



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

September 28, 2016

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: James C. Duff *James C. Duff*

RE: Transmittal of Proposed Amendments to the Federal Rules of
Bankruptcy Procedure

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 1001, 1006(b), and 1015(b) of the Federal Rules of Bankruptcy Procedure, which were approved by the Judicial Conference at its September 2016 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a "clean" copy of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2016 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) excerpts from the May 2016 and the December 2015 Reports of the Advisory Committee on Bankruptcy Rules.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1001. Scope of Rules and Forms; Short Title

The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding.

Committee Note

The last sentence of the rule is amended to incorporate the changes to Rule 1 F.R.Civ.P. made in 1993 and 2015.

The word “administered” is added to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that bankruptcy cases and the proceedings within them are resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

The addition of the phrase “employed by the court and the parties” emphasizes that parties share in the duty of using the rules to secure the just, speedy, and inexpensive determination of every case and proceeding. Achievement of this goal depends upon cooperative and proportional use of procedure by lawyers and parties.

This amendment does not create a new or independent source of sanctions. Nor does it abridge the scope of any other of these rules.

Rule 1006. Filing Fee

* * * * *

(b) PAYMENT OF FILING FEE IN
INSTALLMENTS.

(1) *Application to Pay Filing Fee in Installments.* A voluntary petition by an individual shall be accepted for filing, regardless of whether any portion of the filing fee is paid, if accompanied by the debtor's signed application, prepared as prescribed by the appropriate Official Form, stating that the debtor is unable to pay the filing fee except in installments.

* * * * *

Committee Note

Subdivision (b)(1) is amended to clarify that an individual debtor's voluntary petition, accompanied by an application to pay the filing fee in installments, must be accepted for filing, even if the court requires the initial installment to be paid at the time the petition is filed and the debtor fails to make that payment. Because the debtor's bankruptcy case is commenced upon the filing of the petition, dismissal of the case due to the debtor's failure to

4 FEDERAL RULES OF BANKRUPTCY PROCEDURE

make the initial or a subsequent installment payment is governed by Rule 1017(b)(1).

Rule 1015. Consolidation or Joint Administration of Cases Pending in Same Court

* * * * *

(b) CASES INVOLVING TWO OR MORE RELATED DEBTORS. If a joint petition or two or more petitions are pending in the same court by or against (1) spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of spouses shall, if one spouse has elected the exemptions under § 522(b)(2) of the Code and the other has elected the exemptions under § 522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the

6 FEDERAL RULES OF BANKRUPTCY PROCEDURE

debtors that unless they elect the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by § 522(b)(2).

* * * * *

Committee Note

Subdivision (b) is amended to replace “a husband and wife” with “spouses” in light of the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE***

1 **Rule 1001. Scope of Rules and Forms; Short Title**

2 The Bankruptcy Rules and Forms govern procedure
3 in cases under title 11 of the United States Code. The rules
4 shall be cited as the Federal Rules of Bankruptcy Procedure
5 and the forms as the Official Bankruptcy Forms. These
6 rules shall be construed, administered, and employed by the
7 court and the parties to secure the just, speedy, and
8 inexpensive determination of every case and proceeding.

Committee Note

 The last sentence of the rule is amended to incorporate the changes to Rule 1 F.R.Civ.P. made in 1993 and 2015.

 The word “administered” is added to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that bankruptcy cases and the proceedings within them are resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

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

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

The addition of the phrase “employed by the court and the parties” emphasizes that parties share in the duty of using the rules to secure the just, speedy, and inexpensive determination of every case and proceeding. Achievement of this goal depends upon cooperative and proportional use of procedure by lawyers and parties.

This amendment does not create a new or independent source of sanctions. Nor does it abridge the scope of any other of these rules.

1 **Rule 1006. Filing Fee**

2 * * * * *

3 (b) PAYMENT OF FILING FEE IN
4 INSTALLMENTS.

5 (1) *Application to Pay Filing Fee in*
6 *Installments.* A voluntary petition by an individual
7 shall be accepted for filing, regardless of whether any
8 portion of the filing fee is paid, if accompanied by the
9 debtor's signed application, prepared as prescribed by
10 the appropriate Official Form, stating that the debtor
11 is unable to pay the filing fee except in installments.

12 * * * * *

Committee Note

Subdivision (b)(1) is amended to clarify that an individual debtor's voluntary petition, accompanied by an application to pay the filing fee in installments, must be accepted for filing, even if the court requires the initial installment to be paid at the time the petition is filed and the debtor fails to make that payment. Because the debtor's bankruptcy case is commenced upon the filing of the petition, dismissal of the case due to the debtor's failure to

4 FEDERAL RULES OF BANKRUPTCY PROCEDURE

make the initial or a subsequent installment payment is governed by Rule 1017(b)(1).

