
**COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE**

June 7, 2022

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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AGENDA

1. Opening Business

- A. Welcome and Opening Remarks – Judge John D. Bates, Chair
- B. **ACTION:** The Committee will be asked to approve the minutes of the January 4, 2022 Committee meeting.
- C. Status of Rules Amendments
 - Report on rules adopted by the Supreme Court and transmitted to Congress on April 11, 2022 (potential effective date of December 1, 2022).

2. Joint Committee Business

- A. **ACTION:** The Committee will be asked to recommend the following for final approval:
 - Proposed amendments to Appellate Rules 2 (Suspension of Rules) and 4 (Appeal as of Right—When Taken) (conforming amendment to Emergency Civil Rule 6(b)(2)).
 - New Bankruptcy Rule 9038 (Bankruptcy Rules Emergency).
 - New Civil Rule 87 (Civil Rules Emergency).
 - New Criminal Rule 62 (Criminal Rules Emergency).
- B. **ACTION:** Proposed amendments to add Juneteenth National Independence Day to the list of legal holidays in:
 - Appellate Rule 26 (Computing and Extending Time) and Rule 45 (Clerk’s Duties).
 - Bankruptcy Rule 9006 (Computing and Extending Time; Time for Motion Papers).
 - Civil Rule 6 (Computing and Extending Time; Time for Motion Papers).
 - Criminal Rule 45 (Computing and Extending Time) and Rule 56 (When Court is Open).
- C. Information Items
 - Report on pro se electronic filing project.
 - Electronic filing deadline study (excerpt).

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 7, 2022

AGENDA

3. Report of the Advisory Committee on Appellate Rules – Judge Jay S. Bybee, Chair

- A. **ACTION:** Amendment to add Juneteenth National Independence Day to the list of legal holidays in Rules 26 and 45.
- B. **ACTION:** The Committee will be asked to approve the following for publication for public comment:
 - Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure
- C. Information Items
 - Report on potential amendment to Rule 29 (Brief of an Amicus Curiae) related to the filing of amicus briefs.
 - Report on clarifying the process for challenging the allocation of costs on appeal.
 - Report on potential amendments to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis), in connection with in forma pauperis standards.
 - Report on a new suggestion to identify the amicus or counsel who triggered the striking of an amicus brief.

4. Report of the Advisory Committee on Bankruptcy Rules – Judge Dennis R. Dow, Chair

- A. **ACTION:** The Committee will be asked to recommend the following for final approval:
 - Restyled versions of the 3000 rules series (Part III-Claims; Plans; Distribution to Creditors and Equity Security Holders); the 4000 rules series (Part IV-The Debtor’s Duties and Benefits); the 5000 rules series (Courts and Clerks); and the 6000 rules series (Collecting and Liquidating Property of the Estate).
 - Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer’s Debt Adjustment, and Chapter 13 Individual’s Debt Adjustment Cases).
 - Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal).
 - Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy).
 - Official Form 309E1 (Notice of Chapter 11 Bankruptcy Case (for Individuals or Joint Debtors)).
 - Official Form 309E2 (Notice of Chapter 11 Bankruptcy Case (for Individuals or Joint Debtors under Subchapter V)).
 - Official Form 417A (Notice of Appeal and Statement of Election).
 - Amendment to add Juneteenth National Independence Day to the list of legal holidays in Rule 9006(a)(6)(A).

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- B. **ACTION:** The Committee will be asked to approve the following for publication for public comment:
- Restyled versions of the 7000 rules series (Part VII-Adversary Proceedings); the 8000 rules series (Part VIII-Appeals to District Court or Bankruptcy Appellate Panel); and the 9000 rules series (Part IX-General Provisions).
 - Rule 1007(b)(7) (Lists, Schedules, Statements, and Other Documents; Time Limits) and conforming amendments to Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3), and 9006(c)(2).
 - New Rule 8023.1 (Substitution of Parties).
 - Official Form 410A (Proof of Claim Attachment).
- C. **ACTION:** If the Bankruptcy Threshold Adjustment and Technical Correction Act (the “BTATC Act”), Pub. L. No. __-__, __ Stat. __ becomes law on or before June 7, 2022, the Committee will be asked to approve conforming amendments to Official Forms 101 and 201.
- D. Information Items
- Decision to take no action on suggestion 20-BK-E from CACM for Rule Amendment Establishing Minimum Procedures for Electronic Signatures of Debtors and Others.
 - Report on the work of the subcommittee considering possible amendments to address the timing of post-judgment motions in bankruptcy proceedings initially heard in the district court, and proposed referral to the Appellate Rules Committee.
 - Report on the work of the Consumer Subcommittee regarding the proposed amendments to Rule 3002.1 and the related new official forms that were published for comment in August 2021.
5. **Report of the Advisory Committee on Civil Rules – Judge Robert M. Dow, Jr., Chair**
- A. **ACTION:** The Committee will be asked to recommend the following for final approval:
- Rule 15 (Amended and Supplemental Pleadings).
 - Rule 72 (Magistrate Judges: Pretrial Order).
 - Amendment to add Juneteenth National Independence Day to the list of legal holidays in Rule 6.
- B. Information Items
- Recommendation of no action concerning proposed amendment to Rule 12(a)(4) that was published for comment.
 - Report on the work of the Multidistrict Litigation Subcommittee.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 7, 2022

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- Report on the work of the Discovery Subcommittee.
 - Report on the recommendation from the Rule 9(b) Subcommittee.
 - Report on the work of the joint subcommittee with Appellate Rules examining Rule 42 and the joint subcommittee considering the time when the last day for electronic filing ends.
 - Consideration of suggestions 15-CV-A from Mark Wray and 16-CV-F from then Judge Gorsuch and Judge Graber on Rules 38, 39, and 81(c)(3)(A).
 - Consideration of suggestion 21-CV-O from Judges Furman and Halpern on Rule 41(a)(1).
 - Report on new subcommittee formed to consider suggestion 21-CV-F from Gibson Dunn regarding amicus briefs.
 - Report on matters carried forward on Rules 55, 63, and 73, regarding clerk's duties, successor judges, and consent to assignment of case to a magistrate judge.
6. **Report of the Advisory Committee on Criminal Rules** – Judge Raymond M. Kethledge, Chair
- A. **ACTION:** The Committee will be asked to approve technical amendments to the following:
- Amendment to add Juneteenth National Independence Day to the list of legal holidays in Rules 45 and 56.
 - Amendment to correct cross reference in Rule 16(b)(1)(C)(v).
- B. Information Items
- Consideration of suggestion 21-CR-I from Judge Furman on Rule 49.1 regarding filings made under seal.
 - Consideration of suggestion 21-CR-E from Sai on Rule 49 regarding electronic pro se filing.
 - Consideration of the Department of Justice's comment on Rule 62 regarding extending the grand jury's term.
 - Consideration of suggestion 22-CR-A from the New York City Bar Association on Rule 17 regarding pretrial subpoena authority.
 - Consideration of suggestion 21-CR-K from Judge Reinhart on Rule 5 regarding prosecutorial obligations.
7. **Report of the Advisory Committee on Evidence Rules** – Judge Patrick J. Schiltz, Chair
- A. **ACTION:** The Committee will be asked to recommend the following for final approval:
- Rule 106 (Remainder of or Related Writings or Recorded Statements).

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 7, 2022

AGENDA

- Rule 615 (Excluding Witnesses).
- Rule 702 (Testimony by Expert Witnesses).

B. **ACTION:** The Committee will be asked to approve the following for publication for public comment:

- Rule 611(d) (Illustrative Aids).
- Rule 1006 (Summaries to Prove Content).
- Rule 611(e) (Juror Questions to Witnesses).
- Rule 613 (Witness's Prior Statement).
- Rule 801(d)(2) (An Opposing Party's Statement).
- Rule 804(b)(3) (Hearsay Exceptions; Declarant Unavailable).

8. Other Committee Business

A. Legislative Update.

B. **ACTION:** Strategic Planning – The Committee is asked to refresh and report on its consideration of strategic initiatives – projects, studies, or other efforts that have the potential to make significant contributions to the accomplishment of a strategy or goal in the *Strategic Plan for the Federal Judiciary* – while demonstrating the link between its strategic initiatives and one or more of the strategies and goals identified by the Executive Committee to serve as planning priorities for the next two years. The Committee is also invited to suggest topics for discussion at future long-range planning meetings of Judicial Conference committee chairs.

C. Report on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002.

D. Update on the Judiciary's Response to the COVID-19 Pandemic.

E. Next Meeting – January 4, 2023.

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure (Standing Committee)

Chair

Honorable John D. Bates
United States District Court
Washington, DC

Reporter

Professor Catherine T. Struve
University of Pennsylvania Law School
Philadelphia, PA

Advisory Committee on Appellate Rules

Chair

Honorable Jay S. Bybee
United States Court of Appeals
Las Vegas, NV

Reporter

Professor Edward Hartnett
Seton Hall University School of Law
Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair

Honorable Dennis R. Dow
United States Bankruptcy Court
Kansas City, MO

Reporter

Professor S. Elizabeth Gibson
University of North Carolina at Chapel Hill
Chapel Hill, NC

Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

Advisory Committee on Civil Rules

Chair

Honorable Robert M. Dow, Jr.
United States District Court
Chicago, IL

Reporter

Professor Edward H. Cooper
University of Michigan Law School
Ann Arbor, MI

Associate Reporter

Professor Richard L. Marcus
University of California
Hastings College of Law
San Francisco, CA

RULES COMMITTEES — CHAIRS AND REPORTERS

Advisory Committee on Criminal Rules

Chair

Honorable Raymond M. Kethledge
United States Court of Appeals
Ann Arbor, MI

Reporter

Professor Sara Sun Beale
Duke University School of Law
Durham, NC

Associate Reporter

Professor Nancy J. King
Vanderbilt University Law School
Nashville, TN

Advisory Committee on Evidence Rules

Chair

Honorable Patrick J. Schiltz
United States District Court
Minneapolis, MN

Reporter

Professor Daniel J. Capra
Fordham University School of Law
New York, NY

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Members

Elizabeth J. Cabraser, Esq. Lieff Cabraser Heimann & Bernstein, LLP San Francisco, CA	Honorable Jesse M. Furman United States District Court New York, NY
Robert J. Giuffra, Jr., Esq. Sullivan & Cromwell LLP New York, NY	Honorable Frank M. Hull United States Court of Appeals Atlanta, GA
Honorable William J. Kayatta, Jr. United States Court of Appeals Portland, ME	Peter D. Keisler, Esq. Sidley Austin, LLP Washington DC
Honorable Carolyn B. Kuhl Superior Court of the State of California Los Angeles, CA	Professor Troy A. McKenzie New York University School of Law New York, NY
Honorable Patricia A. Millett United States Court of Appeals Washington, DC	Honorable Lisa O. Monaco Deputy Attorney General (ex officio) United States Department of Justice Washington, DC
Honorable Gene E.K. Pratter United States District Court Philadelphia, PA	Kosta Stojilkovic, Esq. Wilkinson Stekloff LLP Washington, DC
Honorable Jennifer G. Zips United States District Court Tucson, AZ	

Consultants

Professor Daniel R. Coquillette Boston College Law School Newton Centre, MA	Professor Bryan A. Garner LawProse, Inc. Dallas, TX
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**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)**

Consultants (continued)

Professor Joseph Kimble
Thomas M. Cooley Law School
Lansing, MI

Joseph F. Spaniol, Jr., Esq.
Bethesda, MD

RULES COMMITTEE LIAISON MEMBERS

<p>Liaisons for the Advisory Committee on Appellate Rules</p>	<p>Hon. Frank M. Hull <i>(Standing)</i></p> <p>Hon. Bernice B. Donald <i>(Bankruptcy)</i></p>
<p>Liaison for the Advisory Committee on Bankruptcy Rules</p>	<p>Hon. William J. Kayatta, Jr. <i>(Standing)</i></p>
<p>Liaisons for the Advisory Committee on Civil Rules</p>	<p>Peter D. Keisler, Esq. <i>(Standing)</i></p> <p>Hon. Catherine P. McEwen <i>(Bankruptcy)</i></p>
<p>Liaison for the Advisory Committee on Criminal Rules</p>	<p>Hon. Jesse M. Furman <i>(Standing)</i></p>
<p>Liaisons for the Advisory Committee on Evidence Rules</p>	<p>Hon. Robert J. Conrad, Jr. <i>(Criminal)</i></p> <p>Hon. Carolyn B. Kuhl <i>(Standing)</i></p> <p>Hon. Sara Lioi <i>(Civil)</i></p>

**ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Staff**

Administrative Office of the U.S. Courts
Office of General Counsel – Rules Committee Staff
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-300
Washington, DC 20544
Main: 202-502-1820

Allison A. Bruff, Esq.

Counsel
(Criminal)

Brittany Bunting

Administrative Analyst

Bridget M. Healy, Esq.

Counsel
(Appellate, Bankruptcy, Civil, Evidence)

Shelly Cox

Management Analyst

S. Scott Myers, Esq.

Counsel
(Bankruptcy, Civil, Standing)

**FEDERAL JUDICIAL CENTER
Staff**

Hon. John S. Cooke
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 6-100
Washington, DC 20544

Carly E. Giffin, Esq.
Research Associate
(Bankruptcy)

Laural L. Hooper, Esq.
Senior Research Associate
(Criminal)

Marie Leary, Esq.
Senior Research Associate
(Appellate)

Dr. Emery G. Lee
Senior Research Associate
(Civil)

Timothy T. Lau, Esq.
Research Associate
(Evidence)

Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1

TAB 1A

Welcome and Opening Remarks

Item 1A will be an oral report.

TAB 1B

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2022

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) met by videoconference on January 4, 2022. The following members were in attendance:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Judge Jesse M. Furman
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.

Judge Carolyn B. Kuhl
Professor Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

Professor Catherine T. Struve attended as reporter to the Standing Committee.

