary will have to undertake a great deal of programming and reconfiguration of the Case Management/Electronic Case Files (CM/ECF) and the Bankruptcy Noticing Center (BNC) systems, especially for the amendments to Rule 2002(g)(1) and the Proof of Claim form. For instance, the BNC and CM/ECF systems must be altered to receive and process email addresses submitted on the proof of claim/interest under Rule 2002(g)(1), handle a greater volume of bounced back emails, and to ensure correct email addresses on case mailing lists, among other changes.

Similarly, the BJAG/BCAG comment said that "[w]hile we are pleased with the Committee's direction in promoting electronic noticing rules enhancements, there is currently no technically feasible way in either the judiciary's Case Management/Electronic Case Filing (CM/ECF) system or the Bankruptcy Noticing Center (BNC) contract to manage creditor email opt-in."

Both Ms. Roeber and BJAG/BCAG stated that the programming and testing that would be required to implement the proposed opt-in rule most likely could not be undertaken for some time. They explained that resources are currently being devoted to implementing the NextGen system for the bankruptcy courts, and in addition the contract with BNC will expire this fiscal year and will be "recompeted." In light of these complications, these commenters asked that the effective date of the proposed amendments to Rule 2002(g) and Official Form 410 be delayed for two years from final approval, that is, until December 1, 2021. Judge Surratt-States also expressed the need for delay in the effective date of those amendments. Ms. Roeber added that the amendments to Rule 9036 could go into effect within the normal timeframe

.

In order to gain a better understanding of the challenges of implementing the proposed email opt-in provision, members of the Committee and the reporter consulted with the Committee's clerk representative and Administrative Office ("AO") staff members who work with BNC and the Bankruptcy Noticing Working Group. They agreed that a delay in implementation was needed because the CM/ECF system is not currently programmed to pull an email address from a proof of claim for noticing. It would need to be programmed to do this. It would also need to be programmed to include an electronic address in the zipped file sent with the notice to the BNC.

Priorities—Three of the submitted comments expressed concerns about the possibility that conflicting addresses might be on file for a single creditor and that there needs to be clarity about how the proposed email option fits into existing rules about which of the conflicting addresses

should be used. This possibility exists because there are several provisions that allow a creditor to designate an address for notice and service, including § 342(f) of the Bankruptcy Code, § 342(e), Rule 2002(g)(1)(A), Rule 2002(g)(4), and Rule 9036.

BNC currently implements these provisions as follows. Consistent with Code § 342(f) and Rule 2002(g)(4), a creditor can fill out a form designating a preferred mailing address for cases in all bankruptcy courts or in courts that the creditor specifies. If the name on the form matches a name on the court-provided mailing list in a case (usually derived from the debtor's schedules), BNC will substitute the preferred address and send a notice there instead. The form alerts the creditor to the fact that "[n]otices generated by trustees, attorneys, debtors and other entities may continue to be mailed to the address of record filed by the debtor."

Under the authority granted in Rule 9036, BNC also has created the Electronic Bankruptcy Noticing program ("EBN"). To participate, an entity fills out a form requesting notices sent by BNC to be sent by email to a designated email address. The same matching process described above is used to substitute the email address for the mailing address provided by the court. As with the preferred address, EBN just applies to notices sent by BNC. Clerk's offices use email addresses for registered users of the CM/ECF system based on the system's user agreement, which specifies that registering for CM/ECF constitutes consent to receive court notices through the system.

The concern raised by the comments is that it is not clear how an email address on a proof of claim and the checked opt-in box affect the existing priorities and thus it is not clear which email address prevails if there are conflicting ones. Ms. Roeber suggested the following order of priorities: (1) CM/ECF email address for registered users; (2) BNC email address; and (3) proof-of-claim opt-in email address. She proposed stating in the Committee Note to Rule 2002(g) that providing an email address on a proof of claim or other filed request pursuant to Rule 2002(g) does not constitute consent to electronic notice or service under Rule 9036. This statement would be contrary to the proposed Committee Note accompanying the amendments to Rule 2002(g), which states, "A creditor's election on the proof of claim, or an equity securityholder's election on the proof of interest, to receive notices in a particular case by electronic means supersedes a previous request to receive notices at a specified address in that particular case."

Wording Suggestions—In their comments Ms. Roeber and BJAG/BCAG suggested a change in the wording of the opt-in instruction on the proof-of-claim form in order to clarify the scope of the consent being given. Ms. Roeber said that the form should "clarify that an electronic noticing election and email address provided on the form are applicable only in the case in which that form was submitted. It should also be clarified that not all papers in the case will be sent to the claimant by email." She endorsed proposed language submitted by BJAG/BCAG. They suggested that the language accompanying the opt-in box be modified as follows:

> Check this box if you would like to receive all notices and papers <u>that you are entitled to receive in this case</u> by email instead of regular mail. <u>Such notices and</u>

papers do not include any complaint or motion required to be served in accordance with Rule 7004.

Mr. Johnson commented that Rule 9036 should make clear that the clerk's office is not responsible for notifying parties that their attempted service by CM/ECF failed.