1 **Rule 1015. Consolidation or Joint Administration of**
2 **Cases Pending in Same Court**

3 * * * * *

4 (b) CASES INVOLVING TWO OR MORE
5 RELATED DEBTORS. If a joint petition or two or more
6 petitions are pending in the same court by or against (1) a
7 ~~husband and wife~~spouses, or (2) a partnership and one or
8 more of its general partners, or (3) two or more general
9 partners, or (4) a debtor and an affiliate, the court may
10 order a joint administration of the estates. Prior to entering
11 an order the court shall give consideration to protecting
12 creditors of different estates against potential conflicts of
13 interest. An order directing joint administration of
14 individual cases of a ~~husband and wife~~spouses shall, if one
15 spouse has elected the exemptions under § 522(b)(2) of the
16 Code and the other has elected the exemptions under
17 § 522(b)(3), fix a reasonable time within which either may
18 amend the election so that both shall have elected the same

6 FEDERAL RULES OF BANKRUPTCY PROCEDURE

19 exemptions. The order shall notify the debtors that unless
20 they elect the same exemptions within the time fixed by the
21 court, they will be deemed to have elected the exemptions
22 provided by § 522(b)(2).

23 * * * * *

Committee Note

Subdivision (b) is amended to replace “a husband and wife” with “spouses” in light of the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

**EXCERPT FROM THE SEPTEMBER 2016
REPORT OF THE JUDICIAL CONFERENCE**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules**Recommended for Approval and Transmission***

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1001, 1006(b), and 1015(b)*****with a recommendation that they be approved and transmitted to the Judicial Conference.

The proposed amendments to Rules 1001 and 1006(b) were circulated to the bench, bar, and public for comment in August 2015. Because of the limited and conforming nature of the proposed amendments to Rule 1015(b)*****[it is] forwarded for approval without publication.

Rule 1001

Rule 1001 (Scope of Rules and Forms; Short Title) is the bankruptcy counterpart to Civil Rule 1, and it generally tracks the language of the civil rule. The last sentence of Rule 1001 currently states, “These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding.” This language deviates from Civil Rule 1, which states (as of December 1, 2015): “[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The proposed amendment to Rule 1001 changes the last sentence of the rule to conform to the language of Civil Rule 1.

The Advisory Committee received two comments to the proposed rule amendment. One comment supported the amendment and the other concerned general drafting issues. The Advisory Committee determined that the comments did not warrant any changes and voted unanimously to approve the proposed amendment as published.

Rule 1006(b)

Rule 1006(b) (Filing Fee) governs the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). In evaluating a suggested amendment to the rule, the Advisory Committee became aware that some courts refuse to accept a petition or summarily dismiss a case if an installment payment is not made at the time the case is filed. The Advisory Committee concluded that such a practice is inconsistent with Rules 1006(b)(1) and 1017(b)(1). The latter provision allows for dismissal of a case for the failure to pay any installment of the filing fee only “after a hearing on notice to the debtor and the trustee.”

In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the proposed amendment to Rule 1006(b)(1) requires that an individual debtor’s petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments—even if a required initial installment payment is not made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

The Advisory Committee received two comments to the proposed rule amendment. One comment supported the amendment and the other concerned general drafting issues. The

Advisory Committee determined that the comments did not warrant any changes and voted unanimously to approve the proposed amendment as published.

Rule 1015(b)

Rule 1015(b) (Cases Involving Two or More Related Debtors) provides for the joint administration of bankruptcy cases in which the debtors are closely related. Among the debtors covered by the rule are “a husband and wife.” The provision also implements a statutory requirement that a husband and wife with jointly administered cases choose the same exemption scheme—either federal bankruptcy exemptions, if permitted, or state exemptions.

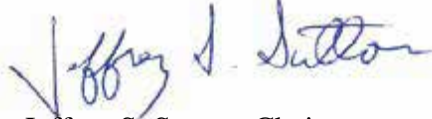
After the decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which held § 3 of the Defense of Marriage Act unconstitutional, the Advisory Committee received a suggestion that Rule 1015(b) be amended to substitute the word “spouses” for “husband and wife” in order to include joint bankruptcy cases of same-sex couples. Two years later, the Court decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which held that the right to marry is a fundamental right under the Fourteenth Amendment and that same-sex couples may not be deprived of that right. *Id.* at 2599. The Court further held in *Obergefell* that the Equal Protection Clause prevents states from denying same-sex couples the benefits of civil marriage on the same terms as opposite-sex couples. *Id.* at 2604.

In light of the holdings and reasoning in *Windsor* and *Obergefell*, the Advisory Committee recommended replacing both instances of “husband and wife” with “spouses” in Rule 1015(b). Because it viewed the proposed changes as conforming amendments, the Advisory Committee voted unanimously to recommend approval without publication for public comment.