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Civil Rules –
Judge Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell,
Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

Others providing support to the Standing Committee included: Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; Bridget Healy, Rules Committee Staff Acting Chief Counsel; Julie Wilson and Scott Myers, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff; Burton S. DeWitt, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal

* Prior to the lunch break, Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco. Deputy Attorney General Monaco represented DOJ after the lunch break. Andrew Goldsmith was also present on behalf of the DOJ.

Judicial Center (FJC); Emery G. Lee, Senior Research Associate at the FJC; and Dr. Tim Reagan, Senior Research Associate at the FJC.

OPENING BUSINESS

Judge Bates called the virtual meeting to order and welcomed everyone. He welcomed new Standing Committee members Elizabeth Cabraser and Professor Troy McKenzie. He also noted that Deputy Attorney General Lisa O. Monaco would attend the afternoon session of the meeting and thanked the other Department of Justice (DOJ) representatives for joining. In addition, Judge Bates thanked the members of the public who were in attendance for their interest in the rulemaking process.

Judge Bates next acknowledged Julie Wilson, who would be leaving the Administrative Office of the U.S. Courts (AO) at the end of January. Judge Bates thanked Ms. Wilson for her years of tremendous service to the rules committees. Professor Struve seconded Judge Bates's sentiments on behalf of the reporters. The reporters and Advisory Committee Chairs expanded on these thanks at later points during the meeting.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the minutes of the June 22, 2021 meeting.**

Bridget Healy reviewed the status of proposed rules and forms amendments currently proceeding through each stage of the Rules Enabling Act (REA) process and referred members to the tracking chart beginning on page 56 of the agenda book. The chart lists rule amendments that went into effect on December 1, 2021. It sets out proposed amendments and proposed new rules that were recently approved by the Judicial Conference. Those proposed amendments and new rules were transmitted to the Supreme Court and will go into effect on December 1, 2022, provided they are adopted by the Supreme Court and Congress takes no action to the contrary. The chart also includes proposed amendments and new rules that are at earlier stages of the REA process.

Judge Bates noted that some public comments had been received on proposed emergency rules developed in response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), and that he expected more comments to be received by the close of the public comment period in February. These comments will be reviewed and discussed by the relevant Advisory Committees at their spring meetings.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Judge Bates introduced this agenda item, which concerns the Advisory Committees' consideration of several suggestions regarding electronic filing by "pro se" (or self-represented) litigants. Noting that he had asked Professor Struve to convene the committee reporters in order to

coordinate their consideration of those suggestions, he invited Professor Struve to provide an update on those discussions.

Professor Struve thanked the commenters whose suggestions had brought this item back onto the rules committees' docket. She stated that at the group's first virtual meeting (in December 2021), the Advisory Committee reporters and researchers from the FJC had discussed how to formulate a research agenda on this topic. The goal is to share ideas on research questions, even though the four Advisory Committees in question may not necessarily reach identical views or formulate identical proposals for rule amendments.

Judge Bates highlighted the fact that the FJC researchers were being asked to devote time to this project and asked the Standing Committee if any members had any comments or concerns with utilizing the FJC's assistance. No members expressed any concern. Judge Bates also thanked Judge Kuhl for a thoughtful suggestion concerning terminology. Judge Kuhl reported that the state courts see a very high number of self-represented litigants, and that the courts are trying to phase out the use of Latin phrases (such as "pro se") that can be harder for lay people to understand. Judge Bates observed that the Advisory Committee chairs and reporters would take this point into account.

Juneteenth National Independence Day

Judge Bates introduced this agenda item, which concerns the proposal to amend the rules' definition of "legal holiday" to explicitly list Juneteenth National Independence Day. He noted that three of the four relevant Advisory Committees had already approved proposed amendments to add the new holiday to the list of legal holidays in their respective time-computation rules, and that the fourth Advisory Committee expects to do so at its spring 2022 meeting. Those proposals will come to the Standing Committee for consideration at its June 2022 meeting and will likely constitute technical amendments that can be forwarded for final approval without publication and comment.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met via videoconference on October 7, 2021. The Advisory Committee presented an action item along with multiple information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 100.

Action Item

Publication of Proposed Amendment to Rules 35 and 40, and Conforming Amendments to Rule 32 and the Appendix of Length Limits. In this action item, the Advisory Committee sought approval for publication of a package of proposed amendments that would consolidate the contents of Rule 35 into Rule 40 and that would make conforming changes to Rule 32 and to the Appendix of Length Limits. Judge Bybee explained that the Advisory Committee had been considering comprehensive amendments to Rules 35 and 40 for some time. Rule 35 addresses hearings and rehearings en banc, and Rule 40 addresses panel rehearings. The proposed amendments would

transfer to Rule 40 the contents of Rule 35 so that the provisions regarding panel rehearing and en banc hearing or rehearing could be found in a single rule, Rule 40. Judge Bybee stated that as a result of discussion at the last Standing Committee meeting, the Advisory Committee acted with a freer hand to revise Rule 40 to clarify and simplify the rule. The result is a more linear rule that was unanimously approved by the Advisory Committee. Judge Bybee thanked the style consultants for their work on the proposed amended rule.

Judge Bates asked about the order of the subparts in Rule 40(b)(2). When listing potential reasons for rehearing en banc, would it not make more sense to list, first, instances when the panel decision conflicts with a decision of the Supreme Court, and then, instances when the decision creates a conflict within the circuit, and finally, instances when the decision creates a conflict with another court? Judge Bybee stated that the Advisory Committee considered the order when drafting the rule. The main reason behind the proposed structure is that an initial consideration for a court of appeals is to maintain consistency within its own docket. Hence, the Advisory Committee chose to list intra-circuit inconsistencies first (in 40(b)(2)(A)). Professor Hartnett agreed with Judge Bybee and added that subparagraph 40(b)(2)(A) is different because it addresses a situation that does not provide grounds for the Supreme Court to grant certiorari.

Judge Bates turned the discussion to proposed amended Rule 40(d)(1), which sets the presumptive deadline for filing a rehearing petition but provides for the alteration of that deadline “by order or local rule.” He asked whether any circuits have local rules that alter that deadline and he questioned whether such local rulemaking was desirable. Professor Hartnett stated that this feature was carried over from current Rules 35(c) and 40(a)(1). A judge member noted that the 14-day limit to file a petition for rehearing is short, particularly for pro se prisoner litigants. In her circuit, there is a local rule that sets the limit at 21 days. This member recommended against precluding circuits from affording litigants a longer period by local rule.

A practitioner member asked whether the proposed Rule 40(g) should say “[t]he provisions of Rule 40(b)(2)(D) . . .” instead of just “[t]he provisions of Rule 40(b)(2).” As written, Rule 40(b)(2)(A)-(C) all refer to “the panel decision,” which would be inapplicable in a petition for initial hearing en banc. Judge Bybee agreed that the wording of Rule 40(b)(2)(A) would not apply literally to a request for initial hearing en banc, but the intent of the Advisory Committee was to allow for an initial hearing en banc when there is an intra-circuit inconsistency. Judge Bybee noted that in his circuit, initial hearings en banc sometimes occur sua sponte when a panel notices two inconsistent opinions of the circuit and refers the inconsistency to the en banc court. The practitioner member agreed that it makes sense to be inclusive if there is a concern about intra-circuit conflict.

The practitioner member asked about Rule 40(b)(2)(C)’s use of the phrase “authoritative decision” when discussing a panel decision’s conflict with a decision from another circuit. This phrase is not used elsewhere in the rule. Judge Bybee responded that this phrasing would rule out rehearing requests based on conflicts with unpublished decisions from other circuits. Professor Hartnett agreed that this provision was designed to exclude petitions asserting conflicts merely with unpublished (i.e., nonprecedential) opinions from other circuits. In response to a follow-up question, Judge Bybee acknowledged that the omission of “authoritative” from Rule 40(b)(2)(A) means that that provision can extend to intra-circuit splits involving unpublished decisions.

The same practitioner member pointed out that Rule 40(d)(5) bars oral argument on whether to grant a rehearing petition and asked whether this prohibition should be revised to allow for local rules or orders to the contrary. In his recent experience, a circuit had ordered argument on whether to grant a petition for rehearing – and subsequently issued a decision that both granted the petition for rehearing and reached a different outcome on the merits. Such a process can be useful, this member said, so why remove this flexibility? Judge Bybee explained that the rule is drafted to discourage requests for argument on whether to grant rehearing. Professor Hartnett added that, under Rule 2, the court has authority to suspend the prohibition on oral arguments by order in a case. Based on these responses, the practitioner member stated that he did not see a need to revise proposed Rule 40(d)(5).

A judge member asked a pair of drafting questions. First, he asked why the proposed new title for Rule 40 (“Rehearing; En Banc Determination”) used the word “determination.” Professor Hartnett explained that “en banc determination” was selected to encompass an initial hearing en banc, which would not be a “rehearing.” Second, the judge member noted that the timing provision in current Rule 35(c) says “must be filed” but the timing provision in current Rule 40(a)(1) says “may be filed.” He asked why proposed Rule 40(d)(1) used “may be filed” (on lines 105 and 112 of the draft at page 128 of the agenda book). Professor Hartnett responded that one possible reason was to avoid the use of a word (“must”) that might lead lay readers to think that the rule was requiring the filing of a rehearing petition. A judge member agreed that pro se litigants might misread “must” as a requirement that they file a petition for a rehearing even if they do not desire a rehearing, while “may” clarifies that they can file a petition, and if they do so, they must do so within fourteen days. The Standing Committee, along with Judge Bybee, Professor Hartnett, and the style consultants, discussed the competing virtues of “may” and “must,” as well as a suggestion from the style consultants to change to “any petition ... must” (at lines 103-05) rather than “a petition ... must.” As a result of the discussion, Judge Bybee and Professor Hartnett agreed to change “a” to “any” in line 103 and “may” to “must” in line 105. As to the use of “may” in line 112, further discussion noted that keeping this as “may” would parallel the use of “must” and “may” in, respectively, Rules 4(a)(1)(A) and 4(a)(1)(B). Ultimately the decision was made to retain “may” at line 112.

A practitioner member suggested that the wording of proposed Rule 40(c) seemed (in comparison to the current rule) to liberalize the standard for granting rehearing en banc. New Rule 40(c) says it “[o]rdinarily ... will be ordered only if” a specified condition is met, whereas current Rule 35(a) says that it “is not favored and ordinarily will not be ordered unless” a specified condition is met. Saying “will not be ordered unless” would help emphasize that en banc rehearing is not preferred. Relatedly, the same member noted that the phrase “rehearing en banc is not favored” had been moved to proposed Rule 40(a), and he suggested that phrase should appear in Rule 40(c). Professor Hartnett stated that the first of the member’s points was a style issue on which the Advisory Committee had deferred to the style consultants. As to the second point, Professor Hartnett explained that the Advisory Committee had moved “rehearing en banc is not favored” up to Rule 40(a) for emphasis. He recalled that an earlier draft may have featured that phrase in both Rule 40(a) and Rule 40(c), and he suggested that the Advisory Committee would prefer to include the phrase in both subparts (even if redundant) rather than simply moving it to Rule 40(c). Judge Bybee agreed with Professor Hartnett but noted he had no objection to including

“rehearing en banc is not favored” in both Rule 40(a) and Rule 40(c). A judge member who had participated in the Advisory Committee discussions voiced support for including the phrase in both places. In response to the practitioner member’s first point, Professor Garner suggested changing “ordered” to “allowed” in line 98 (“[o]rdinarily . . . will be allowed only if”). Such a change would recognize that the court has discretion, but is not required, to order an en banc rehearing if one of the four criteria is met.

A judge member thanked the Advisory Committee and thought the proposed amended rule is more user friendly and clearer. She suggested that reinserting the word “panel” in the title would clarify the rule, particularly for self-represented litigants. Professor Hartnett and Judge Bybee agreed with the suggestion to add “panel” back into the title. Judge Bates voiced his support for adding the word “panel” back into the title as well; he observed that might assist users of the table of contents.

A judge member, stating that adverbs are over-used, questioned the use of “ordinarily” in the phrase about when rehearing en banc will be ordered; this member expressed a preference for “may be allowed.” A different judge member disagreed and thought the word “ordinarily” should be retained. In rare cases the court may want to grant rehearing en banc even though none of the stated criteria are met. A practitioner member concurred in the latter view and said that “ordinarily” usefully preserves the court’s discretion both in Rule 40(c) and in proposed Rule 40(d)(4), which provides that the court “ordinarily” will not grant rehearing without ordering a response to the petition. Judge Bates agreed that “ordinarily” should be retained.

After further discussion, Judge Bybee requested approval for publication of the proposed transfer of Rule 35’s contents to Rule 40, the proposed amendments to Rule 40, and the proposed conforming amendments to Rule 32 and the Appendix of Length Limits. The rule amendments being voted on would include the following changes to Rule 40 compared with the version shown at pages 122-132 in the agenda book: (1) insertion of “Panel” in the title; (2) correction of typographical errors on lines 77, 85, and 86; (3) on lines 97-98, replacing “Ordinarily, rehearing en banc will be ordered” with “Rehearing en banc is not favored and ordinarily will be allowed;” (4) on line 103, changing “a” to “any,” and (5) on line 105, changing “may” to “must”

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rules 35 and 40, with the changes as noted above, and conforming amendments to Rule 32 and the Appendix of Length Limits.**

Information Items

Amicus Disclosures. Judge Bybee invited Professor Hartnett to introduce the information item concerning potential amendments to Rule 29’s disclosure requirements. Professor Hartnett underscored the Advisory Committee’s interest in obtaining the Standing Committee’s feedback on this topic. The Advisory Committee began a review of Rule 29 in 2019 following the introduction in both houses of Congress of the Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act). In 2021, Senator Sheldon Whitehouse and Representative

Henry C. “Hank” Johnson, Jr. requested that the Advisory Committee review Rule 29’s disclosure requirements for organizations that file amicus briefs.

Professor Hartnett explained that the question of amicus disclosures involves important and complicated issues. One issue is that insufficient amicus disclosure requirements can enable parties to evade the page limits on briefs or permit an amicus to file a brief that appears independent of the parties but is not. Another issue is that, without sufficient disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. Countervailing concerns include First Amendment rights of persons who do not wish to reveal their identity.