* * *

The Committee discussed the comments during its spring meeting. Members accepted the views of the commenters and AO personnel that current CM/ECF and BNC software would be unable to implement the email opt-in proposal and that considerable time would be required to do the necessary reprogramming and testing. Some members were concerned, however, about approving the rule and form amendments now but delaying their effective date until 2021. During that more-than-three-year interim, technological advances might result in better means of employing electronic service and noticing than what is currently proposed.

While the commenters sought a delay in implementation, not a rejection of the proposed amendments, the Committee concluded that the comments about determining priorities among conflicting creditor addresses complicated the issue. Parties do not have access to BNC's database of email addresses, so the proof-of-claim opt-in was proposed in order to facilitate email service by parties on creditors that are not registered users of CM/ECF. Thus, assuming that the email address on the proof of claim would be accessible to parties, unlike the EBN email address, the Committee's intent in proposing the amendments would be not served by having an EBN address prevail over a conflicting proof-of-claim address. Likewise, the decision to opt in to email noticing and service needs to be treated as consent in order to be consistent with § 342(e) and (f) and Rule 9036.

The discussion of possibly conflicting email addresses pointed out to the Committee that this bankruptcy rules issue needs to be considered in coordination with other groups and AO personnel who are working on overlapping electronic noticing issues. Ideally there would be one method for a creditor to designate an email address, with access to the information given to all persons who will be sending notices or serving papers. The Committee on Court Administration and Case Management ("CACM") has created a subcommittee that is looking at BNC issues, and Judge Bernstein is a liaison from our Committee to that group. Whether working through the CACM subcommittee or through consultation with the relevant groups, the Committee concluded that the proposed amendments to Rule 2002(g) and Official Form 410 should be held up for now so that a broader perspective could be gained on how best to facilitate electronic service by parties on other parties that are not registered users of CM/ECF.

The Committee decided that the reasons for holding the amendments to Rule 2002(g) and Official Form 410 in abeyance do not apply to the proposed amendments to Rule 9036. The latter amendments would (1) allow both clerks and parties to serve and give notice by CM/ECF to registered users; (2) allow other means of electronic service and noticing to be used for parties that

give their written consent to such service and noticing; and (3) provide that electronic service is complete upon filing or sending unless the sender receives notice that the transmission was not successful. Those changes are consistent with amended Civil Rule 5 (Serving and Filing Pleadings and Other Papers), which Rule 7005 makes applicable in bankruptcy proceedings, and the amendments to Rule 8011 (Filing and Service; Signature), which are on track to go into effect on December 1, 2018. Thus there does not seem to be any reason to hold them up, and the Committee recommends that the Standing Committee approve the amendments to Rule 9036, with the following post-publication changes:

- The last sentence of the rule was changed to refer to "any pleading or other paper [rather than complaint or motion] to be served in accordance with Rule 7004" because some objections, pleadings other than complaints (for insured depository institutions), and chapter 13 plans must be served in that manner.
- The following sentences were added to the Committee Note in response to Mr. Johnson's comment: "The rule does not make the court responsible for notifying a person who filed a paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service." Identical language appears in the Committee Note to Rule 8011.
- The words "or notice" after "service" were added to the third sentence of the rule to be consistent with the wording of the remainder of the rule.
- Stylistic changes were made in response to the comments of the style consultants.

Action Item 4. Rule 9037(h) (Motion to Redact a Previously Filed Document). The proposed amendment to Rule 9037 would add a new subdivision (h) to address the procedure for redacting personal identifiers in previously filed documents that are not in compliance with Rule 9037(a). The Committee proposed the amendment in response to a suggestion (14-BK-B) submitted by CACM.

Three comments were submitted regarding this amendment. The first, submitted by Charles Ivey IV (BK-2017-0003-0005), suggested that the proposed amendment be expanded further to allow parties to submit a redacted document as an alternative to an existing sealed document that is subject to Rule 8009(f). Rule 8009(f) governs the handling on appeal of documents placed under seal by the bankruptcy court. Without elaborating, Mr. Ivey said that Rule 8009(f) creates many unwanted consequences that significantly prolong and complicate bankruptcy appeals. As an alternative to the designation of sealed documents to be included in the record on appeal, he suggested that proposed Rule 9037(h) also permit a party to request that a redacted version of the sealed document be submitted. If the bankruptcy court granted this motion to substitute the redacted document, he said, the bankruptcy clerk's office would transmit the redacted document as part of the final record on appeal.

The Committee decided that Mr. Ivey's suggestion would expand the amendment to address a situation that it has not considered and that it was not attempting to deal with when it proposed the amendment. It therefore voted unanimously to make no changes to the published amendment in response to this comment.

The second comment was submitted by Ryan Johnson (Clerk, Bankr. N.D.W. Va.) (BK-2017-0003-0006). He said that a party who did not file the previous (unredacted) document but is requesting that a document be restricted from viewing due to the improper disclosure of personal identifying information should be specifically exempted from paying the redaction fee. Furthermore, he said, debtors or any entity whose personal information is wrongfully disclosed should not be required by Rule 9037(h) to file a redacted document, such as a proof of claim and its attachments, on behalf of the party originally filing the document.