Recommendation: That the Judicial Conference:

- a. Approve the proposed amendments to Bankruptcy Rules 1001, 1006(b), and 1015(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 law;

Respectfully submitted,

A handwritten signature in blue ink that reads "Jeffrey S. Sutton". The signature is written in a cursive style with a large initial "J" and "S".

Jeffrey S. Sutton, Chair

Brent E. Dickson
Roy T. Englert, Jr.
Gregory G. Garre
Daniel C. Girard
Neil M. Gorsuch
Susan P. Graber
William K. Kelley

Patrick J. Schiltz
Amy J. St. Eve
Larry D. Thompson
Richard C. Wesley
Sally Quillian Yates
Jack Zouhary

Excerpt from the May 10, 2016 Report of the Advisory Committee on Bankruptcy Rules

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 10, 2016

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 31, 2016, in Denver, Colorado.

* * * * *

The Committee now seeks the Standing Committee's final approval of two rule amendments that were published in August 2015, as well as retroactive approval of technical amendments that have been made to several official forms.

* * * * *

Part II of this report discusses the action items, grouped as follows:

A. Items for Final Approval

Excerpt from the May 10, 2016 Report of the Advisory Committee on Bankruptcy Rules

- (A1) Rules published for comment in August 2015—
- Rules 1001;
 - Rule 1006(b); and

* * * * *

II. Action Items

A. Items for Final Approval

(A1) *Rules published for comment in August 2015.*

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 2015 and are discussed below. Bankruptcy Appendix A includes the rules that are in this group.

Action Item 1. Rule 1001 (Scope of Rules and Forms; Short Title). Rule 1001 is the bankruptcy counterpart to Civil Rule 1. Rather than incorporating Civil Rule 1 by reference, Rule 1001 generally tracks the language of the civil rule. The last sentence of Rule 1001 currently states, “These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding.” This language deviates from Civil Rule 1, which states (as of December 1, 2015), “[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The proposed amendment to Rule 1001 changes the last sentence of the rule to conform to the language of Civil Rule 1.

The Committee received two comments to the proposed rule amendment and, after due deliberation, determined that the comments did not warrant any action. Accordingly, the Committee voted unanimously to approve the proposed amendment as published.

Action Item 2. Rule 1006(b) (Filing Fee). Rule 1006(b) governs the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). The Committee received and over the course of several years considered a potential amendment to the rule with respect to courts requiring a debtor who applies to pay the filing fee in installments to make an initial installment payment with the petition and the application. The Committee requested the Federal Judicial Center (“FJC”) to conduct an empirical study on court practices regarding initial installment payments at the time of filing and whether there is an association between such a requirement and the rate of fee waiver applications. Although based on the FJC study and other factors, the Committee ultimately concluded that there was no need to clarify that courts may require an initial installment payment with the petition and application, the FJC study raised a different issue. Because Rule 1006(b)(1) requires the bankruptcy clerk to accept the petition, resulting in the commencement of a bankruptcy case, the practice of some courts of refusing to accept a petition or summarily dismissing a case because of the failure to make an installment payment at the time of filing is inconsistent with Rules 1006(b)(1) and 1017(b)(1). The latter provision allows the court, only “after a hearing on notice to the debtor and the trustee,” to dismiss a case for the failure to pay any installment of the filing fee.

Excerpt from the May 10, 2016 Report of the Advisory Committee on Bankruptcy Rules

In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the Committee proposed, and the Standing Committee approved, publication of an amendment to Rule 1006(b)(1) clarifying that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments and even if a required initial installment payment is not made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

The Committee received two comments to the proposed rule amendment and, after due deliberation, determined that the comments did not warrant any action. Accordingly, the Committee voted unanimously to approve the proposed amendment as published.

* * * * *

Excerpt from the December 10, 2015 Report of the Advisory Committee on Bankruptcy Rules

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

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CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

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

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

DATE: December 10, 2015

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on October 1, 2015.

* * * * *

At the meeting the Committee approved conforming amendments to one rule and minor amendments to three official forms. It seeks the Standing Committee's approval of these amendments without publication.

* * * * *

II. Action Items

A. Items for Final Approval without Publication

Excerpt from the December 10, 2015 Report of the Advisory Committee on Bankruptcy Rules

The Committee requests that the Standing Committee approve the following rule and form amendments without publishing them for public comment due to their conforming or limited nature. The Committee recommends that the amended forms take effect on December 1, 2016. The rule and forms in this group appear in Appendix A.

Action Item 1. Rule 1015(b) (Cases Involving Two or More Related Debtors).

Rule 1015(b) provides for the joint administration of bankruptcy cases in which the debtors are closely related. Among the debtors covered by the rule are “a husband and wife.” The provision also implements a statutory requirement that a husband and wife with jointly administered cases choose the same exemption scheme—either federal bankruptcy exemptions, if permitted, or state exemptions.