Professor Hartnett stated that there are many approaches the Advisory Committee could take in amending Rule 29, depending on how these various issues are resolved. One approach is that the Advisory Committee could move forward with minimal amendments such as adding “drafting” to the current rule’s disclosure requirement concerning persons that “contributed money that was intended to fund preparing or submitting the brief” – to foreclose the contention that this disclosure requirement only reaches funding for the costs of printing and filing a brief.

He advised that a more extensive revision to Rule 29 is possible, and he noted three issues that the Advisory Committee is reviewing. First, Rule 29 could be amended to address contributions beyond funds earmarked for a particular brief. However, if the Advisory Committee goes down this road, it raises the question of the contribution threshold that would trigger disclosure requirements. The sketch of a potential rule on page 106 of the agenda book would trigger disclosure if a party (or its counsel) contributed at least 10 percent of the amicus’s gross annual revenue. That 10 percent trigger is borrowed from Rule 26.1, which deals with corporate disclosures. The purposes of the two rules are different, but the 10 percent number provides a starting point for the discussion.

Professor Hartnett noted that a second issue is whether any increased disclosure requirements should apply only to relationships between the parties and an amicus, or whether such increased requirements should also encompass disclosures relating to the relationship between non-parties and an amicus. Finally, he stated that the Advisory Committee is also looking at the issue of whether to retain the current rule’s exemption from disclosure for nonparty members of an amicus. An exclusion avoids some of the constitutional issues regarding membership lists, but if any disclosure requirement excludes members, it would make it easy to avoid disclosure by converting contributions into membership fees.

Judge Bates noted that this is a particularly important and sensitive subject, and specifically so because it comes through the Supreme Court to the Advisory Committee. Judge Bates asked if members had any comments or suggestions.

A practitioner member stated that the three issues Professor Hartnett noted are important to consider, and the Advisory Committee should try to find middle ground. A broader amendment, particularly with respect to disclosure regarding non-parties, may not be successful.

A judge member believed the Advisory Committee was asking the right questions and was right on point with its conclusions. Another judge member agreed that the Advisory Committee was heading in the right direction. As a judge, he would rather know who was behind a brief, though he noted that the importance of that question does get greatly overstated. He suggested that seeking the “middle ground” might prove to be quite a challenge because actors might structure their transactions to evade the disclosure requirement.

A practitioner member thought the middle ground route would be preferable. The member also noted that there is an uptick in the motions to file amicus briefs in district courts now, particularly in multi-district litigation and other complex litigation, and the district courts have less experience in dealing with amicus filings. Judge Bates noted the absence of any national rule governing amicus filings in the district court and observed that this may be a matter for other Advisory Committees and the Standing Committee to consider in the future. A judge member suggested that it is important for the Civil Rules to address amicus filings in the district courts, particularly to deal with the possibility that an amicus might file a brief for the purpose of triggering a recusal. (Discussion of amicus filings in the district court recurred later in the meeting, during the Civil Rules Advisory Committee’s presentation, as noted below.) Another judge member suggested that it would be helpful to know more about the AMICUS Act’s prospects of enactment.

A practitioner member noted that amicus filings often face a time crunch and increasing the disclosure requirements risks dissuading amici from undertaking the effort. For an organization with many members – such as a banking association – detailed disclosures could be burdensome.

A judge member suggested that one approach might be to adopt a rule that invites voluntary disclosures – that is, an amicus would either identify its principal members and funders or state that it is choosing not to disclose. This voluntary standard avoids constitutional issues while also allowing parties to disclose the information.

A judge member stated she liked the 10 percent rule. It is a significant trigger for recusal concerns, and it is already in use in the corporate disclosure requirements. Moreover, if the disclosure would require a judge to either recuse herself or to deny leave to file an amicus brief, it seems very “head-in-the-sand” to not require that disclosure.

A practitioner member stressed the importance of the distinction between parties and non-parties. As to parties, he observed that it is very easy to see the concern about a party using an amicus filing as an additional opportunity to make an argument. However, in practice there is a lot of coordination between amici and parties. Parties seek out potential amici whose voices they would like to get before the court. Though it is important to enforce the rule’s current requirements, practical experience illustrates the limits of what can be done by rulemaking. As to non-parties, it would be useful for the court to know if there is a dominant, hidden figure lurking behind an amicus. But if the rule were to go beyond that level of detail, one would have to ask what problem the rule is trying to solve. If the court has never heard of the amicus, the court can simply assess the amicus brief on its own merits.

Judge Bybee thanked the Standing Committee members for their comments and stated that he would relay them to the Advisory Committee.

Judge Bates asked for comments on the other information items outlined in the Advisory Committee's report in the agenda book. There were no further comments.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Advisory Committee on Evidence Rules, which last met in Washington, DC on November 5, 2021. The Advisory Committee's report presented multiple information items but no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 302.

Information Items

Rules Published for Public Comment in August 2021. Judge Schiltz reminded the Standing Committee that proposed amendments to Rules 106, 615, and 702 had been published for public comment in August 2021. The proposed amendments to Rule 702, which clarify the court's gatekeeping role for admitting expert testimony, will be controversial. The Advisory Committee has received a number of comments on that proposal and expects to hear testimony on it at its upcoming January 2022 hearing. Judge Schiltz stated that courts have frequently misconstrued Rule 702 requirements as going only to the weight, and not the admissibility, of the expert's testimony; those judges will admit the testimony if they think that a reasonable juror could conclude that the requirements are met. The proposed amendments to the rule emphasize that the court must determine that the reliability-based requirements for expert testimony are established by a preponderance of the evidence, and that the trial court must evaluate whether the expert's conclusion is properly derived from the basis and methodology that the expert has employed. The latter aspect of the proposal is designed to address the problem of overstatement by experts.

Judge Schiltz provided some detail concerning the comments received regarding Rule 702. He explained that there is some opposition, particularly from members of the plaintiffs' bar, to the concept of amending the rule. Judge Schiltz said that the Advisory Committee is unlikely to accept this point of view, because it believes that Rule 702 needs clarification. Courts frequently issue decisions interpreting Rule 702 incorrectly. Conversely, comments from the defense bar say that the Advisory Committee has not done enough to clarify the rule, and that the committee note should be more explicit that certain decisions are wrong and are rejected. The Advisory Committee does not think specifically singling out incorrect decisions in the committee note is the correct approach.

When discussing a draft of the proposed amendments, some Advisory Committee members had expressed concern that under the proposal as then formulated ("if the court finds"), some judges might think they need to make formal findings on the record that all the requirements of the rule are met, even if no party objects to the expert testimony. To address this concern, the proposed amendment as published for comment instead uses the phrase "if the proponent has demonstrated." A number of commentators have objected to this change. These comments note

that the very problem the amendment is designed to fix is that often the judge delegates this responsibility to jurors when it should be the judge who determines whether the requirements are met. According to these commentators, because this language does not say who needs to make the determination, it does not in fact provide the clarification that the amended rule is intended to convey. Judge Schiltz asked whether the Standing Committee had comments on the proposed amendments to Rule 702 for the Advisory Committee's consideration at its next meeting.

A practitioner member noted that in mass tort litigation, there are complaints among defense lawyers that courts do not sufficiently screen expert testimony, choosing instead to say that objections go to weight, not admissibility. There are limits to how much can be done to legislate this issue, so the member agrees with the Advisory Committee's decision not to specifically criticize incorrect decisions in the committee note. However, some emphasis on enhancing the judicial role, even if only in situations where the testimony's admissibility is central and contested, would not be too much of an imposition on the court.

Rule 611 – Illustrative Aids. Judge Schiltz introduced this information item as one that the Advisory Committee will likely submit to the Standing Committee in June 2022 with a request for approval to publish for public comment. He explained that illustrative aids are not specifically addressed by any rules. Judges, himself included, often struggle to distinguish demonstrative evidence (offered to prove a fact) from illustrative aids. Additionally, judges have very different rules on whether parties must disclose illustrative aids prior to use at trial, as well as whether (and how) they can go to the jury. Finally, judges have different rules on whether illustrative aids are or can be part of the record. Judge Schiltz noted that there is a companion proposal to amend Rule 1006, which deals with summaries, that is also under consideration by the Advisory Committee.

A judge member applauded the proposed changes to Rule 611 and Rule 1006. He suggested that to the extent that the proposed addition to Rule 611 (as set out on pages 304-05 of the agenda book) sets conditions for the use of an illustrative aid, it seems odd to include items (3) and (4). Those two provisions—the prohibition on providing the aid to the jury over a party's objection unless the court finds good cause; and the requirement that the aid be entered into the record—are not conditions on the use of an illustrative aid but rather regulations of what happens after the use of the illustrative aid. Professor Capra agreed with the judge member that items (3) and (4) should be part of a separate subdivision.

A practitioner member noted that he does not turn over opening or closing slide presentations prior to using them in arguments. Also, during examination of a witness, he will often have an easel where he can write down highlights of the testimony as it is given. He asked whether these types of aids would be covered by the proposed rule. If these are considered illustrative aids, it is important to draft the rule in a way that does not discourage their use. Professor Capra acknowledged the validity of this concern, noted that these questions have been part of the Advisory Committee's discussions, and agreed that it would be important to ensure that the notice requirement would not be unduly rigid as applied to such situations. Judge Schiltz stated that the practitioner members on the Advisory Committee had expressed a similar concern, but the judge members favored requiring advance notice. Without advance notice, judges could have to deal with objections interpolated in the middle of an opening statement. In sum, Judge Schiltz

stated, this is a challenging issue, but the Advisory Committee is very focused on the pros and cons of the notice requirement.

Another practitioner member emphasized that trial practice has moved toward very slick presentations, for openings and closings, with expert witnesses, and even with fact witnesses. He stated that advance disclosure to opposing counsel can be a good idea; otherwise, if counsel shows the jury slides that mischaracterize the evidence, there is a real risk of a mistrial. The member said that judges often impose notice requirements for slides used in opening arguments, although they may be more flexible about closing arguments. Slides have become crucial in trial practice. Something might be lost by disclosing, he said, but disclosure avoids sharp practices. Judge Schiltz stated that he requires attorneys to provide advance disclosure, but the disclosure can be made five minutes beforehand. A judge member concurred; in her view, this is a case management issue on which it is difficult to write a rule. The judge has to know the case and require advance disclosures by the lawyers.

Professor Bartell noted the proposed rule text does not define “illustrative aid.” For example, if a lawyer stands 20 feet away from the witness and asks, “can you see my glasses,” one might say that is illustrative. She suggested being careful to cabin the rule’s scope.

Rule 1006 Summaries. Judge Schiltz introduced this information item as a companion proposal to the proposed amendment to Rule 611. Rule 1006 provides that certain summaries are admissible as evidence if the underlying records are admissible and if they are too voluminous to be conveniently examined at trial. This rule is often misapplied. Some judges erroneously instruct the jury that a summary admitted under Rule 1006 is not evidence. Some judges will not admit a Rule 1006 summary unless all the underlying records have been admitted into evidence, which runs contrary to the purpose of Rule 1006. Other judges do the opposite and will not allow Rule 1006 summaries if any of the underlying records have been admitted into evidence. The confusion over Rule 1006 is closely related to the confusion over illustrative aids, and the Advisory Committee hopes to clarify both topics.

Rule 611 – Safeguards to Apply When Jurors Are Allowed to Pose Questions to Witnesses. Judge Schiltz provided the update on this information item, explaining that the proposed amendment would list the safeguards that a court must use when it allows jurors to ask questions. The proposed rule would not take any position on whether jurors should be allowed to ask questions, but rather would provide a floor of safeguards that must apply if the judge does allow juror questions. These safeguards were taken from caselaw.

A judge member stated that it makes sense to have a rule regarding juror questions because it is an important and perilous area. He noted that there are various possible approaches to juror questions; one is to allow the lawyers to take the juror’s question under advisement and allow the lawyers to decide whether they will cover that topic in their own questioning of the witness. This seems like it might often be the prudent course, but proposed Rule 611(d)(3) appears to foreclose it. Professor Capra said he would look into this issue. His understanding was that judges that permit juror questions generally read the questions to the witness, and then allow for follow-up questioning from counsel.

Judge Bates asked whether proposed Rule 611(d)(1)(D) should be a bit broader. He suggested that instead of saying that no “negative inferences” should be drawn, it should say “no inferences” should be drawn. Professor Capra agreed that “negative” should be omitted. Following up on Judge Bates’s suggestion, a judge member added that it would be better to be even broader and suggested that Rule 611(d)(1)(D) say that no inference should be drawn from anything the judge does with a juror’s question (whether asking, not asking, or rephrasing it). Judge Bates stated his agreement with the judge member’s suggestion.

A judge member asked a question about Rule 611(d)(1). As she read the rule, it seems to prohibit juror questions outright unless the judge provides the required instructions “before any witnesses are called.” She asked how the rule would handle instances where the issue of juror questioning arises mid-trial; also, she wondered whether this timing requirement should be placed elsewhere in the rule. Professor Capra promised to take this issue into account.

Judge Schiltz referred the Standing Committee to the Advisory Committee’s report in the agenda book for information regarding the remainder of the information items, and there were no further comments.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on September 14, 2021. The Advisory Committee presented one action item and three information items. The Advisory Committee’s report and the draft minutes of its last meeting were included in the agenda book beginning at page 157.

Action Item

Rule 7001. Judge Dow introduced this action item to request approval to publish for public comment an amendment to Rule 7001. The proposed amendment responds to Justice Sotomayor’s suggestion in her concurring opinion in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021), that the rulemakers “consider amendments to the Rules that ensure prompt resolution of debtors’ requests for turnover under § 542(a), especially where debtors’ vehicles are concerned,” because the delay in resolving turnover proceedings can present a problem for a debtor’s ability to recover the car that the debtor needs to get to work in order to earn money to fund a Chapter 13 plan. Before the Advisory Committee had a chance to address Justice Sotomayor’s comment, a group of law professors submitted a suggestion, which later was generally endorsed by another suggestion submitted by the National Bankruptcy Conference. The law professors recommended a new rule to allow all turnover proceedings to be brought by motion rather than adversary proceeding. The Advisory Committee decided on a narrower approach tailored to the issues raised by Justice Sotomayor and proposed amending Rule 7001 to provide that turnover of tangible personal property of an individual debtor could be sought by motion as opposed to adversary proceeding. The Advisory Committee decided not to adopt a national procedure for these turnover motions, preferring instead to allow them to remain governed by local rules.