Mr. Johnson explained that currently many courts addressing this situation restrict viewing of the offending document at the request of the non-filing party and then enter an order directing the original party to file a motion to redact, pay the fee, and attach the redacted version of the offending document. Mr. Johnson was concerned that these procedures might be contrary to proposed Rule 9037(h). He noted that the language regarding a court's ability to "order otherwise" is ambiguous because the language appears in subsection (h)(1) and then is repeated in subparagraph (h)(1)(C). He expressed concern that once a motion to redact is filed, it is unclear whether a court can alter the requirements of subparagraphs (h)(1)(A) and (B).

Judicial Conference policy addresses the issue Mr. Johnson raised concerning the assessment of a redaction fee on a debtor or other person whose personal identifiers have been exposed. Section 325.90 of the *Guide to Judiciary Policy*, Vol. 10 (Public Access and Records) provides that "[t]he court may waive the redaction fee in appropriate circumstances. For example, if a debtor files a motion to redact personal identifiers from records that were filed by a creditor in the case, the court may determine it is appropriate to waive the fee for the debtor." Because the judiciary policy already allows a waiver of the redaction fee in appropriate situations, the Committee concluded that there is no need for Rule 9037(h) to address the issue.

The Committee thought that Mr. Johnson had raised a valid point about the ambiguity concerning when the rule allows a bankruptcy court to depart from its requirements. As published, subdivision (h)(1) begins with the language "Unless the court orders otherwise." That language could be read to apply to all of (h)(1) were it not for the inclusion of the same language in subdivision (h)(1)(C), thereby possibly suggesting that similar authority is not granted under (h)(1)(A) and (B). The Committee voted unanimously to revise subdivision (h)(1) to make it one sentence that is prefaced with the clause, "Unless the court orders otherwise," and to delete that language from subdivision (h)(1)(C).

The final comment was submitted by Chief Judge Robert E. Grant (Bankr. N.D. Ind.) (BK-2017-0003-0012). He suggested that there was a gap in proposed Rule 9037(h) as there was nothing in the rule that actually required the filing of a redacted version of the original document

as a condition to the restrictions upon public access. Under the rule as published, he said, the only redacted version of the original document is the one attached to the motion itself and that copy, along with the entire motion, is restricted from public view. Accordingly, he stated that it was at least theoretically possible that a motion to redact could be submitted and granted but the redacted document is never filed, with the result being that the original filing, as well as the motion to redact it, would be restricted from public view unless the court took further action.

Judge Grant suggested that the rule be revised so that the restrictions upon public access would not occur until the motion was granted and a redacted or amended version of the original document was actually filed with the court. He explained that most courts readily respond to motions to redact, and the difference in timing between the immediate technological restrictions on public access, contemplated by the proposed rule, and the entry of an order granting or denying the motion to redact should be relatively slight. He further noted that the order granting the motion could state that restrictions upon public access would be put in place upon the filing of a redacted version of the original document which, if submitted along with the motion to redact, could occur immediately.

When the Committee initially considered how best to provide for the redaction of already filed documents, it was aware that bankruptcy courts were using a variety of procedures for handling these requests. Of special importance to the Committee was devising a procedure that would provide maximum protection from public view of unredacted documents. To avoid the possibility that a publicly available motion to redact would highlight the existence in court files of an unredacted document, the proposed rule required immediate restriction on public access of the motion itself and the unredacted original document. Access to those documents would remain restricted if the court granted the motion to redact. Although the rule did not expressly say so, the underlying intent, and arguably the implication, of the rule was that the redacted document, which was filed with the motion, would then be placed on the record as a substitute for the original document that remained protected from public view. The first sentence of the penultimate paragraph of the Committee Note explained: "If the court grants the motion to redact, the redacted document should be placed on the docket, and public access to the motion and the unredacted document should remain restricted."

To eliminate any uncertainty, the Committee decided that the best way to respond to the issue Judge Grant raised was to add before the second sentence of subdivision (h)(2), "If the court grants it, the redacted document must be filed." The Committee, however, did not accept the suggestion that a restriction on access to the motion and unredacted document be delayed until the court grants the motion to redact.

A few stylistic changes were made in response to suggestions from the style consultants, and the Committee Note was revised to reflect the changes made to the rule.

(A2) Conforming changes proposed for approval without publication.

The Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed form amendments that are discussed below. The forms as proposed for amendment are in Bankruptcy Appendix A.

Action Item 5. Official Forms 411A and 411B (Power of Attorney). As part of the Forms Modernization Project, the power-of-attorney forms, previously designated as Official Forms 11A and 11B, were changed to Director's Forms 4011A (General Power of Attorney) and 4011B (Special Power of Attorney), the use of which is optional unless required by local rule. This change took effect on December 1, 2015. Rule 9010(c), however, provides that "[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*" (emphasis added). In order to bring the rule and forms into conformity, the Committee voted unanimously to return the power-of-attorney forms to Official Form status. Because there will be no change in the content of the forms, the Committee seeks approval of this redesignation of the forms without publication. If approved, the new Official Forms will have an effective date of December 1, 2018, and, in keeping with the new numbering system for forms, will be designated Official Forms 411A and 411B.

The Forms Modernization Project group recommended that the power-of-attorney forms be changed to Director's Forms in order to allow greater flexibility in their use, in light of the prospect of amended Rule 9009 increasing restrictions on making modifications to Official Forms. The Committee Note accompanying this amendment explained, "Parties routinely modify the General Power of Attorney form to conform to state law, the needs of the case, or local practice. The exact language of the form is not needed."