After the decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which held § 3 of the Defense of Marriage Act (“DOMA”) unconstitutional, the Committee received a suggestion that Rule 1015(b) be amended to substitute the word “spouses” for “husband and wife” in order to include joint bankruptcy cases of same-sex couples. The Committee considered the suggestion at its spring 2014 meeting. It concluded that the first reference to “husband and wife” in Rule 1015(b) falls squarely within the holding of *Windsor*. Section 302 of the Bankruptcy Code, unlike the language of Rule 1015(b), authorizes the filing of a joint petition under a chapter by “an individual that may be a debtor under such chapter and such individual’s spouse.” The rule’s use of the more restrictive term “husband and wife” could be justified only by reliance on § 3 of DOMA, which amended the Dictionary Act to provide that “the word ‘spouse’ refers only to a person of the opposite sex who is a husband or wife.” 1 U.S.C. § 7. *Windsor*’s invalidation of the DOMA provision removed support for the rule’s deviation from the statutory language.

The other reference to “husband and wife” in Rule 1015(b), however, is consistent with the statutory language. The rule implements § 522(b)(1) of the Code, which imposes a restriction on the choice of exemptions in cases in which the debtors are a “husband and wife.” While some of the Court’s reasoning in *Windsor* could be read to suggest that same-sex married couples in bankruptcy should not have a greater choice of exemptions than husbands and wives have, the decision is not directly on point. The Committee voted at the spring 2014 meeting to propose the substitution of “spouses” for both references to “husband and wife” in Rule 1015(b), but to await further clarification of the law on same-sex marriages before presenting the amendment to the Standing Committee.

At this fall’s meeting, the Committee revisited the issue in light of the decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which held that the right to marry is a fundamental right under the Fourteenth Amendment and that same-sex couples may not be deprived of that right. *Id.* at 2599. The Court further held that the Equal Protection Clause prevents states from denying same-sex couples the benefits of civil marriage on the same terms as opposite-sex couples. *Id.* at 2604. The Committee concluded that the decision supported the proposed amendments to Rule 1015(b) to eliminate language suggesting that only opposite-sex married couples may file a joint bankruptcy petition under § 303 and that same-sex married couples are subject to different rules regarding their choice of exemptions. Because the Committee viewed

Excerpt from the December 10, 2015 Report of the Advisory Committee on Bankruptcy Rules

the proposed changes as conforming amendments, it voted unanimously to seek approval of them without publication for public comment.

* * * * *



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

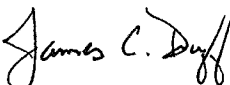
THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

September 28, 2016

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: James C. Duff 

RE: Transmittal of Proposed Amendments to the Federal Rules of
Evidence

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 803(16) and 902 of the Federal Rules of Evidence, which were approved by the Judicial Conference at its September 2016 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a “clean” copy of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2016 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2016 Report of the Advisory Committee on Evidence Rules.

Attachments

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE**

**Rule 803. Exceptions to the Rule Against Hearsay—
Regardless of Whether the Declarant Is
Available as a Witness**

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * * * *

(16) *Statements in Ancient Documents.* A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

* * * * *

Committee Note

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and

growth of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases—such as cases involving latent diseases and environmental damage—parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability—which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20-year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of

authenticating an old document under Rule 901(b)(8)—or under any ground available for any other document—remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule. *See* Committee Note to Rule 901(b)(8) (“Any time period selected is bound to be arbitrary.”).

Under the amendment, a document is “prepared” when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that—the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * * * *

(13) *Certified Records Generated by an Electronic*

Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and

inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this Rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * * * *

- (14) *Certified Data Copied from an Electronic Device, Storage Medium, or File.* Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than

through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by “hash value.” A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this Rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic

technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE***

1 **Rule 803. Exceptions to the Rule Against Hearsay—**
2 **Regardless of Whether the Declarant Is**
3 **Available as a Witness**

4 The following are not excluded by the rule against
5 hearsay, regardless of whether the declarant is available as
6 a witness:

7 * * * * *

8 (16) *Statements in Ancient Documents.* A
9 statement in a document ~~that is at least 20 years~~
10 ~~old~~that was prepared before January 1, 1998,
11 and whose authenticity is established.

12 * * * * *

Committee Note

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has

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

determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases—such as cases involving latent diseases and environmental damage—parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability—which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20-year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8)—or under any ground available for any other document—remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule. *See* Committee Note to Rule 901(b)(8) (“Any time period selected is bound to be arbitrary.”).