An academic member stated that this rule will be a huge improvement over current procedure. He asked what would happen, under the proposal, in a Chapter 7 case when the trustee is seeking turnover of tangible property. The member expressed an expectation that the motion procedure would not apply to the trustee's turnover proceeding, because the proposal only extends to proceedings "by an individual debtor." Judge Dow agreed that under the proposed amendment, the trustee would need to seek turnover by adversary proceeding.

Upon motion, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 7001.**

Information Items

Rule 9006(a)(6) (Legal Holidays). Judge Dow stated that the Advisory Committee has approved a technical amendment to Rule 9006(a)(6) adding Juneteenth National Independence Day to the list of legal holidays. The Advisory Committee is not asking for approval at this time; rather, it will make that request in June 2022 in coordination with the other Advisory Committees' parallel proposals.

Electronic Signatures. Judge Dow introduced this information item, which concerns electronic signatures by debtors and others who do not have a CM/ECF account. Judge Dow noted that this issue connects to the question of electronic filing by self-represented litigants, but he observed that the working group of reporters and FJC researchers is addressing the latter topic, so the Advisory Committee's focus in this information item was on the electronic-signature topic. The Advisory Committee is looking at the practice of requiring the debtor's counsel to retain a wet signature for documents signed by the debtor and filed electronically. Previously, when the Advisory Committee last considered amendments to Rule 5005(a) that would have allowed the filing of debtors' scanned signatures without the retention of the original "wet" signature, the DOJ raised concerns with technologies available for verifying those signatures. The Advisory Committee has asked the DOJ whether its concerns have been alleviated by intervening technical advances. The pandemic has given us some experience with courts relaxing the wet-signature-retention requirement, and the FJC is assisting the Advisory Committee in studying the issue. There is a preliminary draft of a possible amendment to Rule 5005(a) on page 161 of the agenda book.

Professor Gibson stated the Advisory Committee found this to be a challenging problem. With documents that are filed electronically, what constitutes a valid signature for purposes of the rules? Under all rule sets, a CM/ECF account holder's signature is associated with that holder's unique account. A filing made through the account holder's account, and authorized by that person, constitutes the person's signature. But that does not address the common situation in bankruptcy where the *attorney* is filing a document with the *debtor's* signature, as the debtor is not the account holder. (Also, a pro se litigant might be allowed by some courts to submit documents through some electronic means other than CM/ECF—for instance, via email.) The Advisory Committee is not sure where it stands with wet signature requirements, but it is continuing to explore. Professor Gibson also noted that the Advisory Committee needs to learn more about lawyers' views concerning the requirement that the attorney for a represented debtor retain a wet signature.

An academic member noted that the DOJ's concern the last time this issue came before the Advisory Committee was that without a requirement for the retention of a wet signature, the Department's experts in bankruptcy fraud prosecutions would not be able to verify the authenticity of a signature. He asked whether the possible change in approach now would flow from a change in what a handwriting expert was willing to testify to, or whether it would flow from the advent of electronic methods for verifying the signature. Professor Gibson answered that technology has improved since the last time the Advisory Committee addressed this issue, and now there are electronic-signing software programs that offer a means to trace electronic signatures back to the signer. DOJ has told the Advisory Committee that the proposal is no longer dead from the beginning, meaning there does not always have to be a wet signature for its experts to be able to verify the authenticity of the signature. But it depends on the technology. Software that enables verification of electronic signatures may not currently be incorporated into the software that consumer lawyers are using to prepare bankruptcy filings. The technology exists, however. Therefore, the Advisory Committee felt it is worth pursuing the amendment. Judge Dow noted that the Advisory Committee has included the DOJ in the discussions of this item from the outset and has stressed to the DOJ that its input is necessary.

Professor Coquillette applauded Professor Gibson's attention to state ethics requirements and cautioned that the Advisory Committee needs to be careful not to amend the rules in ways that could conflict with state-law professional-responsibility requirements. State-law professional-responsibility requirements may, for example, address the lawyer's retention of a client's "wet" signature.

Deputy Attorney General Monaco said she is hopeful that the Department can work through some of the technology issues that this proposal would raise. The Department has convened an internal working group to review the issue.

A judge member noted that he understands the point that the Advisory Committee does not want to have rules that require adoption of new software, but might the rules incentivize it? What if the rule says that if counsel use software that enables electronic signature verification, then they do not have to retain a wet signature? That could be a good development.

Restyling. Judge Dow introduced the final information item: an update on the restyling project. The project is going well. Parts I and II have gone through the entire process up to (but not including) transmission to the Judicial Conference, which will happen once the remaining parts have also passed through the entire process. Parts III through VI are out for public comment and are on track to go to the Standing Committee at the next meeting. Parts VII, VIII, and IX will come to the Advisory Committee this spring and should be ready for Standing Committee approval for publication this summer.

Professor Bartell added that while the restyling project has been ongoing, some of the restyled rules have been subsequently amended. The Advisory Committee still needs to decide how it wants to handle these amended rules. One possibility will be to request to republish for public comment all the restyled rules that have been subsequently amended.

Professor Kimble stated that the style consultants will conduct one final top-to-bottom review of all the restyled rules for consistency and any other minor issues. They are currently doing so for Parts I and II.

Judge Bates thanked the style consultants for their work on the restyling project.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which last met via videoconference on October 5, 2021. The Advisory Committee presented one action item and three information items. The Advisory Committee briefly noted other items on its agenda, one of which elicited discussion. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 184.

Action Item

Publication of Rule 12(a). Judge Dow introduced the only action item, a proposed amendment to Rule 12(a) that the Advisory Committee was requesting approval to publish for public comment. Rule 12(a) sets the time to serve responsive pleadings. Rule 12(a)(1) recognizes that a federal statute setting a different time should govern, but subdivisions 12(a)(2) and (3) do not recognize the possibility of conflicting statutes. However, there are in fact statutes that set times shorter than the time set by Rule 12(a)(2). While not every glitch in the rules requires a fix, this is one that would be an easy fix. The Advisory Committee decided unanimously to request publication for public comment.

Professor Cooper added there is an argument that Rule 12(a)(2) as currently drafted supersedes the statutes that set a shorter response time, and the Advisory Committee never intended such a supersession. In addition to fixing the glitch, the proposed amendment will avoid the potential awkwardness of arguments concerning unintended supersession.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 12(a).**

Information Items

Multi-District Litigation (MDL) Subcommittee. Judge Dow introduced the work of the MDL Subcommittee as the first information item. Two major topics remain on the subcommittee's agenda. First, the subcommittee is looking at the idea of an "initial census" (what used to be known as "early vetting")—that is, methods for the MDL transferee judge to get a handle on the cases that are included in the MDL. There are three current MDLs where some version of this is in use—the *Juul MDL* before Judge Orrick in the Northern District of California, the *3M MDL* before Judge Rodgers in the Northern District of Florida, and the *Zantac MDL* before Judge Rosenberg (who chairs the MDL Subcommittee) in the Southern District of Florida. Second, the subcommittee is reviewing issues concerning the court's role in the appointment and compensation of leadership

counsel. Several meetings ago, the Advisory Committee discussed what it called a “high impact” sketch of a potential new Rule 23.3 that would extensively address court appointment of leadership counsel, establishment of a common benefit fund to compensate lead counsel, and court rulings on attorney fees. More recently, the subcommittee has been considering a sketch of a “lower impact” set of rules amendments that focuses on Rules 16(b) and 26(f). It would deal with both the initial census and issues of appointing, managing, and compensating leadership counsel throughout an MDL proceeding.

The approach taken in the lower impact sketch is similar to what the Advisory Committee did with Rule 23 a few years ago: operate at a high level of generality and not try to prescribe too much, but put prompts in the rules so that lawyers and judges know from day one a lot of the important things that they will encounter over the number of years it will take for an MDL to conclude. The subcommittee is trying to preserve flexibility. Much of what is in the rule sketch will not apply in any single given MDL. The prompts in the rule will guide MDL participants, and the committee note will provide more detail on how the court might apply these prompts. The subcommittee has met with Lawyers for Civil Justice and will meet with American Association for Justice and others in the coming months.

Professor Marcus observed, with respect to the call for rulemaking with respect to matters such as attorney compensation in MDLs, that rulemaking on such topics is challenging. One approach would be to amend Rule 26(f) so as to require the lawyers to address such matters in their proposed discovery plan; this could then inform the judge’s consideration of how to address those matters in the Rule 16(b) order. As to oversight of the settlement, Judge Dow noted that the subcommittee initially considered giving the judge oversight of the substance of the settlement, but now is focusing instead on whether to provide for judicial oversight of the process for arriving at the settlement. In current practice, some judges exert indirect influence on the settlement, for example through their orders appointing leadership counsel. But whether to make rules concerning settlement in MDLs is the most controversial issue the subcommittee is considering, and its members do not agree on how best to proceed. Professor Cooper added that the rules do not currently define what obligations, if any, leadership counsel has to plaintiffs other than their own clients.

Judge Bates said he agrees with the Civil Rules Committee report’s observation that the absence of any mention of MDLs in the Civil Rules is striking, given that MDLs make up a third or more of the federal civil caseload. He commended the Advisory Committee and subcommittee on their work on these issues.

A judge member suggested that the Advisory Committee consider addressing appointment of special masters. The role that courts have delegated to special masters in some large MDLs is significant. If the Advisory Committee addresses special masters, a rule could deal with whether and when special masters should have *ex parte* communications with counsel. There is the potential for an appearances problem if the special master is viewed as favoring one side or the other. A poor decision concerning the use of a special master can have significant consequences. Professor Marcus noted that Rule 53 requires that the order appointing a special master must address the circumstances, if any, in which the master may engage in *ex parte* communications.

However, the question then is whether Rule 53 is sufficient to address the issue in the MDL context.

A judge member thanked the subcommittee for its work on the MDL rules. He expressed skepticism concerning the desirability of rules specific to MDLs, noting that one size does not fit all as the cases range from quite simple to large and complicated. The current rules are flexible and capacious enough to accommodate the differences. Judge Chhabria's point (in the *Roundup MDL*) concerning the transferee judge's learning curve is well taken, but the judge member questioned whether a rule change could really make that learning curve any easier.

Apart from that big-picture skepticism, this judge member also made some more specific suggestions. First, the question of who should speak for the plaintiffs during the early meet-and-confer is a big one, and whether any rule should address that is a worthy issue that may warrant treatment if the Advisory Committee is going to be addressing MDLs. Second, in some MDLs the court has appointed lead counsel on the defense side, and the judge member queried whether the rules should address that. Third, if the rules will be amended to address table-setting issues that counsel and the court should consider early on, one such issue is whether there will be a master consolidated complaint and what its effect will be (a topic touched on in *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 n.3 (2015)). Fourth, the judge member stressed that the common benefit fund order should be clear as to whether plaintiffs' lawyers will be required to submit to the common benefit fund a portion of their fees arising from the settlement of cases pending in other courts; he expressed doubt, however, as to whether the question of court authority to impose such a requirement is an appropriate topic for rulemaking. Lastly, the member noted that in the current rule sketch of proposed Rule 16(b)(5)(F) provided in the agenda book (at p. 197) it seemed a little odd to require the court in an initial order to provide a method for the court to give notice of its assessment of the fairness of the process that led to any proposed settlement.

A practitioner member stated that the judge member whose comments preceded hers had raised all the issues that she had in mind. She suggested that the Rule 16 approach is particularly well taken. It will cause more lawyers to read Rule 16 earlier and to pay attention to it. Rule 16 is "the Swiss Army knife" for active case management, and it is precisely the right context for adding provisions to deal with MDLs. Right now, judges are innovating in their MDL case-management orders, but that procedural common law is not as well disseminated as it should be amongst the people who need it the most: transferee judges and the lawyers practicing before them. If Rule 16 addresses MDL practice, judges will cite the rule in their orders, and in turn these orders will more likely be published and found in searches. Moreover, the proposed approach will not stifle the flexibility that exists in the absence of a rule. No two MDLs are the same. She noted that she wishes there were a repository of all MDL case-management orders. Getting MDLs into the rules in a very flexible way may confer at least some of that benefit.

Professor Coquillette seconded Professor Cooper's point concerning the significance of conflict-of-interest issues with lead counsel in MDLs. Questions percolate regarding American Bar Association (ABA) Model Rule 1.7. The rulemakers should always be aware that attorney conduct is subject to another regulatory system, which applies broadly because most federal courts adopt by local rule either the ABA Model Rules or the rules of attorney conduct of the State in which they sit. Professor Marcus noted the added complication that the lawyers in an MDL may

be based in many different states. Professor Coquillette observed that the ABA Model Rules do have a choice-of-law provision, but it can be challenging to apply.

An academic member expressed his appreciation for the work of the subcommittee and reporters on this. He echoed the suggestion that, in this area, less is more. With the complexity and variation of MDLs, encasing things in formal rules is probably not a good idea. The goal should be to provide transparency and give some guidance to judges who do not have prior experience in MDLs. However, it would be a mistake to try to make something concrete when it should be plastic. Thus, the Manual for Complex Litigation seems to be the natural place to locate much of the guidance concerning best practices. This member also cautioned against trying to assimilate MDLs to Rule 23 class actions. Class action practice should not be the model for MDLs, because MDLs require flexibility.

Judge Bates acknowledged that the range of MDLs is daunting and that is a reason to question whether rules that apply to all MDLs can be formulated. However, that view is in tension with the Federal Rules of Civil Procedure themselves, which are a set of rules that apply to an even wider variety of cases.