The Committee later realized that using Director's Forms for powers of attorney, rather than Official Forms, created a conflict with Rule 9010(c). The Committee concluded that Director's Forms are not needed to allow modifications of the power-of-attorney forms. Rule 9009 allows modifications of Official Forms "as provided in these rules." The relevant rule here—Rule 9010(c)—only requires substantial, not exact, conformity with the appropriate Official Form. Other rules requiring a document that "conforms substantially" to an Official Form have been interpreted by the Committee to permit modifications of those forms, and they are included in the chart of Alterations Permitted by Bankruptcy Rules that was approved at the Committee's fall 2017 meeting and is available on the AO website. Treating Rule 9010(c) as permitting modifications of the power-of-attorney forms would be consistent with the interpretation of Rules 3001(a), 3007, 3016(d), 7010, 8003(a)(3), 8005(a)(1), and 8015(a)(7)(C)(ii).

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 16.1. Pretrial Discovery Conference; Request for Court Action

(a) Discovery Conference. No later than 14 days after the arraignment, the attorney for the government and the defendant's attorney must confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16.

(b) Request for Court Action. After the discovery conference, one or both parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial.

Committee Note

This new rule requires the attorney for the government and counsel for the defendant to confer early in the process, no later than 14 days after arraignment, about the timetable and procedures for pretrial disclosure. The new requirement is particularly important in cases involving electronically

[1] New material is underlined.

stored information (ESI) or other voluminous or complex discovery.

For practical reasons, the rule does not require attorneys for the government to confer with defendants who are not represented by counsel. However, neither does the rule limit existing judicial discretion to manage discovery in cases involving pro se defendants, and courts must ensure such defendants have full access to discovery.

The rule states a general procedure that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increase.

Moreover, the rule does not (1) modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, (2) displace local rules or standing orders that supplement and are consistent with its requirements, or (3) limit the authority of the district court to determine the timetable and procedures for disclosure.

Because technology changes rapidly, the rule does not attempt to state specific requirements for the manner or timing of disclosure in cases involving ESI. However, counsel should be familiar with best practices. For example, the Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) have published "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases" (2012).

Subsection (b) allows one or more parties to request that the court determine or modify the timing, manner, or other aspects of the disclosure to facilitate trial preparation.

This rule focuses exclusively on the process, manner and timing of pretrial disclosures, and does not address modification of the trial date. The Speedy Trial Act, 18 U.S.C. §§ 3161-3174, governs whether extended time for discovery may be excluded from the time within which trial must commence.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS[1]

Rule 5. The Answer and the Reply

* * * * *

(e) Reply. The petitioner may ~~submit~~file a reply to the respondent's answer or other pleading~~ within a time fixed by the judge~~. The judge must set the time to file unless the time is already set by local rule.

Committee Note

The petitioner has a right to file a reply. Subsection (e), added in 2004, removed the discretion of the court to determine whether or not to allow the petitioner to file a reply in a case under § 2254. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (e) makes it even clearer that the petitioner has a right to file a reply to the respondent's answer or pleading. It retains the word "may," which is used throughout the federal rules to mean

[1] New material is underlined; matter to be omitted is lined through.

"is permitted to" or "has a right to." No change in meaning is intended by the substitution of "file" for "submit."

As amended, the second sentence of the rule retains the court's discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule. Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS[1]

Rule 5. The Answer and the Reply

* * * * *

(d) Reply. The moving party may ~~submit~~file a reply to the respondent's answer or other pleading~~ within a time fixed by the judge~~. The judge must set the time to file unless the time is already set by local rule.

Committee Note

The moving party has a right to file a reply. Subsection (d), added in 2004, removed the discretion of the court to determine whether or not to allow the moving party to file a reply in a case under § 2255. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (d) makes it even clearer that the moving party has a right to file a reply to the respondent's answer or pleading. It retains the word "may," which is used throughout the federal rules to mean

[1] New material is underlined; matter to be omitted is lined through.

"is permitted to" or "has a right to." No change in meaning is intended by the substitution of "file" for "submit."

As amended, the second sentence of the rule retains the court's discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule. Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

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

MEMORANDUM

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

FROM: Hon. Donald W. Molloy, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 17, 2018

I. Introduction

The Advisory Committee on Criminal Rules met on April 24, 2018, in Washington, D.C. This report presents two action items. The Committee unanimously recommends that the Standing Committee transmit to the Judicial Conference the following proposed amendments that were previously published for public comment:

(1) New Rule 16.1 (pretrial discovery conference), and
(2) Amendments to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings (right to file a reply).

* * * * *

II. Action Item: New Rule 16.1

Proposed new Rule 16.1 has its origins in a request from the National Association of Criminal Defense Lawyers (NACDL) and the New York Council of Defense Lawyers (NYCDL) that the Committee address discovery problems in complex cases that involve "millions of pages of documentation," "thousands of emails," and "gigabytes of information." The Committee's work on the proposal revealed that discovery issues involving electronically stored information (ESI) could be adequately addressed in most cases by an early discussion between counsel, and were not limited to "complex" cases, or cases with a high volume of ESI. Accordingly, the proposed rule is not limited to such cases, and provides a process that encourages the parties to confer early in each case to determine whether the standard discovery procedures should be modified.