Under the amendment, a document is “prepared” when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that—the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of

the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

1 **Rule 902. Evidence That Is Self-Authenticating**

2 The following items of evidence are self-
3 authenticating; they require no extrinsic evidence of
4 authenticity in order to be admitted:

5 * * * * *

6 **(13) Certified Records Generated by an Electronic**

7 **Process or System.** A record generated by an
8 electronic process or system that produces an
9 accurate result, as shown by a certification of a
10 qualified person that complies with the
11 certification requirements of Rule 902(11) or
12 (12). The proponent must also meet the notice
13 requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and

inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this Rule to prove the requirements of Rule 803(6). Rule 902(13) is solely

limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

1 **Rule 902. Evidence That Is Self-Authenticating**

2 The following items of evidence are self-
3 authenticating; they require no extrinsic evidence of
4 authenticity in order to be admitted:

5 * * * * *

6 **(14) Certified Data Copied from an Electronic**

7 **Device, Storage Medium, or File.** Data copied
8 from an electronic device, storage medium, or
9 file, if authenticated by a process of digital
10 identification, as shown by a certification of a
11 qualified person that complies with the
12 certification requirements of Rule 902(11) or
13 (12). The proponent also must meet the notice
14 requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than

through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by “hash value.” A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this Rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or

process at issue, including possibly retaining a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

**EXCERPT FROM THE SEPTEMBER 2016
REPORT OF THE JUDICIAL CONFERENCE**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 803(16) and 902, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2015.

Rule 803(16)

Evidence Rule 803(16) provides a hearsay exception for “ancient documents”; that is, if a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. Over the years, the rationale for the exception has been criticized because it assumes that just because the document itself is authentic, all of the statements in the document are reliable enough to be admissible despite the fact they are hearsay. The Advisory Committee has long concurred with this criticism, but has not felt the need to address it because the exception is used infrequently. However, because electronically stored information can be retained for more than 20 years, a strong likelihood exists that the ancient documents exception will be used much more frequently going forward. Accordingly, the Advisory Committee determined that the time had come to address the ancient documents exception.

The decision to address the exception was based on a concern that, with its increased use, the exception could become a receptacle for *unreliable* hearsay—that is, if the hearsay is in fact

reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to electronically stored information, for the very reason that there may well be a great deal of *reliable* electronic data available to prove any dispute of fact.

The proposed amendment that was issued for public comment would have abrogated the ancient documents exception. While some commentators supported elimination of the exception, most did not. Lawyers in several specific areas—*e.g.*, product liability litigation involving latent diseases, land-use disputes, environmental clean-up disputes—said they had come to rely on the exception. After considering several alternatives, the Advisory Committee decided to amend the rule to limit the ancient documents exception to documents prepared before 1998. The year was chosen for two reasons: (1) going backward, it addressed the reliance-interest concerns of many commentators; and (2) going forward, reliable electronically stored information is likely to be preserved that can be used to prove the facts that are currently proved by scarce hardcopy. If the electronically stored information is generated by a business, then it is likely to be easier to find a qualified witness who is familiar with the electronic recordkeeping than it is under current practice to find a records custodian familiar with hardcopy practices from the 1960's and earlier. Moreover, the Committee Note emphasizes that the residual exception remains available to qualify old documents that are reliable, and makes clear the expectation that the residual exception not only can, but *should*, be used by courts to admit reliable documents prepared after January 1, 1998, that would have previously been offered under the ancient documents exception. The Advisory Committee unanimously approved the modification.

Rule 902

The proposed amendments to Rule 902 (Evidence That Is Self-Authenticating) add two new subdivisions that would allow certain electronic evidence to be authenticated by a certification of a qualified person (in lieu of that person's testimony at trial). New Rule 902(13) would allow self-authentication of machine-generated information (such as a web page) upon a submission of a certificate prepared by a qualified person. New Rule 902(14) would provide a similar certification procedure for a copy of data taken from an electronic device, media, or file. The proposed new subdivisions are analogous to Rule 902(11) and 902(12), which permit a foundation witness to establish the authenticity and admissibility of business records by way of certification, with the burden of challenging authenticity on the opponent of the evidence. The purpose of the two new subdivisions is to make authentication easier for certain kinds of electronic evidence that, under current law, would likely be authenticated under Rule 901 but only after calling a witness to testify to authenticity. The Advisory Committee has found that electronic evidence is rarely the subject of a legitimate authenticity dispute yet, under current law, a proponent must still go to the expense of producing authenticating witnesses for trial. The amendments would alleviate the unnecessary costs of this production by allowing the qualifying witness to establish authenticity by way of certification.

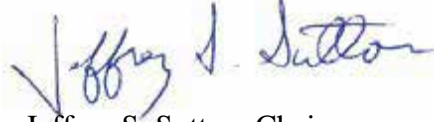
Commentators were generally supportive of the proposal. Following the public comment period, minor revisions to the Committee Notes were made in an effort to increase clarity and emphasize the importance of reasonable notice.

The Standing Committee voted unanimously to support both recommendations of the Advisory Committee on Evidence Rules.

Recommendation: That the Judicial Conference approve the proposed amendments to Evidence Rules 803(16) and 902, 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.