A judge member echoed the comment on having a “best practices” guide outside the rules, and stated that the Advisory Committee should resist writing rules specific to MDLs.

Another judge member applauded the effort to continue to think about this important but difficult topic. The draft Rule 16(b)(5) is a little unusual in that it is a precatory statement about what a judge should consider, but it does not give the judge any additional tools that the judge does not already have. In this sense, the sketch of Rule 16(b)(5) resembles the Manual for Complex Litigation. This member suggested that, instead, the focus should be on whether there are tools that MDL transferee judges want but do not currently have, and whether those tools are something that an amendment under the Rules Enabling Act process can provide. Judge Dow observed that although a new edition of the Manual for Complex Litigation is in process, it will be several years before it comes out. The Judicial Panel on Multidistrict Litigation, likewise, has tried to provide guidance on best practices, but has held conferences only intermittently. He noted that the Standing Committee’s discussion overall evinced more support for the low-impact (Rule 16) approach than the high-impact (Rule 23.3) approach. Director Cooke reported that the FJC is in the preliminary stages of organizing a committee to assist in the preparation of a new edition of the Manual for Complex Litigation.

Discovery Subcommittee. Judge Dow briefly discussed the Discovery Subcommittee’s work on privilege log issues. Plaintiffs’ and defendants’ lawyers have very different views as to whether the current rules present problems. However, there are areas of consensus—that it could be valuable to encourage the parties to discuss privilege-log issues early on, perhaps with the

judge's guidance, and that a system of rolling privilege logs is useful. These areas are the subcommittee's current focus.

Judge Dow also noted the subcommittee's work on sealing. The AO is already reviewing issues related to sealing documents. The Advisory Committee is going to hold off on further consideration of sealing issues and will monitor the progress of the broader AO project.

Rule 9(b) Subcommittee. Judge Dow introduced the work of the new Rule 9(b) Subcommittee (chaired by Judge Lioi). The subcommittee is considering a proposal by Dean Benjamin Spencer to amend Rule 9(b)'s provision concerning pleading conditions of the mind (“[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally”). The subcommittee has had its first meeting and will report to the Advisory Committee at its March meeting.

Other Items

Judge Dow briefly noted a multitude of other projects under consideration by the Advisory Committee, including proposals regarding Rules 41, 55, and 63, as well as one regarding amicus briefs in district courts and one involving the standards and procedures for granting petitions to proceed as a poor person (“in forma pauperis”). Judge Dow also noted that the Advisory Committee is awaiting public comments on the proposed new emergency rule, Rule 87.

Professor Cooper asked whether amicus practice in the district court may present very different questions from amicus practice in appellate courts. In addition to the relative rarity of amicus filings in the district court, he suggested there might be more of a risk that an amicus's participation could interfere with the parties' opportunity to shape the record and develop the issues germane to the litigation in the district court. The discussion during the Appellate Rules Committee's presentation left Professor Cooper concerned about drafting a Civil Rule to address amicus issues.

Judge Bates agreed that amicus filings in the district court could present different issues. He doubted whether there would be many instances where anything in an amicus brief could help to develop the record of the case. For example, in an administrative review case, the record is already set by what was before the administrative agency. And in most other civil cases, the factual record will be developed by the parties through discovery. On the other hand, amicus filings could help to frame or identify issues.

A judge member noted that he too was skeptical about addressing amicus filings in the Civil Rules. This seems to be a solution in search of a problem. If an organization wants to file an amicus brief, it requests leave to file the brief, and the judge decides whether to grant leave and how to handle ancillary issues such as affording the parties an opportunity to respond. Especially given that amicus filings in the district courts are relatively rare, why should the Civil Rules

address this topic when they do not address the general topic of briefs? The judge member also noted that having a rule regarding amicus briefs might encourage people to file more of them.

Judge Bates echoed the judge member's skepticism. Amicus briefs in district courts are almost all filed in just a few courts nationwide, including the District of Columbia (which has a local rule) and the Southern District of New York. This may be something where it is best to leave the practice to local rules in the few courts that see most of the amicus briefs.

Judge Dow stated that he agreed with the comments of the judge member and of Judge Bates. He noted that if a person has the resources to draft an amicus brief, it will have the resources to figure out how to request leave to file it.

A practitioner member stated that amicus briefs are being filed with increasing frequency in MDLs. This is not to say that there should be a Civil Rule on point, but it may be useful to keep in mind that the Appellate Rules' treatment of amicus briefs can be a useful resource for district judges. This member stated that amicus filings in the district court may sometimes attempt to contribute to the record by requesting judicial notice of particular matters; and amicus filings might sometimes add to the complexity in MDLs that are already complex enough. However, trying to craft a Civil Rule to address such issues may be borrowing trouble.

Professor Hartnett returned to the concern (that a member had raised during the discussion of the Appellate Rules Committee's report) that an amicus filing might be made in the district court with the goal of triggering the judge's recusal. Appellate Rule 29 allows the court of appeals to disallow or strike an amicus brief when that brief would require a judge's disqualification. Amicus filings designed to trigger recusal—if they became a common practice—would be more dangerous at the district court level when the case is before a single judge.

Another practitioner member stated that it would be a big mistake to have a national rule governing amicus briefs in district courts. Amicus briefs can be taken for what they are worth, and judges can either read them or not read them. To regulate this on a national basis just does not make sense.

Turning to matters covered in the Civil Rules Committee's written report, Judge Bates noted the Civil Rules Committee's decision not to proceed with a proposal to amend Rule 9 to set a pleading standard for certain claims under the Americans with Disabilities Act. He requested that the Civil Rules Committee coordinate with the Rules Committee Staff at the AO to communicate this decision to Congress. The proposal in question, he noted, initially came from members of the Senate.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met in Washington, DC on November 4, 2021. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 258.

Information Items

Grand Jury Secrecy Under Rule 6(e). Judge Kethledge described the Advisory Committee’s decision not to proceed with a proposed amendment to Rule 6 regarding an exception to grand jury secrecy for materials of exceptional historical or public interest. The Advisory Committee had received multiple proposals for such an exception. Both the Rule 6 Subcommittee (chaired by Judge Michael Garcia) and the full Advisory Committee extensively considered the proposals. The subcommittee held an all-day miniconference where it heard a wide range of perspectives, including from former prosecutors, defense attorneys, the general counsel for the National Archives, a historian, Public Citizen Litigation Group, and the Reporters Committee for Freedom of the Press. The subcommittee thereafter met by phone four times. It had two main tasks. First, it tried to draft the best proposed amendment. Second, it had to decide whether to recommend to the full Advisory Committee whether to proceed with a proposed amendment. The draft rule that the subcommittee worked out would have allowed disclosure only 40 years after a case was closed, and only if the grand jury materials had exceptional historical importance. However, a majority of the subcommittee decided not to recommend that the full Advisory Committee proceed with an amendment.

At its fall 2022 meeting, the Advisory Committee discussed the matter fully and voted 9-3 not to proceed with an amendment. Judge Kethledge noted that the Advisory Committee benefited from a wealth and broad range of relevant experience on the part of its members. The Advisory Committee understood the proposal’s appeal and found it to present a close question. The members identified “back end” concerns – that is to say, possible risks that could arise at the time of the disclosure of the grand jury materials – and noted that those concerns could be addressed (although not fully avoided) by employing safeguards. However, Advisory Committee members were concerned that on the “front end” – that is, when a grand jury proceeding is contemplated or ongoing – the potential for later disclosure pursuant to the proposed exception would complicate conversations with witnesses and jeopardize the witnesses’ cooperation. A number of members also noted that this exception would be different in kind from those that are currently in the rule. The other exceptions relate to the use of grand jury materials for other criminal prosecutions or national security interests. Historical interest would be an altogether different kind of exception. There was the sense that a historical significance exception would signal a relaxation of grand jury secrecy and could lead to unintended consequences. The grand jury is an ancient institution that advances its purposes in ways that we are often unaware of; this heightens the risk of unintended consequences from a rule amendment. The DOJ has consistently supported a historic significance exception, but all eight former federal prosecutors on the Advisory Committee opposed having an amendment along these lines. In sum, the Advisory Committee voted to not make an amendment, subject to input from the Standing Committee.

Judge Bates stated that he thought this was a carefully considered decision by the Advisory Committee.

A practitioner member expressed agreement with the recommendation not to proceed. This is a hard issue, and he recognizes the appeal of having an exception, but as a former federal prosecutor who is now on the other side of the bar, he does not feel comfortable having an

exception that only touches certain cases, namely those of exceptional historical interest, and therefore treats some grand jury participants differently than others.

A judge member praised the Advisory Committee's report for its thoroughness. This member asked how categorically the Advisory Committee had rejected the possibility of disclosures of very old materials of great public interest. Did the Advisory Committee believe that, had there been a grand jury investigation into the assassination of President Lincoln, disclosing those grand jury materials now would create "front end" problems with the cooperation of current-day witnesses? Judge Kethledge stated that it was the sense of the Advisory Committee that it should not add a new exception to Rule 6, even for material of great historical interest. One can think of examples where one would be glad for materials of such strong historical interest to be disclosed, but that does not mean that there should be a rule permitting such disclosure. As an analogy, take President Lincoln suspending habeas corpus during the Civil War. Many people would say they are glad that he did so because things may have turned out differently if he had not done so. Yet at the same time, most people would not want a general rule allowing the President to suspend habeas corpus when he sees fit.

Additionally, Judge Kethledge noted that although the Advisory Committee decided not to recommend a rule amendment, that does not exclude the possibility of common-law development of an exception. There is a circuit split as to whether federal courts have inherent authority to authorize disclosure of grand jury materials. Justice Breyer thought that the Advisory Committee should resolve the circuit split via rulemaking. However, Judge Kethledge stated his view, which he believed the Advisory Committee shares, that the underlying question of inherent authority was outside the purview of Rules Enabling Act rulemaking. If the Supreme Court resolves the circuit split in favor of recognizing inherent authority to authorize disclosure, the courts will be free to take a case-by-case approach.

Professor Beale added that a number of Advisory Committee members had noted that they felt comfortable with the state of the law prior to *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020), and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 624 (2020), and probably would have concluded (as the Advisory Committee had in 2012) that there was not a problem with courts very occasionally authorizing disclosure. Yet writing it out in a rule is fundamentally different: It would change the calculus and change the context under which the grand jury would operate going forward. It is unclear how changing that calculus and context would affect the grand jury as an institution.

A judge member said he thought that the Advisory Committee should consider a rule. He recalled from the Advisory Committee's discussions a shared sense that it is actually a good thing that grand jury materials have been released in certain cases of exceptional historical significance. The problem under the current regime is the circuit-to-circuit variation on whether disclosure is ever possible. Additionally, by not resolving the issue the Advisory Committee is just kicking the can down the road. If the Supreme Court rules that courts lack inherent authority to authorize disclosures not provided for in the Rule, then there will be renewed pressure for a rule amendment. If the Supreme Court instead rules that courts do have such inherent authority, there will still be demands for a rule amendment so as to provide a common approach to disclosure decisions. Therefore, either way, the rulemakers will end up having to take up this issue again.

The same member also stated he was less persuaded by the argument that an exception for materials of exceptional historical interest will dissuade witnesses from testifying. As it is, there are exceptions to grand jury secrecy, including—in some circuits—a multifactor test for whether to release grand-jury materials to the defendant once the defendant has been indicted. Thus, prosecutors already are unable to tell witnesses that there are no circumstances under which their testimony could become public. Furthermore, the comment that certain organizations, such as Al Qaeda or gangs, have long memories is a red herring: These are not the types of cases of exceptional historical interest that would fit within the contemplated exception. The member closed, however, by thanking the Advisory Committee for its thoughtful consideration of the issue.

Professor Hartnett advocated precision in the use of the phrase “inherent authority.” It can mean two different things: first, the court’s authority to act in the absence of authorization by a statute or rule; and second, the court’s authority to act despite a statute or rule that purports to prohibit it from acting. The latter type of inherent authority is much narrower and its scope presents a constitutional question. Judge Kethledge acknowledged this distinction, but noted that the question addressed by the Advisory Committee was only whether to adopt a provision of positive law, in the Criminal Rules, recognizing the exception in question.

Clarification of Court’s Authority to Release Redacted Versions of Grand Jury-Related Judicial Opinions. Judge Kethledge introduced this information item, which stems from a suggestion by Chief Judge Howell and former Chief Judge Lamberth of the District of Columbia District Court. The suggestion requested that Rule 6(e) be amended to clarify the court’s authority to issue opinions that discuss and potentially reveal matters before the grand jury. Both the subcommittee and entire Advisory Committee considered the issue. The Advisory Committee’s conclusion was that the issue is not yet ripe. There has not been any indication so far that redaction is inadequate as a means to avoid contentions that the release of a judicial opinion somehow violates Rule 6. Absent any recent contentions that the release of a judicial opinion violated Rule 6, the Advisory Committee did not think it should act on the suggestion at this time.

Rule 49.1 and CACM Guidance Referenced in the Committee Note. Judge Kethledge introduced this information item, which arises from a suggestion by Judge Furman. Judge Furman suggested amending Rule 49.1 and its committee note to clarify that courts cannot allow parties to file under seal documents to which the public has either a common law or First Amendment right of access. The Advisory Committee appointed a subcommittee to review the issue. Judge Kethledge noted that in his experience, there does seem to be a problem of parties filing documents under seal that should not be so filed.

Judge Furman clarified that the issue is more with the committee note than the text of the rule. The committee note specifies that a financial affidavit in connection with a request for representation under the Criminal Justice Act should be filed under seal. This is in tension with the approach of most courts, which have found that these affidavits are judicial documents and therefore subject to a public right of access under the Constitution. However, at least one court in reliance on the committee note has allowed defendants to file CJA-related financial affidavits under seal.