The proposed amendment is not included in Rule 16 itself, but would instead be a new Rule 16.1. Because it addresses activity that is to occur well in advance of discovery, shortly after arraignment, the Committee concluded it warrants a separate position in the rules. A separate rule will also draw attention to the new requirement.

The new rule has two sections.

The first section requires that no later than 14 days after arraignment the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Members agreed that 14 days was an appropriate period, noting that the proposal permits flexibility. Because the proposed rule requires a meeting "no later than" 14 days after arraignment, it permits the parties to meet before arraignment when that would be desirable. And in cases in which 14 days is not sufficient for the parties to accurately gauge what discovery may entail, the rule requires no more than an initial discussion, which can then be followed by additional conversations. Subsection (b) bears some resemblance to Civil Rule 26(f), but is more narrowly focused than the Civil Rule.

The second section states that after the discovery conference the parties may "ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial." The phrase "determine or modify" contemplates two possible situations. First, if there is no applicable order or rule governing the schedule or manner of discovery, the parties may ask the court to "determine" when and how disclosures should be made. Alternatively, if the parties wish to change the existing discovery schedule, they must seek a modification. A modification would be required, for example, if the schedule or manner of discovery in the case is governed by a standing order or local rule. In either situation, the request to "determine or modify" discovery may be made jointly if the parties have reached agreement, or by one party alone if no agreement has been reached. The rule does not prescribe a time period for seeking judicial assistance.

The proposed rule requires the parties to confer and authorizes them to seek an order from the court governing the manner, timing and other aspects of discovery. But it does not require the

court to accept their agreement or otherwise limit the court's discretion. Under the proposed rule, district courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and through local rules and standing orders. To avoid any confusion, this point is emphasized in the Committee Note, which states: "Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the court to determine the timetable and procedures for disclosure."

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure in cases involving electronically stored information (ESI). The Committee Note draws attention to this point and states that counsel "should be aware of best practices." As an example of these best practices, it cites the ESI protocol developed by the Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) (Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases (2012)). The Committee hopes that including the reference to this protocol will help bring it to the attention of both courts and practitioners.

Publication of the rule produced six comments. Although all were supportive of (or did not question) the amendment's general approach of requiring the prosecution and defense to confer about discovery soon after arraignment, several expressed concerns and/or suggested changes in the text or Committee Note. The comments raised the following issues:

(1) Should the text or note state that the amendment does not preclude shorter times for discovery required by local court rules or court orders?
(2) Should the text or note be amended to state that the amendment does not grant new discovery authority or override current statutory limitations (e.g., the Classified Information Procedures Act (CIPA) and the Jencks Act)?
(3) Should the rule explicitly state that it does not apply to pro se defendants?
(4) Should the amendment be relocated or renumbered?
(5) Should the rule require the parties to confer "in good faith"?
(6) Should the rule require the parties to file a joint discovery report?

The Committee concluded that the existing Committee Note was sufficient to address the concern about local rules and orders setting shorter times for discovery, but it agreed to propose revisions to the Note addressing statutory limitations such as CIPA and the applicability of the rule to pro se defendants. It also accepted the suggestion that the wording of subsection (b) should be revised to parallel Rule 16(d)(2)(A). With the exception of a few minor changes recommended by the style consultants, the Committee declined to make other changes in the rule as published.

a. Local rules

Two comments (CR-2017-0009 and CR-2017-0011) expressed concern about the effect of the proposed rule in districts where local rules already require the government to make specific disclosures at particular times, especially where those disclosures must be made before the time

set for the pretrial discovery conference (14 days after arraignment). The comments suggested changes to the text or Committee Note. In the drafting process the Committee sought to preserve the authority of district courts to impose additional discovery requirements by local rule or court order. As published, the Committee Note states (emphasis added):

> The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increase. Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

The Committee concluded that no further clarification is needed, in either the text or the Committee Note, to respond to the concerns about local rules requiring early disclosures.

b. New discovery authority

The Department of Justice (CR-2017-0010) expressed concern that the language in (b) might be read to "grant[] new discovery authorities that could cause serious problems and undermine important protections contained in other laws." As published, (b) provided (emphasis added):

> (b) Modification of Discovery. After the discovery conference, one or both parties may ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.

The Department noted that this language varies slightly from current Rule 16(d)(2)(A).

The Committee agreed to conform the language of the proposed rule to the phrasing of Rule 16(1)(b). There is no substantive difference between the phrasing used in the rule as published ("the timing, manner, or other aspect of disclosure") and the parallel words in Rule 16 ("time, place, or manner, or other terms and conditions of disclosure"). Although it seems unlikely that these slight differences would form the basis for a successful argument that Rule 16.1 was intended to be different in some important respect, the Committee had no objection to tracking the phrasing of Rule 16(d)(2)(A) in new Rule 16.1(b). As revised, the proposed rule provides:

> After the discovery conference, one or both parties may ask the court to determine or modify the ~~timing, manner, or other aspect of disclosure~~ time, place, or manner, or other terms and conditions of disclosure to facilitate preparation for trial.