Respectfully submitted,

A handwritten signature in blue ink that reads "Jeffrey S. Sutton". The signature is written in a cursive style with a large initial "J" and "S".

Jeffrey S. Sutton, Chair

Brent E. Dickson
Roy T. Englert, Jr.
Gregory G. Garre
Daniel C. Girard
Neil M. Gorsuch
Susan P. Graber
William K. Kelley

Patrick J. Schiltz
Amy J. St. Eve
Larry D. Thompson
Richard C. Wesley
Sally Quillian Yates
Jack Zouhary

Excerpt from the May 7, 2016 Report of the Advisory Committee on Evidence Rules

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. William K. Sessions, III, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 7, 2016

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on April 29, 2016 in Alexandria, Virginia.

The Committee seeks final approval of two proposed amendments for submission to the Judicial Conference:

1. Amendment to Rule 803(16), the ancient documents exception to the hearsay rule, to limit its application to documents prepared before 1998; and
2. Amendment to Rule 902 to add two subdivisions that would allow authentication of certain electronic evidence by way of certification by a qualified person.

* * * * *

II. Action Items

A. Amendment Limiting the Coverage of Rule 803(16)

Rule 803(16) provides a hearsay exception for “ancient documents.” If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. The Committee has considered whether Rule 803(16) should be eliminated or amended because of the development of electronically stored information. The rationale for the exception has always been questionable, because a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Committee concluded that the exception has been tolerated because it has been used relatively infrequently, and usually because there is no other evidence on point. But because electronically stored information can be retained for more than 20 years, there is a strong likelihood that the ancient documents exception will be used much more frequently in the coming years. And it could be used as a receptacle for unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a great deal of *reliable* electronic data available to prove any dispute of fact.

The proposed amendment that was issued for public comment would have eliminated the ancient documents exception. The public comment on that proposed elimination was largely negative, however. Most of the comments asserted that without the ancient documents exception, important documents in certain specific types of litigation would no longer be admissible—or would be admissible only through expending resources that are currently not necessary under Rule 803(16). Examples of litigation cited by the public comment include cases involving latent diseases; disputes over the existence of insurance; suits against churches alleged to condone sexual abuse by their clergy; cases involving environmental cleanups; and title disputes. Many of the comments concluded that the business records exception and the residual exception are not workable alternatives for ancient documents. The comments contended that the business records exception requires a foundation witness that may be hard to find, and that the residual exception is supposed to be narrowly construed. Moreover, both these exceptions would require a statement-by-statement analysis, which is not necessary under Rule 803(16), thus leading to more costs for proponents. Much of the comment was about the amendment’s leading to extra costs of qualifying old documents.

In light of the public comment, the Committee abandoned the proposal to eliminate the ancient documents exception. But it also rejected the option of doing nothing. The Committee strongly believes that the ESI problem as related to Rule 803(16) is real. Because ESI can be easily and permanently stored, there is a substantial risk that the terabytes of emails, web pages, and texts generated in the last 20 or so years could inundate the courts by way of the ancient documents exception. Computer storage costs have dropped dramatically—that greatly expands the universe of information that could be potentially offered under the ancient documents exception. Moreover, the presumption of the ancient documents exception was that a hardcopy document kept around for 20 years must have been thought to have some importance; but that presumption is no longer the case with easily stored ESI. The Committee remains convinced that

it is appropriate and necessary to get out ahead of this problem—especially because the use of the ancient documents exception is so difficult to monitor. There are few reported cases about Rule 803(16) because no objection can be made to admitting the content of the document once it has been authenticated—essentially there is nothing to report. So tracking reported cases would not be a good way to determine whether ESI is being offered under the exception. Finally, the Committee adheres to its position that Rule 803(16) is simply a flawed rule; it is based on the fallacy that because a document is old and authentic, its contents are reliable. Therefore something must be done, at least, to limit the exception as to ESI.

The Committee considered a number of alternatives for amending Rule 803(16) to limit its impact. The alternatives of adding reliability requirements, or necessity requirements, were rejected. These alternatives were likely to lead to the increased costs of qualification of old documents, and extensive motion practice, that were opposed in the public comment. Ultimately, the Committee returned to where it started—the ESI problem. The Committee determined that the best result was to limit the ancient documents exception to documents prepared before 1998. That amendment will have no effect on any of the cases raised in the public comments, because the concerns were about cases involving records prepared well before 1998. And 1998 was found to be a fair date for addressing the rise of ESI. The Committee recognizes, of course, that any cutoff date will have a degree of arbitrariness, but it also notes that the ancient documents exception itself set an arbitrary time period for its applicability.