OTHER COMMITTEE BUSINESS

Legislative Report. The Rules Law Clerk delivered a legislative report. The chart in the agenda book at page 332 summarized most of the relevant information, but an additional bill had been introduced since the finalization of the agenda book. The AMICUS Act, which had been introduced in the previous Congress, was reintroduced in December, albeit with some differences compared to the previous version. As relevant to the Standing Committee, the new bill would apply to any potential amicus in the Courts of Appeals or Supreme Court, regardless of how many briefs it filed in a given year. The Rules Law Clerk also specifically noted the Protecting Our Democracy Act, which had passed the House in December 2021 and now awaits action in the Senate. That bill would prohibit any interpretation of Criminal Rule 6(e) that would prohibit disclosure to Congress of grand jury materials related to the prosecution of certain individuals that the President thereafter pardons. Additionally, the bill would direct the Judicial Conference to promulgate under the Rules Enabling Act rules to facilitate the expeditious handling of civil suits to enforce Congressional subpoenas.

Judiciary Strategic Planning. Judge Bates addressed the Judiciary Strategic Planning item, which appeared in the agenda book at page 339. The Judicial Conference has asked all its committees to provide any feedback on lessons learned over the past two years that may assist it in planning for future pandemics, natural disasters, and other crises that threaten to significantly impact the work of the courts.

Judge Bates asked the Standing Committee whether there was anything the members thought the Standing Committee should focus on in responding to the Judicial Conference. No members had any comments or questions regarding this item.

Judge Bates then asked the Standing Committee members whether there was any concern with delegating to him, Professor Struve, and the Rules Committee Staff the matter of communicating with the Judicial Conference. With no objections raised, Judge Bates said that he would consider that the approval of the Standing Committee.

Judicial Conference Committee Self-Evaluation Questionnaire. Every five years, the Judicial Conference requires all its committees to complete a self-evaluation. Judge Bates stated that he had circulated to the Standing Committee members a draft of that response.

The main item to address in the current draft is the modest adjustments to the jurisdictional statement for the Standing Committee and the Advisory Committees. First, the draft deletes the reference to receiving rule amendment suggestions “from bench and bar” because the Advisory Committees receive suggestions from others as well. Second, the draft clarifies that the Standing Committee, rather than the Advisory Committees, approves rules for publication for public comment. Third, the draft’s descriptions of the duties of the Standing Committee and Advisory Committees have been revised to reflect the discussion of those duties in the Judicial Conference’s procedures governing the rulemaking process.

Judge Bates asked the Standing Committee whether there were any comments regarding the draft response to the Judicial Conference’s committee self-evaluation questionnaire. There were none.

Judge Bates requested that the Standing Committee members delegate to him, Professor Struve, the Advisory Committee chairs, and the Rules Committee Staff the matter of responding to the self-evaluation questionnaire. Judge Bates noted that the Advisory Committee chairs had already weighed in on the draft response. With no objections raised, Judge Bates said that he would consider that the approval of the Standing Committee.

Update on Judiciary’s Response to COVID-19 Pandemic. Julie Wilson provided an update on the judiciary’s response to the COVID-19 pandemic. She observed that the federal judge members of the Standing Committee had access to a number of resources on this topic via the “JNet” (the federal judiciary’s intranet website). There is a COVID-19 task force studying a wide range of items relevant to the judiciary’s response to the pandemic. Its current focus is on issues related to returning to the workplace. The task force has a virtual judiciary operations subgroup (“VJOS”) that includes representatives from the courts, federal defenders’ offices, and DOJ, and it is studying the use of technology for remote court operations. Ms. Wilson noted that she has highlighted for the VJOS participants the relevant Criminal Rules concerning remote versus in-person participation, and she predicted that suggestions on this topic are likely to reach the rulemakers in the future.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their patience and attention. The Standing Committee will next meet on June 7, 2022. Judge Bates expressed the hope that the meeting would take place in person in Washington, DC.

TAB 1C

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)

REA History:

- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020).	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if “the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.”	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(i) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
BK Restyled Rules (Parts I & II)	The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020.	

Revised May 18, 2022

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- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If approved by the Standing Committee, and the Judicial Conference, the proposed change to Form 101 (published in Aug. 2021) will go into effect December 1, 2022.	
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 (published in Aug. 2021) will go into effect December 1, 2022.	
CV 7.1	<p>An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021.</p> <p>The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.</p>	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of 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).	
CR 16	Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Revised May 18, 2022

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by relevant advisory committee (Apr/May 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of FRAP 4.	CV 87 (Emergency CV 6(b)(2))
BK 3002.1 and five new related Official Forms	The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor’s mortgage and of claims secured by a debtor’s home in chapter 13 case. At its March 2022 meeting, the Bankruptcy Rules Committee remanded the Rule and Forms to the Consumer and Forms Subcommittee for further consideration in light of comments received. This action will delay the effective date of the proposed changes to no earlier than December 1, 2024.	
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication would add Juneteenth National Independence Day to the list of legal holidays.	
BK Restyled Rules (Parts III-VI)	The second set, approximately 1/3 of current Bankruptcy Rules, restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the anticipated third set (Parts VII-IX) are expected to be published in 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of “A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]” would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word “within” with “no later than.”	

Revised May 18, 2022

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by relevant advisory committee (Apr/May 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 72	The proposed amendment would replace the requirement that the magistrate judge’s findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to “(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony.” Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate “an officer or employee” to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that “the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.” In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- To be published for public comment (Aug 2022 – Feb 2023)

REA History:

- Approved for publication by Standing Committee (Jan 2022) or by relevant Advisory Committee (April/May 2022) unless otherwise noted

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure	Conforming proposed amendments would reflect the consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word “statement” with “certificate”: Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, “a proceeding by an individual debtor to recover tangible personal property under § 542(a).”	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	
BK Restyled Rules (Parts VII-IX)	The third and final set, approximately 1/3 of current Bankruptcy Rules, restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
BK Form 410A	The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for “Principal & Interest”) with two lines, one for “Principal” and one for “Interest.” The amendments would put the burden on the claim holder to identify the elements of its claim.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	

Revised May 18, 2022

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REA History:

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Rule	Summary of Proposal	Related or Coordinated Amendments
EV 611(d)	The proposed new subdivision (d) would provide standards for the use of illustrative aids.	EV 1006
EV 611(e)	The proposed new subdivision (e) would provide procedural safeguards for when a court decides to allow jurors to submit questions for trial witnesses.	
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness’s prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant’s principal, hearsay statements made by the declarant or declarant’s principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3) would parallel the language in Rule 807 and require the court to consider the presence or absence of corroborating evidence in determining whether corroborating circumstances exist.	
EV 1006	The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been admitted.	EV 611

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 January 4, 2022. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow, Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Burton DeWitt, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal

NOTICE

**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE
UNLESS APPROVED BY THE CONFERENCE ITSELF.**

Judicial Center (FJC); and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, Department of Justice (DOJ).

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on three items of coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees: (1) the proposed emergency rules developed in response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and published for public comment in August 2021; (2) consideration of suggestions to allow electronic filing by pro se litigants; and (3) consideration of amendments to list Juneteenth National Independence Day in the definition of “legal holiday” in the federal rules. Finally, the Committee was briefed on the judiciary’s ongoing response to the COVID-19 pandemic.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 32, 35, and 40, and the Appendix of Length Limits, with a recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee’s recommendation.

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

The proposed amendment to Rule 32 is a conforming amendment that reflects the proposed transfer of Rule 35’s contents into a restructured Rule 40. In Rule 32(g)’s list of papers that require a certificate of compliance, the amendment would replace the reference to papers

submitted under Rules 35(b)(2)(A) or 40(b)(1) with a reference to papers submitted under Rule 40(d)(3)(A).

Rule 35 (En Banc Determination)

The proposed amendment to Rule 35 would transfer its contents to Rule 40 in an effort to provide clear guidance in one rule that will cover en banc hearing and rehearing and panel rehearing.

Rule 40 (Petition for Panel Rehearing)

The proposed amendment to Rule 40 would expand that rule by incorporating into it the provisions of current Rule 35. The proposed amended Rule 40 would govern all petitions for rehearing as well as the rare initial hearing en banc.

Proposed amended Rule 40(a) would provide that a party may petition for panel rehearing, rehearing en banc, or both. It sets a default rule that a party seeking both types of rehearing must file the petitions as a single document. Proposed amended Rule 40(b) would set forth the required content for each kind of petition for rehearing; the requirements are drawn from existing Rule 35(b)(1) and existing Rule 40(a)(2).

Proposed amended Rule 40(c)—which is drawn from existing Rules 35(a) and (f)—would describe the reasons and voting protocols for ordering rehearing en banc. Rule 40(c) makes explicit that a court may act sua sponte to order rehearing en banc; this provision also reiterates that rehearing en banc is not favored. Proposed amended Rule 40(d)—drawn from existing Rules 35(b), (c), (d), and existing Rules 40(a), (b), and (d)—would bring together in one place uniform provisions governing matters such as the timing, form, and length of the petition. A new feature in Rule 40(d) would provide that a panel’s later amendment of its decision restarts the clock for seeking rehearing.

Proposed Rule 40(e)—which expands and clarifies current Rule 40(a)(4)—addresses the court’s options after granting rehearing. Proposed Rule 40(f) is a new provision addressing a panel’s authority to act after the filing of a petition for rehearing en banc. Proposed Rule 40(g) carries over (from existing Rule 35) provisions concerning initial hearing en banc.

Appendix of Length Limits Stated in the Federal Rules of Appellate Procedure

The proposed amendments are conforming amendments that would reflect the relocation of length limits for rehearing petitions from Rules 35(b)(2) and 40(b) to proposed amended Rule 40(d)(3).

Information Items

The Advisory Committee met by videoconference on October 7, 2021. In addition to the matters discussed above, agenda items included the consideration of two suggestions related to the filing of amicus briefs, several suggestions regarding in forma pauperis issues, including potential changes to Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis), and a new suggestion regarding costs on appeal.

Amicus Briefs

The Advisory Committee reported that, in response to a suggestion from Senator Sheldon Whitehouse and Representative Henry Johnson, Jr., it is continuing its consideration of whether additional disclosures should be required for amicus briefs. Proposed legislation regarding disclosures in amicus briefs has been filed in the Senate and House, most recently in December 2021.

The Advisory Committee reported that the question of amicus disclosures involves important and complicated issues. One issue is that insufficient amicus disclosure requirements can enable parties to evade the page limits on briefs or permit an amicus to file a brief that appears independent of the parties but is not. Another issue is that, without sufficient

disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. On the other hand, when considering any disclosure requirement, it is necessary to consider the First Amendment rights of those who do not wish to disclose themselves.

The Advisory Committee sought the Committee's feedback on these issues. In doing so, the Advisory Committee highlighted the distinction between disclosure regarding an amicus's relationship to a party and disclosure regarding an amicus's relationship to a nonparty. The Advisory Committee also noted that any proposed amendments to Rule 29 would have to be based on careful identification of the governmental interest being served and be narrowly tailored to serve that interest. Various members of the Committee voiced their perspectives on these issues, and expressed appreciation for the Advisory Committee's ongoing work on these topics.

The Advisory Committee also has before it a separate suggestion regarding amicus briefs and Rule 29. In 2018, Rule 29 was amended to empower a court of appeals to prohibit the filing of an amicus brief or strike an amicus brief if that brief would result in a judge's disqualification. The suggestion proposes adopting standards for when judicial disqualification would require a brief to be stricken or its filing prohibited. This suggestion is under consideration by the Advisory Committee.

Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis)

The Advisory Committee is continuing to consider suggestions to regularize the criteria for granting in forma pauperis status, including possible revisions to Form 4 of the Federal Rules of Appellate Procedure. It is gathering information on how courts handle such applications, including what standards are applied and how Appellate Form 4 is used.

Costs on Appeal

In a recent decision, the Supreme Court stated that the current rules could specify more clearly the procedure that a party should follow to bring arguments about costs to the court of appeals. *See City of San Antonio v. Hotels.com L. P.*, 141 S. Ct. 1628 (2021). Accordingly, the Advisory Committee created a subcommittee to explore the issue.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted a proposed amendment to Rule 7001 (Types of Adversary Proceedings) with a recommendation that it be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendment to Rule 7001 addresses a concern raised by Justice Sotomayor in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021). The *Fulton* Court held that a creditor's continued retention of estate property that it acquired prior to bankruptcy does not violate the automatic stay under § 362(a)(3). In so ruling, the Court found that a contrary reading of § 362(a)(3) would render largely superfluous § 542(a)'s provisions for the turnover of estate property from third parties. In a concurring opinion, Justice Sotomayor noted that under current procedures turnover proceedings can be very slow because, under Rule 7001(1), they must be pursued by an adversary proceeding. Addressing the need of chapter 13 debtors, such as those in *Fulton*, to quickly regain possession of a seized car in order to work and earn money to fund a plan, she stated that the Advisory Committee on Rules of Bankruptcy Procedure should consider rule amendments that would ensure prompt resolution of debtors' requests for turnover under § 542(a). Post-*Fulton*, two suggestions were submitted that echo Justice Sotomayor's call for amendments; these suggestions advocate that the rules be amended to allow all turnover

proceedings to be brought by a quicker motion-based practice rather than by adversary proceeding.

Members of the Advisory Committee generally agreed that debtors should not have to wait an average of a hundred days to get a car needed for a work commute, and they supported a motion-based turnover process in that and similar circumstances involving tangible personal property. There was less support, however, for broader rule changes that would allow all turnover proceedings to occur by motion. The Advisory Committee ultimately recommended an amendment to Rule 7001 that would exempt, from the list of adversary proceedings, “a proceeding by an individual debtor to recover tangible personal property under § 542(a).”

Information Items

The Advisory Committee met by videoconference on September 14, 2021. In addition to the recommendation discussed above, the Advisory Committee considered possible rule amendments in response to a suggestion from the Committee on Court Administration and Case Management (CACM Committee) regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account and discussed the progress of the Restyling Subcommittee.