The Department also suggested that the text of the rule be amended to state that the court may determine or modify the disclosure "in accordance with Rule 16 and other applicable law," and that the following language be added to the Committee Note:

> . . . nothing in this new rule is designed to change substantive discovery rules, grant the courts authorities in addition to what is provided for under Rule 16 and other applicable law, or change the safeguards provided in various security and privacy laws such as the Jencks Act or the Classified Information Procedures Act ("CIPA").

In its comment on the rule, NACDL (CR-2017-0012) opposed that suggested change, praising the flexibility of the rule as published and stating its understanding that the rule "rightly empower[s] trial judges to demand that the government provide discovery that is timely, complete and accessible to the defense, according to the particular nature and circumstances of any given case."

The Committee did not accept the Department's suggestion that the text of the rule be revised to add references to Rule 16 "and other applicable law." Adding a requirement that the court must act "in accordance with . . . other applicable law" to this rule might suggest that unless the same language is added to other rules the courts have carte blanche to ignore other relevant laws. The style consultants were unanimous in rejecting this language.

The Committee agreed, however, that it would be appropriate to add language to the Committee Note addressing the Department's concern by recognizing the limited nature of the new rule. The placement of the new language (underlined below) shows that the new rule alters neither existing statutory safeguards for security and privacy, nor local rules or standing orders:

> The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increase. Moreover, the rule does not <u>modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, nor does it</u> displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

c. Pro se parties

Two comments addressed the application of the amendment to pro se parties, though they disagreed on the proper approach. The Department of Justice (CR-2017-0010) suggested that the Committee Note squarely address the point, implicit in the text, that the requirement of a pretrial conference is applicable only to attorneys and hence not to pro se defendants. NACDL (CR-2017-0010) disagreed, suggesting that "'attorney for the defendant' is properly understood to include defendants representing themselves." Further, NACDL argued, the Committee Note should confirm this understanding. It observed that where conferring with a pro se defendant would be impractical, the government can seek relief on a case-by-case basis.

These comments squarely presented for Committee discussion the question whether the prosecution should have a duty to confer with a pro se defendant concerning discovery within 14 days after arraignment, assuming that it would be feasible to do so. On the one hand, most pro se

defendants lack the training and experience to understand the discovery process, and conferring in such circumstances would often be difficult. On the other hand, cases involving pro se defendants may include quantities of ESI, and such defendants–even more than those represented by counsel–have a very significant interest in the timing and form of discovery.

The Committee again concluded, consistent with its assumption prior to publication, that for a variety of practical reasons it would not be appropriate to require the government to confer about discovery with each pro se defendant within 14 days of arraignment, and that the text should make this point more clearly. As published subsection (a) required "the attorneys for the government and the defendant" to confer and try to agree on the timetable and procedures for pretrial disclosures. As revised, subsection (a) refers to "the attorney for the government and the defendant's attorney."

Although the Committee agreed that it is not practical to require discovery conferences with pro se defendants, it also recognized that it is essential for such defendants to have pretrial access to material necessary to prepare their defense. To emphasize this point, the Committee unanimously supported adding to the Committee Note a statement about the courts' existing discretion to manage discovery and their responsibility to ensure pro se defendants "have full access to discovery." An addition to the Committee Note reads:

> For practical reasons, the rule does not require attorneys for the government to confer with defendants who are not represented by counsel. However, neither does the rule limit existing judicial discretion to manage discovery in cases involving pro se defendants, and courts must ensure such defendants have full access to discovery.

d. Relocating or renumbering the amendment

Two comments addressed the location of the new provision. The Justice Department suggested that it might be desirable to delete subsection (b) and move the new provision imposing a duty to confer to Rule 16. A Concerned Citizen suggested (CR-2017-005), instead, that the new rule come after Rule 10 (arraignment) and before Rule 16 (discovery). This would, Concerned Citizen urged, preserve the present order of the rules, which follows the chronology of the typical criminal case. Citizen favored placing the new rule between Rules 11 and 12.

The Committee concluded that no change should be made in the numbering or location of the rule. A new, separate rule will be much more visible than placement within Rule 16, which is already very long and complex. A simple freestanding rule also parallels Rule 17. The Committee saw no reason to relocate the new rule.

e. Additional requirements of good faith and joint discovery reports

One commentator, Professor Daniel McConkie (CR-2017-0007), suggested that Rule 16.1, like the Civil Rules, should expressly impose the requirement of conferring in "good faith." He

noted that there are situations in which one party is not engaged and the other party "needs the ability to file a motion with some teeth to call out that bad behavior." In the drafting process the Committee considered including a good faith requirement, but it declined to do so. Indeed, members noted that discovery in criminal cases currently proceeds more smoothly than it does in civil cases, despite the explicit requirement of "good faith."

Professor McConkie also described local rules that require both discovery conferences and pretrial joint discovery reports, and he urged the Committee to add similar provisions to Rule 16.1. Although the Committee did not specifically consider the requirement of a joint defense report, in the drafting process it did consider–and decided against–more detailed requirements beyond conferring within 14 days after arraignment. Members were not persuaded that it would be desirable to add such a requirement.

f. Style changes

The Committee accepted several changes recommended by the style consultants, which did not affect the substance of the proposed rule.

The consultants recommended changes in the captions to more accurately reflect the subject of subsection (b). The revised caption is "Request for Court Action."