The Committee has considered the possibility that in the future, cases involving latent diseases, CERCLA, etc. will arise. But the Committee has concluded that in such future cases, the ancient documents exception is unlikely to be necessary because, going forward from 1998, there is likely to be preserved, reliable ESI that can be used to prove the facts that are currently proved by scarce hardcopy. If the ESI is generated by a business, then it is likely to be easier to find a qualified witness who is familiar with the electronic recordkeeping than it is under current practice to find a records custodian familiar with hardcopy practices from the 1960's and earlier. Moreover, the Committee has emphasized in the Committee Note that the residual exception remains available to qualify old documents that are reliable; the Note states the Committee's expectation that the residual exception not only can, but *should* be used by courts to admit reliable documents prepared after January 1, 1998 that would have previously been offered under the ancient documents exception.

*The Committee unanimously recommends that the Standing Committee approve the * * * * * amendment to Rule 803(16), and the Committee Note, for submission to the Judicial Conference[.]*

* * * * *

B. Proposed Amendment to Evidence Rule 902

At its Spring 2015 meeting, the Committee unanimously approved a proposal to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification

procedure for a copy of data taken from an electronic device, medium or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee has concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience—and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under those rules a business record is authenticated by a certificate, but the opponent is given “a fair opportunity” to challenge both the certificate and the underlying record. The proposals for new Rules 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes regarding the described electronic evidence.

Applications of Rules 902(13) and (14)

At the Standing Committee meeting in Spring 2015, Committee members inquired as to what kind of information might be authenticated under these new provisions. The Committee (with the substantial assistance of John Haried, who initially proposed these amendments) has prepared the following examples to illustrate how Rules 902(13) and (14) may be used:

Examples of how Rule 902(13) can be used:

1. Proving that a USB device was connected to (i.e., plugged into) a computer: In a hypothetical civil or criminal case in Chicago, a disputed issue is whether Devera Hall used her computer to access files stored on a USB thumb drive owned by a co-worker. Ms. Hall’s computer uses the Windows operating system, which automatically records information about every USB device connected to her computer in a database known as the “Windows registry.” The Windows registry database is maintained on the computer by the Windows operating system in order to facilitate the computer’s operations. A forensic technician, located in Dallas, Texas, has provided a printout from the Windows registry that indicates that a USB thumb drive, identified by manufacturer, model, and serial number, was last connected to Ms. Hall’s computer at a specific date and time.

Without Rule 902(13): Without Rule 902(13), the proponent of the evidence would need to call the forensic technician who obtained the printout as a witness, in order to establish the authenticity of the evidence. During his or her testimony, the forensic technician would typically be asked to testify about his or her background and qualifications; the process by which digital forensic examinations are conducted in general; the steps taken by the forensic technician during the examination of Ms. Hall’s

computer in particular; the process by which the Windows operating system maintains information in the Windows registry, including information about USB devices connected to the computer; and the steps taken by the forensic examiner to examine the Windows registry and to produce the printout identifying the USB device.

Impact of Rule 902(13): With Rule 902(13), the proponent of the evidence could obtain a written certification from the forensic technician, stating that the Windows operating system regularly records information in the Windows registry about USB devices connected to a computer; that the process by which such information is recorded produces an accurate result; and that the printout accurately reflected information stored in the Windows registry of Ms. Hall's computer. The proponent would be required to provide reasonable written notice of its intent to offer the printout as an exhibit and to make the written certification and proposed exhibit available for inspection. If the opposing party did not dispute the accuracy or reliability of the process that produced the exhibit, the proponent would not need to call the forensic technician as a witness to establish the authenticity of the exhibit. (There are many other examples of the same types of machine-generated information on computers, for example, internet browser histories and wifi access logs.)

2. Proving that a server was used to connect to a particular webpage: Hypothetically, a malicious hacker executed a denial-of-service attack against Acme's website. Acme's server maintained an Internet Information Services (IIS) log that automatically records information about every internet connection routed to the web server to view a web page, including the IP address, webpage, user agent string and what was requested from the website. The IIS logs reflected repeated access to Acme's website from an IP address known to be used by the hacker. The proponent wants to introduce the IIS log to prove that the hacker's IP address was an instrument of the attack.

Without Rule 902(13): The proponent would have to call a website expert to testify about the mechanics of the server's operating system; his search of the IIS log; how the IIS log works; and that the exhibit is an accurate record of the IIS log.

With Rule 902(13): The proponent would obtain the website expert's certification of the facts establishing authenticity of the exhibit and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the registry key, then the proponent would not need to call the website expert to establish authenticity.

3. Proving that a person was or was not near the scene of an event: Hypothetically, Robert Jackson is a defendant in a civil (or criminal) action alleging that he was the driver in a hit-and-run collision with a U.S. Postal Service mail carrier in Atlanta at 2:15 p.m. on March 6, 2015. Mr. Jackson owns an iPhone, which has software that records machine-generated dates, times, and GPS coordinates of each picture he takes with his iPhone. Mr. Jackson's iPhone contains two pictures of his home in an Atlanta suburb at about 1 p.m. on March 6. He wants to introduce into evidence the photos together with the metadata, including

the date, time, and GPS coordinates, recovered forensically from his iPhone to corroborate his alibi that he was at home several miles from the scene at the time of the collision.