Electronic Signatures

The Bankruptcy Rules now generally require electronic filing by represented entities and authorize local rules to allow electronic filing by unrepresented individuals. Documents that are filed electronically and must be signed by debtors or others without CM/ECF privileges will of necessity bear electronic signatures. They may be in the form of typed signatures, /s/, or images of written signatures, but none is currently deemed to constitute the person’s signature for rules purposes. The issue the Advisory Committee has been considering, therefore, is whether the rules should be amended to allow the electronic signature of someone without a CM/ECF

account to constitute a valid signature and, if so, under what circumstances. The Advisory Committee's Technology Subcommittee is studying this issue.

Bankruptcy Rules Restyling Update

The 3000, 4000, 5000, and 6000 series of the restyled Bankruptcy Rules have been published for comment. The Advisory Committee will be reviewing the comments at its spring 2022 meeting.

In fall 2021, the Restyling Subcommittee completed its initial review of the 7000 and 8000 series and began its initial review of the 9000 series. The subcommittee will continue to meet until the subcommittee and style consultants have agreed on draft amendments. The subcommittee expects to present the 7000, 8000, and 9000 series of restyled rules—the final group of the restyled bankruptcy rules—to the Advisory Committee at its spring 2022 meeting with a request that the Advisory Committee approve those proposed amendments and submit them to the Standing Committee for approval for publication.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 12 (Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing) with a request that it be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 12(a) prescribes the time to serve responsive pleadings. Paragraph (1) provides the general response time, but recognizes that a federal statute setting a different time governs. In contrast, neither paragraph (2) (which sets a 60-day response time for the United States, its agencies, and its officers or employees sued in an official capacity) nor paragraph (3) (which sets

a 60-day response time for United States officers or employees sued in an individual capacity for acts or omissions in connection with federal duties) recognizes the possibility of conflicting statutory response times.

The current language is problematic for several reasons. First, while it is not clear whether any statutes inconsistent with paragraph (3) exist, there are statutes setting shorter times than the 60 days provided by paragraph (2); one example is the Freedom of Information Act. Second, the current language fails to reflect the Advisory Committee's intent to defer to different response times set by statute. Third, the current language could be interpreted as a deliberate choice by the Advisory Committee that the response times set in paragraphs (2) and (3) supersede inconsistent statutory provisions.

The Advisory Committee determined that an amendment to Rule 12(a) is necessary to explicitly extend to paragraphs (2) and (3) the recognition now set forth in paragraph (1), namely, that a different response time set by statute supersedes the response times set by those rules.

Information Items

The Advisory Committee met by videoconference on October 5, 2021. In addition to the action item discussed above, the Advisory Committee considered reports on the work of the Multidistrict Litigation Subcommittee and the Discovery Subcommittee, and was advised of the formation of an additional subcommittee that will consider a proposal to amend Rule 9(b). The Advisory Committee also retained on its agenda for consideration a suggestion for a rule establishing uniform standards and procedures for filing amicus briefs in the district courts, suggestions that uniform in forma pauperis standards and procedures be incorporated into the Civil Rules, and suggestions to amend Rules 41, 55, and 63.

Multidistrict Litigation Subcommittee

Since November 2017, a subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Over time, the subcommittee has narrowed the list of issues on which its work is focused to two, namely (1) efforts to facilitate early attention to “vetting” (through the use of “plaintiff fact sheets” or “census”), and (2) the appointment and compensation of leadership counsel on the plaintiff side. To assist in its work, the subcommittee prepared a sketch of a possible amendment to Rule 16 (Pretrial Conferences; Scheduling; Management) that would apply to MDL proceedings. The amendment sketch encourages the court to enter an order (1) directing the parties to exchange information about their claims and defenses at an early point in the proceedings, (2) addressing the appointment of leadership counsel, and (3) addressing the methods for compensating leadership counsel. The subcommittee drafted a sketch of a corollary amendment to Rule 26(f) (Conference of the Parties; Planning for Discovery) that would require that the discovery plan include the parties’ views on whether they should be directed to exchange information about their claims and defenses at an early point in the proceedings. For now, the sketches of possible amendments are only meant to prompt further discussion and information gathering. The subcommittee has yet to determine whether to recommend amendments to the Civil Rules.

Discovery Subcommittee

In 2020, the Discovery Subcommittee was reactivated to study two principal issues. First, the Advisory Committee has received suggestions that it revisit Rule 26(b)(5)(A), the rule that requires that parties withholding materials on grounds of privilege or work product protection provide information about the materials withheld. Though the rule does not say so and the accompanying committee note suggests that a flexible attitude should be adopted, the suggestions state that many or most courts have treated the rule as requiring a document-by-

document log of all withheld materials. One suggestion is that the rule be amended to make it clearer that such a listing is not required, and another is that the rule be amended to provide that a listing by “categories” is sufficient.

As a starting point, the subcommittee determined that it needed to gather information about experience under the current rule. In June 2021, the subcommittee invited the bench and bar to comment on problems encountered under the current rule, as well as several potential ideas for rule changes. The subcommittee received more than 100 comments. In addition, subcommittee members have participated in a number of virtual conferences with both plaintiff and defense attorneys.

While the subcommittee has not yet determined whether to recommend rule changes, it has begun to focus on the Rule 26(f) discovery plan and the Rule 16(b) scheduling conference as places where it might make the most sense for the rules to address the method that will be used to comply with Rule 26(b)(5)(A).

The second issue before the subcommittee is a suggestion for a new rule setting forth a set of requirements for motions seeking permission to seal materials filed in court. In its initial consideration of the suggestion, the subcommittee learned that the AO’s Court Services Office is undertaking a project to identify the operational issues related to the management of sealed court records. The goals of the project will be to identify guidance, policy, best practices, and other tools to help courts ensure the timely unsealing of court documents as specified by the relevant court order or other applicable law. Input on this new project was sought from the Appellate, District, and Bankruptcy Clerks Advisory Groups and the AO’s newly formed Court Administration and Operations Advisory Council (CAOAC). In light of this effort, the subcommittee determined that further consideration of the suggestion for a new rule should be deferred to await the result of the AO’s work.

Amicus Briefs

The Advisory Committee has received a suggestion urging adoption of a rule establishing uniform standards and procedures for filing amicus briefs in the district courts. The proposal is accompanied by a draft rule adapted from a local rule in the District Court for the District of Columbia, and informed by Appellate Rule 29 (Brief of an Amicus Curiae) and the Supreme Court Rules. The Advisory Committee determined that the suggestion should be retained on its study agenda. The first task will be to determine how frequently amicus briefs are filed in district courts outside the District Court for the District of Columbia.

Uniform In Forma Pauperis Standards and Procedures

The Advisory Committee has on its study agenda suggestions to develop uniform in forma pauperis standards and procedures. The Advisory Committee believes that serious problems exist with the administration of 28 U.S.C. § 1915, which allows a person to proceed without prepayment of fees upon submitting an affidavit that states “all assets” the person possesses and states that the person is unable to pay such fees or give security therefor. For example, the procedures for gathering information about an applicant’s assets vary widely. Many districts use one of two AO Forms, but many others do not. Another problem is the forms themselves, which have been criticized as ambiguous, as seeking information that is not relevant to the determination, and as invading the privacy of nonparties. Further, the standards for granting leave to proceed in forma pauperis vary widely, not only from court to court but often within a single court as well.

The Advisory Committee retained the topic on its study agenda because of its obvious importance and because it is well-timed to the ongoing work of the Appellate Rules Committee (discussed above) relating to criteria for granting in forma pauperis status. There is clear potential for improvement, but it is not yet clear whether that improvement can be effectuated

through the Rules Enabling Act process.

Rule 41(a) (Dismissal of Actions – Voluntary Dismissal)

Rule 41(a) governs voluntary dismissals without court order. The Advisory Committee is considering a suggestion that Rule 41(a) be amended to make clear whether it does or does not permit dismissal of some, but not all claims in an action. There exists a division of decisions on the question whether Rule 41(a)(1)(A)(i) authorizes dismissal by notice without court order and without prejudice of some claims but not others. That provision states, in relevant part, that “the plaintiff may dismiss an action without a court order by filing ... a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment” The preponderant view is that the rule authorizes dismissal only of all claims and that anything less is not dismissal of “an action”; however, some courts allow dismissal as to some claims while others remain. The Advisory Committee will consider these and other issues relating to Rule 41, including the practice of allowing dismissal of all claims against a particular defendant even though the rest of the action remains.

Rule 55 (Default; Default Judgment)

Rule 55(a) directs the circumstances under which a clerk “must” enter default, and subdivision (b) directs that the clerk “must” enter default judgment in narrowly defined circumstances. The Advisory Committee has learned that at least some courts restrict the clerk’s role in entering defaults short of the scope of subdivision (a), and many courts restrict the clerk’s role in entering default judgment under subdivision (b). The Advisory Committee has asked the FJC to survey all of the district courts to better ascertain actual practices under Rule 55. The information gathered will guide the determination whether to pursue an amendment to Rule 55.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met in person (with some participants joining by videoconference) on November 4, 2021. A majority of the meeting was devoted to consideration of the final report of the Rule 6 Subcommittee. The Advisory Committee also decided to form a subcommittee to consider a suggestion to amend Rule 49.1.

Rule 6 (The Grand Jury)

Rule 6(e) (Recording and Disclosing the Proceedings). The Advisory Committee last considered whether to amend Rule 6(e) to allow disclosure of grand jury materials of exceptional historical importance in 2012, when it considered a suggestion from the DOJ to recommend such an amendment. At that time, the Advisory Committee concluded that an amendment would be “premature” because courts were reasonably resolving applications “by reference to their inherent authority” to allow disclosure of matters not specified in the exceptions to grand jury secrecy listed under Rule 6(e)(3). Since then, *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020), and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 624 (2020), overruled prior circuit precedents and held that the district courts have no authority to allow the disclosure of grand jury matters not included in the exceptions stated in Rule 6(e)(3), thereby deepening a split among the courts of appeals with regard to the district courts’ inherent authority. Moreover, in a statement respecting the denial of certiorari in *McKeever*, Justice Breyer pointed out the circuit split and stated that “[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit.” *McKeever*, 140 S. Ct. at 598 (statement of

Breyer, J.).

In 2020 and 2021, the Advisory Committee received suggestions seeking an amendment to Rule 6(e) that would address the district courts' authority to disclose grand jury materials because of their exceptional historical or public interest, as well as a suggestion seeking a broader exception that would ground a new exception in the public interest or inherent judicial authority. The latter urged an amendment "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." In contrast, over the past three administrations (including the suggestion the Advisory Committee considered in 2012), the DOJ has sought an amendment that would abrogate or disavow inherent authority to order disclosures not specified in the rule. The DOJ's most recent submission advocates that "any amendment to Rule 6 should contain an explicit statement that the list of exceptions to grand jury secrecy contained in the Rule is exclusive."

After the Rule 6 Subcommittee was formed in May 2020 in reaction to *McKeever* and *Pitch*, two district judges suggested an amendment that would explicitly permit courts to issue judicial opinions when even with redaction there is potential for disclosure of matters occurring before the grand jury.

As reported to the Conference in September 2021, the subcommittee's consideration of the proposals included convening a day-long virtual miniconference in April 2021 at which the subcommittee obtained a wide range of perspectives based on first-hand experience. Participants included academics, journalists, private practitioners (including some who had previously served as federal prosecutors but also represented private parties affected by grand jury proceedings), representatives from the DOJ, and the general counsel of the National Archives and Records Administration. In addition, the subcommittee held four meetings over the summer of 2021.

Part of its work included preparing a discussion draft of an amendment that defined a limited exception to grand jury secrecy for historical records meant to balance the interest in disclosure against the vital interests protected by grand jury secrecy. The draft proposal would have (1) delayed disclosure for at least 40 years, (2) required the court to undertake a fact-intensive inquiry and to determine whether the interest in disclosure outweighed the public interest in retaining secrecy, and (3) provided for notice to the government and the opportunity for a hearing at which the government would be responsible for advising the court of any impact the disclosure might have on living persons. In the end, a majority of the subcommittee recommended that the Advisory Committee not amend Rule 6(e).

After careful consideration and a lengthy discussion, a majority of the Advisory Committee agreed with the recommendation of the subcommittee and concluded that even the most carefully drafted amendment would pose too great a danger to the integrity and effectiveness of the grand jury as an institution, and that the interests favoring more disclosure are outweighed by the risk of undermining an institution critical to the criminal justice system.

Further, a majority of members expressed concern about the increased risk to witnesses and their families that would result from even a narrowly tailored amendment such as the discussion draft prepared by the subcommittee. A majority of the members concluded that the dangers of expanded disclosure would remain, and that the addition of the exception would be a significant change that would both complicate the preparation and advising of witnesses and reduce the likelihood that witnesses would testify fully and frankly. Moreover, as drafted, the proposed exception was qualitatively different from the existing exceptions to grand jury secrecy, which are intended to facilitate the resolution of other criminal and civil cases or the investigation of terrorism.

Consideration of these suggestions by both the subcommittee and the full Advisory Committee revealed that this is a close issue. Although many members recognized that there are rare cases of exceptional historical interest where disclosure of grand jury materials may be warranted, the predominant feeling among the members was that no amendment could fully replicate current judicial practice in these cases. Moreover, members felt that, even with strict limits, an amendment expressly allowing disclosure of these materials would tend to increase both the number of requests and actual disclosures, thereby undermining the critical principle of grand jury secrecy.

Members also discussed a broader exception for disclosure in the public interest. The subcommittee had recommended against such a broad exception, and members generally agreed that a broader and less precise exception would be an even greater threat to the grand jury.

Finally, the Advisory Committee chose not to address the question whether federal courts have inherent authority to order disclosure of grand jury materials. In the Advisory Committee's view, this question concerns the scope of "[t]he judicial power" under Article III. That is a constitutional question, not a procedural one, and thus lies beyond the Advisory Committee's authority under the Rules Enabling Act.

The Advisory Committee further declined the suggestion that subdivision (e) be amended to authorize courts "to release judicial decisions issued in grand jury matters" when, "even in redacted form," those decisions reveal "matters occurring before the grand jury." The Advisory Committee agreed with the subcommittee's determination that the means currently available to judges—particularly redaction—were generally adequate to allow for sufficient disclosure while complying with Rule 6(e).