The consultants recommended the text in subsection (a) refer, for clarity, to "the attorney for the government and the defendant's attorney" rather than the "the attorneys for the government and the defendant."

Finally, the consultants recommended the deletion of a comma.

The Committee unanimously recommends that the Standing Committee approve new Rule 16.1 and the accompanying Committee Note, as amended after publication, for transmittal to the Judicial Conference.

III. Action Item: Rule 5(d) of the Rules Governing Section 2255 Proceedings and Rule 5(e) of the Rules Governing Section 2254 Cases

Judge Richard Wesley first drew the Committee's attention to a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings. The Rule states that "The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." Although the Committee Note and history of the amendment make it clear that this language was intended to give the inmate a right to file a reply, some courts have held that the inmate who brings the § 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right.

After a review of the cases, the Committee concluded that the text of the current rule is contributing to a misreading of the rule by a significant number of district courts. A similar problem was found in cases interpreting parallel language in Rule 5(e) of the Rules Governing 2254 actions. Both rules currently provide that a prisoner may file a reply "within a time fixed by the judge." Apparently the reference to filing "within a time fixed by the judge" can be read as allowing a prisoner to file a reply only if the judge determines a reply is warranted and sets a time for filing.

The amendment published for public comment makes it clear that the moving party (or petitioner in 2254 cases) has a right to file a reply by placing the provision concerning the time for filing in a separate sentence:

> The moving party may file a reply to the respondent's answer or other pleading. The judge must set the time to file, unless the time is already set by local rule.

The Committee Note states that the Rule "retains the word 'may,' which is used throughout the federal rules to mean 'is permitted to' or 'has a right to.'"

A parallel amendment for Rule 5(e) of the Rules Governing 2254 Proceedings was also published for public comment. Although the case brought to the Committee by Judge Wesley concerned Rule 5 of the Rules Governing Section 2255 Proceedings, the Committee concluded that parallel treatment was warranted. The Committee that revised the amendments saw no reason to treat them differently, the same division of authority appears in both Section 2254 and 2255 cases, and the reasoning in the Section 2254 cases mirrors that in the 2255 cases.

Only three comments were received. Two addressed issues that had been considered before publication: whether there was any need for an amendment, and whether to replace "may" with a phrase such as "has a right to" or "is entitled to." These issues had been debated at length before publication, and the Committee decided there was insufficient reason to revisit them.

The third comment, from NACDL, expressed support for the proposed amendments to Rule 5 of both the 2254 and 2255 Rules, but suggested a related change. NACDL argued that inmates should be told about the reply and when it should be filed at the time the court orders the respondent to file a response; it proposed an additional amendment to Rule 4 of the Section 2254 and 2255 Rules. Although the Committee was not persuaded that an amendment to the Rules was warranted, it did approve the addition of the following sentence to the Committee Notes accompanying the Rule 5 amendments dealing with notice to prisoners of the time to reply:

> Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

In the Committee's view, this addition would serve as a helpful reinforcement of best practices, and it would not require republication.

With this change to the Committee Notes for both Rules 5, the Committee voted unanimously to approve the Rule 5 amendments for transmittal to the Standing Committee.

The Committee unanimously recommends that the Standing Committee approve the amendment to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings, and the accompanying Committee Notes as amended after publication, for transmittal to the Judicial Conference.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 807. Residual Exception

(a) In General. Under the following ~~circumstances~~ conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not ~~specifically covered by~~admissible under a hearsay exception in Rule 803 or 804:

(1) the statement ~~has equivalent circumstantial~~is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

~~**(2)** it is offered as evidence of a material fact;~~

[1] New material is underlined; matter to be omitted is lined through.

(~~3~~2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts~~; and~~

~~**(4)** admitting it will best serve the purposes of these rules and the interests of justice~~.

(b) Notice. The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ —including its substance and the declarant's name— so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The "equivalence" standard has not served to guide a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court should proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness. *See* Rule 104(a). As with any hearsay statement offered under an exception, the court's threshold finding that admissibility requirements are met merely means that the jury may consider the statement and not that it must assume the statement to be true.

The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is

relevant to, but not dispositive of, whether a statement should be admissible under this exception. Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence.

The amendment does not alter the case law prohibiting parties from proceeding directly to the residual exception, without considering the admissibility of the hearsay under Rules 803 and 804. A court is not required to make a finding that no other hearsay exception is applicable. But the opponent cannot seek admission under Rule 807 if it is apparent that the hearsay could be admitted under another exception.

The rule in its current form applies to hearsay "not specifically covered" by a Rule 803 or 804 exception. The amendment makes the rule applicable to hearsay "not admissible under" those exceptions. This clarifies that a court assessing guarantees of trustworthiness may consider whether the statement is a "near-miss" of one of the Rule 803 or 804 exceptions. If the court employs a "near-miss" analysis it should—in addition to evaluating all relevant guarantees of trustworthiness—take into account the reasons that the hearsay misses the admissibility requirements of the standard exception.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule

provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

Of course, even if the court finds sufficient guarantees of trustworthiness, the independent requirements of the Confrontation Clause must be satisfied if the hearsay statement is offered against a defendant in a criminal case.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules. *See* Rules 102, 401.