Without Rule 902(13): The proponent would have to call the forensic technician to testify about Mr. Jackson's iPhone's operating system; his search of the phone; how the metadata was created and stored with each photograph; and that the exhibit is an accurate record of the photographs.

With Rule 902(13): The proponent would obtain the forensic technician's certification of the facts establishing authenticity of the exhibits and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone's logs, then the proponent would not have to call the technician to establish authenticity.

4. Proving association and activity between alleged co-conspirators: Hypothetically, Ian Nichols is charged with conspiracy to commit the robbery of First National Bank that occurred in San Diego on January 30, 2015. Two robbers drove away in a silver Ford Taurus. The alleged co-conspirator was Dain Miller. Dain was arrested on an outstanding warrant on February 1, 2015, and in his pocket was his Samsung Galaxy phone. The Samsung phone's software automatically maintains a log of text messages that includes the text content, date, time, and number of the other phone involved. Pursuant to a warrant, forensic technicians examined Dain's phone and located four text messages to Ian's phone from January 29: "Meet my house @9"; "Is Taurus the Bull out of shop?"; "Sheri says you have some blow"; and "see ya tomorrow." In the separate trial of Ian, the government wants to offer the four text messages to prove the conspiracy.

Without Rule 902(13): The proponent would have to call the forensic technician to testify about Dain's phone's operating system; his search of the phone's text message log; how logs are created; and that the exhibit is an accurate record of the iPhone's logs.

With Rule 902(13): The proponent would obtain the forensic technician's certification of the facts establishing authenticity of the exhibit and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone's logs, then the court would make the Rule 104 threshold authenticity finding and admit the exhibits, absent other proper objection.

Hearsay Objection Retained: Under Rule 902(13), the opponent – here, criminal defendant Ian—would retain his hearsay objections to the text messages found on Dain's phone. For example, the judge would evaluate the text "Sheri says you have some blow" under F.R.E. 801(d)(2)(E) to determine whether it was a coconspirator's statement during and in furtherance of a conspiracy, and under F.R.E. 805, to assess the hearsay within hearsay. The court might exclude the text "Sheri says you have some blow" under either rule or both.

Example of how Rule 902(14) can be used

In the armed robbery hypothetical, above, forensic technician Smith made a forensic copy of Dain's Samsung Galaxy phone in the field. Smith verified that the forensic copy was identical to the original phone's text logs using an industry standard methodology (*e.g.*, hash value or other means). Smith gave the copy to forensic technician Jones, who performed his examination at his lab. Jones used the copy to conduct his entire forensic examination so that he would not inadvertently alter the data on the phone. Jones found the text messages. The government wants to offer the copy into evidence as part of the basis of Jones's testimony about the text messages he found.

Without Rule 902(14): The government would have to call two witnesses. First, forensic technician Smith would need to testify about making the forensic copy of information from Dain's phone, and about the methodology that he used to verify that the copy was an exact copy of information inside the phone. Second, the government would have to call Jones to testify about his examination.

With Rule 902(14): The proponent would obtain Smith's certification of the facts establishing how he copied the phone's information and then verified the copy was true and accurate. Before trial the government would provide the certification and exhibit to the opposing party—here defendant Ian—with reasonable notice that it intends to offer the exhibit at trial. If Ian's attorney does not timely dispute the reliability of the process that produced the Samsung Galaxy's text message logs, then the proponent would only call Jones.

The Committee has carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a criminal defendant. The Committee is satisfied that no constitutional issue is presented, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322 (2009), that even when a certificate is prepared for litigation, the admission of that certificate is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts have uniformly held that certificates prepared under Rule 902(11) do not violate the right to confrontation; those courts have relied on the Supreme Court's statement in *Melendez-Diaz*. The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation—a certification cannot render constitutional an underlying report that itself violates the Confrontation Clause. There is of course no intention or implication from the amendment that a certification could somehow be a means of bringing otherwise testimonial reports into court. But the Committee concluded that if the underlying report is not testimonial, the certification of authenticity will not raise a constitutional issue under the current state of the law.

In this regard, the Note approved by the Committee emphasizes that the goal of the amendment is a narrow one: to allow authentication of electronic information that would

otherwise be established by a witness, instead to be established through a certification by that same witness. The Note makes clear that these are authentication-only rules and that the opponent retains all objections to the item other than authenticity --- most importantly that the item is hearsay or that admitting the item would violate a criminal defendant's right to confrontation.

The Committee unanimously recommends that the proposed amendment to Rule 902, adding new subdivisions (13) and (14), and their Committee Notes, be approved by the Standing Committee and submitted to the Judicial Conference.

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