The notice provision has been amended to make four changes in the operation of the rule:

· First, the amendment requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. *See* Rule 103(a)(2)

(requiring the party making an offer of proof to inform the court of the "substance" of the evidence).

· Second, the prior requirement that the declarant's address must be disclosed has been deleted. That requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant's address was known or easily obtainable. If prior disclosure of the declarant's address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

· Third, the amendment requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. *See* Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

· Finally, the pretrial notice provision has been amended to provide for a good cause exception. Most courts have applied a good cause exception under Rule 807 even though the rule in its current form does not provide for it, while some courts have read the rule as it was written. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay.

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after

a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

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

MEMORANDUM

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

FROM: Hon. Debra Ann Livingston, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 14, 2018 (revised July 16, 2018)

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 26-27, 2018 in Washington, D.C. * * * * *

The Committee made the following determinations at the meeting:

● It unanimously approved the proposed amendment to Rule 807, and is submitting it to the Standing Committee for final approval.

* * * * *

II. Action Items

A. Proposed Amendment to Rule 807, for Final Approval

At its June, 2017 meeting, the Standing Committee unanimously approved a proposed amendment to Rule 807 for release for public comment. The project to amend Rule 807 began with exploring the possibility of expanding it to admit more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation, the Advisory Committee determined that it would not seek to expand the breadth of the exception. In particular, the Committee was cognizant of concerns in the practicing bar about increasing judicial discretion to admit hearsay that was not covered by existing exceptions, as well as concerns by academics that expanding the residual exception would result in undermining the standard exceptions.

But in conducting its review of cases decided under the residual exception, and in discussions with experts at a Conference at Pepperdine Law School, the Advisory Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems that are addressed by the proposed amendment to Rule 807 are as follows:

- The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803 and yet both sets are considered possible points of comparison for any statement offered as residual hearsay. And the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to "equivalence" review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. "Equivalence" thus does little or nothing to guide a court's discretion. Given the difficulty and disutility of the "equivalence" standard, the Committee determined that a better, more user-friendly approach is simply to require the judge to find whether the statement is supported by sufficient guarantees of trustworthiness.

- Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Committee determined that an amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, because corroboration provides a guarantee of trustworthiness. Thus, trustworthiness can best be defined in the rule as requiring an evaluation of two factors: 1) circumstantial guarantees surrounding the making of the statement, and 2) corroborating evidence. Adding a requirement that the

court consider corroboration --- or the lack thereof --- is an improvement to the rule independent of any decision to expand the residual exception.

● The requirements in Rule 807 that the residual hearsay must be proof of a "material fact" and that admission of residual hearsay be in "the interests of justice" and consistent with the "purpose of the rules" have not served any good purpose. The inclusion of the language "material fact" is in conflict with the drafters' avoidance of the term "materiality" in Rule 403 --- and that avoidance was well-reasoned, because the term "material" is used in so many different contexts. The courts have essentially held that "material" means "relevant" --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice and the purpose of the rules because that guidance is already provided by Rule 102. Moreover, the interests of justice language could be --- and has been --- used as an invitation to judicial discretion to admit or exclude hearsay under Rule 807 simply because it leads to a "just" result. The Committee has determined that the rule will be improved by deleting the references to "material fact" and "interest of justice" and "purpose of the rules."

● The current notice requirement is problematic in at least four respects:

1) Most importantly, there is no provision for allowing untimely notice upon a showing of good cause. This absence has led to a conflict in the courts on whether a court even has the power to excuse notice no matter how good the cause. Other notice provisions in the Evidence Rules (e.g., Rule 404(b)) contain good cause provisions, so adding such a provision to Rule 807 will promote uniformity.

2) The requirement that the proponent disclose "particulars" has led to unproductive arguments and unnecessary case law.

3) There is no requirement that notice be in writing, which leads to disputes about whether notice was ever provided.

4) The requirement that the proponent disclose the declarant's address is nonsensical when the witness is unavailable --- which is usually the situation in which residual hearsay is offered.

The proposed amendments to the notice requirements solve all these problems.

Finally, it is important to note that the Committee has retained the requirement from the original rule that the proponent must establish that the proffered hearsay is more probative than any other evidence that the proponent can reasonably obtain to prove the point. Retaining the "more probative" requirement indicates that there is no intent to expand the residual exception, only to improve it. The "more probative" requirement ensures that the rule will only be invoked when it is necessary to do so.

Public Comment

The Committee received nine public comments on the Rule 807 proposal. It carefully considered those comments, most of which were positive, and made some changes as a result of the comments --- mainly style suggestions. The Committee also implemented some of the suggestions made by members of the Standing Committee at its June, 2017 meeting --- including adding a reference to Rule 104(a), and a reference to the Confrontation Clause, to the Committee Note. Finally, the Committee addressed a dispute in the courts about whether the residual exception could be used when the hearsay is a "near-miss" of a standard exception. A change to the text and Committee Note as issued for public comment provides that a statement that nearly misses a standard exception can be admissible under Rule 807 so long as the court finds that there are sufficient guarantees of trustworthiness.

The Committee unanimously recommends that the Standing Committee approve the proposed amendment to Rule 807 and the Committee Note, for referral to the Judicial Conference.

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