Rule 6(c) (Foreperson and Deputy Foreperson). Also before the Advisory Committee was a suggestion to amend Rule 6(c) to expressly authorize forepersons to grant individual grand

jurors temporary excuses to attend to personal matters. Forepersons have this authority in some, but not all, districts. The Advisory Committee agreed with the recommendation of the subcommittee that at present there is no reason to disrupt varying local practices with a uniform national rule.

Rule 49.1 (Privacy Protections for Filings Made with the Court)

Rule 49.1 was adopted in 2007, as part of a cross-committee effort to respond to the E-Government Act of 2002. The committee note incorporates the *Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files* (March 2004) issued by the CACM Committee that “sets out limitations on remote electronic access to certain sensitive materials in criminal cases,” including “financial affidavits filed in seeking representation pursuant to the Criminal Justice Act.” The guidance states in part that such documents “shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access.”

Before the Advisory Committee is a suggestion to amend the rule to delete the reference to financial affidavits in the committee note because the guidance as to financial affidavits is “problematic, if not unconstitutional” and “inconsistent with the views taken by most, if not all, of the courts that have ruled on the issue to date.” *See United States v. Avenatti*, No. 19-CR-374-1 (JMF), 2021 WL 3168145 (S.D.N.Y. July 27, 2021) (holding that the defendant’s financial affidavits were “judicial documents” that must be disclosed (subject to appropriate redactions) under both the common law and the First Amendment).

The Advisory Committee formed a subcommittee to consider the suggestion. Its work will include consideration of the privacy interests of indigent defendants and their Sixth Amendment right to counsel, and the public rights of access to judicial documents under the First Amendment and the common law. The subcommittee plans to coordinate with the Bankruptcy

and Civil Rules Committees since their rules have similar language, and will also inform both the CACM Committee and the CAOAC that it is considering this issue.

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met in person (with some non-member participants joining by videoconference) on November 5, 2021. In addition to an update on Rules 106, 615, and 702, currently out for public comment, the Advisory Committee discussed possible amendments to Rule 611 to regulate the use of illustrative aids and Rule 1006 to clarify the distinction between summaries that are illustrative aids and summaries that are admissible evidence. The Advisory Committee also discussed possible amendments to Rule 611 to provide safeguards when jurors are allowed to pose questions to witnesses, Rule 801(d)(2) to provide for a statement's admissibility against the declarant's successor in interest, Rule 613(b) to provide a witness an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of the statement is admitted, and Rule 804(b)(3) to require courts to consider corroborating evidence when determining admissibility of a declaration against penal interest in a criminal case.

Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence)

The Advisory Committee is considering two separate proposed amendments to Rule 611. First, the Advisory Committee is considering adding a new provision that would provide standards for allowing the use of illustrative aids, along with a committee note that would emphasize the distinction between illustrative aids and admissible evidence (including demonstrative evidence). Second, the Advisory Committee is considering adding a new provision to set forth safeguards that must be employed when the court has determined that jurors will be allowed to pose questions to witnesses.

Rule 1006 (Summaries to Prove Content)

The Advisory Committee determined that courts frequently misapply Rule 1006, and most of these errors arise from the failure to distinguish between summaries of evidence that are admissible under Rule 1006 and summaries of evidence that are inadmissible illustrative aids. It is considering amending Rule 1006 to address the mistaken applications in the courts.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The Advisory Committee is considering a proposed amendment to Rule 801(d)(2) regarding the hearsay exception for statements of party-opponents. The issue arises in cases in which a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or defense has been transferred to another, and it is the transferee that is the party-opponent. The Advisory Committee is considering an amendment to provide that if a party stands in the shoes of a declarant, then the statement should be admissible against the party if it would be admissible against the declarant.

Rule 613 (Witness's Prior Statement)

The Advisory Committee is considering a proposed amendment to Rule 613(b), which currently permits extrinsic evidence of a prior inconsistency so long as the witness is given an opportunity to explain or deny it. However, courts are in dispute about the timing of that opportunity. The Advisory Committee determined that the better rule is to require a prior opportunity to explain or deny the statement (with the court having discretion to allow a later opportunity), because witnesses will usually admit to making the statement, thereby eliminating the need for extrinsic evidence.

Rule 804 (Hearsay Exceptions; Declarant Unavailable)

The Advisory Committee is considering a proposed amendment to Rule 804(b)(3). The rule provides a hearsay exception for declarations against interest. In a criminal case in which a

declaration against penal interest is offered, the rule requires that the proponent provide “corroborating circumstances that clearly indicate [the] trustworthiness” of the statement, but there is a dispute about the meaning of the “corroborating circumstances” requirement. The Advisory Committee is considering a proposed amendment to Rule 804(b)(3) that would parallel the language in Rule 807 and require the court to consider the presence or absence of corroborating evidence in determining whether “corroborating circumstances” exist.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to consider a request by the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard (1st Cir.), regarding pandemic-related issues and lessons learned for which Committee members recommend further exploration through the judiciary’s strategic planning process. The Committee’s views were communicated to Chief Judge Howard by letter dated January 11, 2022.

FIVE-YEAR REVIEW OF COMMITTEE JURISDICTION AND STRUCTURE

In 1987, the Judicial Conference established a requirement that “[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished.” JCUS-SEP 1987, p. 60. Because this review is scheduled to occur again in 2022, the Committee was asked to evaluate the continuing importance of its mission as well as its jurisdiction, membership, operating procedures, and relationships with other committees so that the Executive Committee can identify where improvements can be made. To assist in the evaluation process, the Committee was asked to complete the 2022 Judicial Conference Committee Self-Evaluation Questionnaire. The Committee provided the completed questionnaire to the Executive Committee.

Respectfully submitted,



John D. Bates, Chair

Elizabeth J. Cabraser	Troy A. McKenzie
Jesse M. Furman	Patricia A. Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank Mays Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zips
Carolyn B. Kuhl	

TAB 2

TAB 2A

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

ROBERT M. DOW, JR.
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Committee on Rules of Practice and Procedure

FROM: Catherine T. Struve, Reporter
Committee on Rules of Practice and Procedure

Daniel J. Capra, Reporter
Advisory Committee on Evidence Rules

RE: CARES Act Project Regarding Emergency Rules

DATE: May 17, 2022

As the Standing Committee is aware, during 2020-2021 the advisory committees collaborated to prepare for publication a package of rules for use in extreme situations that substantially impair the courts' ability to function in compliance with the existing rules of procedure. The set of proposed new rules and amendments published for public comment in August 2021 included this package of emergency rules, and the package is now before the Standing Committee for final approval. This memo provides a brief overview of the project; further details are in the reports of the relevant advisory committees.

In 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, or “CARES Act,”¹ which among other things addresses the use of video conferences and telephone conferences in criminal cases during the period of the national emergency relating to COVID-19. In addition, Section 15002 of the CARES Act assigns a broader project to the Judicial Conference and the Supreme Court:

The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the “Rules Enabling Act”), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

CARES Act § 15002(b)(6).

The set of proposed amendments and new rules developed in response to this charge includes an amendment to Appellate Rule 2 (and a related amendment to Appellate Rule 4); new Bankruptcy Rule 9038; new Civil Rule 87; and new Criminal Rule 62. The relevant advisory committees, having reviewed the public comments on these proposed amendments and new rules, each voted to forward their respective proposals to the Standing Committee for final approval. If the Standing Committee votes to approve the proposals, they will be on track to take effect in December 2023 (if they are approved at each further stage of the Enabling Act process and if Congress takes no contrary action).

Though the Appellate rule is much more flexible than the others, and though the Bankruptcy, Civil, and Criminal rules provide for deviation from quite different types of provisions in the non-emergency Rules, the proposed emergency rules share some overarching, uniform features.² Each rule places the authority to declare a rules emergency solely in the hands of the Judicial Conference. Each rule uses the same basic definition of a “rules emergency” – namely, when “extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court,³ substantially impair the court’s ability to perform its functions in compliance with these rules.”⁴ The Bankruptcy, Civil, and Criminal rules take a roughly similar approach to the content of the emergency declaration, setting ground rules to make clear the scope of the declaration (though the Civil rule uses a different formulation than that in the Bankruptcy

¹ Pub. L. No. 116-136, March 27, 2020, 134 Stat 281.

² It should be noted that the somewhat different approaches were approved by the Standing Committee at its Spring 2021 meeting.

³ Bankruptcy Rule 9038(a) here substitutes “bankruptcy court” in place of “court.”

⁴ In addition to the uniform basic definition of “rules emergency” set forth above, Criminal Rule 62(a)(2) adds the requirement that “no feasible alternative measures would sufficiently address the impairment within a reasonable time.”

and Criminal rules).⁵ Each emergency rule limits the duration of the declaration; provides for additional declarations; and accords the Judicial Conference discretion to terminate an emergency declaration before the declaration's stated termination date. The Bankruptcy, Civil, and Criminal rules each address what will happen when a proceeding that has been conducted under an emergency rule continues after the emergency has terminated, though each rule does so with provision(s) tailored to take account of the different contexts and subject matters addressed by the respective emergency provisions.

The advisory committees' reports describe the comments submitted on each of the proposed emergency rules. The comments that touched on uniform aspects of the emergency rules focused on the role of the Judicial Conference. Some commentators criticized the decision to place in the hands of the Judicial Conference the authority to declare⁶ or terminate⁷ a rules emergency, though another commentator specifically supported the decision to centralize authority in the Judicial Conference.⁸ One commentator argued that there should be a backup plan in case the emergency prevents the Judicial Conference from acting.⁹

As the Standing Committee will recall, the role of the Judicial Conference was carefully discussed in the pre-publication process. Consideration of the public comments by the advisory committees this spring did not cause any of the four advisory committees to revise that role. The Committees uniformly concluded that the Judicial Conference was fully capable of responding to Rules emergencies, and that the uniform approach of the Judicial Conference was preferable to different approaches of more decisionmakers. Accordingly, the advisory committees have voted to retain, as published, all of the uniform features of the set of proposed emergency rules.

The reports from the Civil and Criminal Rules Committees detail post-publication changes made in the Committee Notes to Civil Rule 87 and Criminal Rule 62. Those changes concern non-uniform features of those particular rules, and thus are not addressed in this cover memo.

⁵ The Civil rule states that the declaration of emergency must "adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them." The Bankruptcy and Criminal rules provide that a declaration of emergency must "state any restrictions on the authority granted in" the relevant subpart(s) of the emergency rule in question.

⁶ See Comments AP-2021-0001-0004 (Ivan Moritzky); AP-2021-0001-0010 (Jane Castro); CV-2021-0004-0007 (Federal Magistrate Judges Association); see also Comment CV-2021-0004-0008 (NY State Bar Ass'n Commercial & Federal Litigation Section) (arguing that Civil Rule 87 should set more specific criteria for declaring emergency).

⁷ See Comment AP-2021-0001-0006 (Matthew Deinhardt).

⁸ See Comment AP-2021-0001-0009 (Federal Bar Association).

⁹ See Comment CV-2021-0004-0012 (American Association for Justice).

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Judge Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Appellate Rule 2 and Appellate Rule 4 (CARES Act)

DATE: May 13, 2022

At its June 2021 meeting, the Standing Committee approved for publication proposed amendments to Appellate Rule 2 and Appellate Rule 4. The text of each of those proposed amendments as published with accompanying Committee Note is attached to this report.

The Advisory Committee now seeks final approval of these proposed amendments without change.

Appellate Rule 2. Existing Appellate Rule 2 broadly empowers a court of appeals to suspend virtually any provision of the Appellate Rules in a particular case and order proceedings as it directs. This power does not reach the time to file a notice of appeal or petition for review. *See* Appellate Rule 26(b).

The proposed amendment to Appellate Rule 2 would modestly broaden this power when the Judicial Conference declares an Appellate Rules emergency. In such a declared emergency, the court of appeals would be empowered to “suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2).”

The power is broadened in two ways. First, the suspension power reaches beyond a particular case. Second, the suspension power reaches time limits to appeal or petition for review that are established only by rule. It does not purport to empower the court to suspend time limits to appeal or petition for review set by statute.

As detailed in the cover memo by Professors Capra and Struve, the standards and process for declaring an Appellate Rules emergency parallel that proposed by other Advisory Committees.

Appellate Rule 4. The proposed amendment to Appellate Rule 4 is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that Emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time.

It does this by replacing the phrase “no later than 28 days after the judgment is entered” in Rule 4(a)(4)(A)(vi) with the phrase “within the time allowed for filing a motion under Rule 59.”

When Emergency Civil Rule 6(b)(2) is not in effect, this amendment makes no change at all. That’s because the time allowed for filing a motion under Rule 59 is 28 days after the judgment is entered.

But if Emergency Civil Rule 6(b)(2) is ever in effect, a district court might extend the time to file a motion under Rule 59. If that happens, the amendment to Appellate Rule 4(a)(4)(A)(vi) would allow Appellate Rule 4 to properly take that extension into account.

As a refresher on how that works, here is the relevant passage from the Advisory Committee’s June 2021 report:

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court’s decision on these motions before pursuing an appeal, Appellate Rule 4(a)(4)(A) resets the time to appeal from the

judgment so that it does not run until entry of an order disposing of the last such motion.

Appellate Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d); 52(b); and 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed “within a reasonable time,” and for certain Civil Rule 60(b) motions, no more than a year after judgment. See Civil Rule 60(c)(1) (“A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.”).

For this reason, Appellate Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Appellate Rule 4(a)(4)(A) are governed simply by the general requirement that they be filed within the time allowed by the Civil Rules, but Appellate Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if “filed no later than 28 days after the judgment is entered.”

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d); 52(b); 59(b), (d), and (e); and 60(b). That means that when Appellate Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d); 52(b); and 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Appellate Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

Enter proposed Emergency Civil Rule 6(b)(2). That emergency rule would authorize district courts to grant extensions that they are otherwise prohibited from granting. Under it, district courts would be able to grant extensions to file motions under Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). For all these motions except Civil Rule 60(b) motions, Appellate Rule 4 would continue to work seamlessly. Appellate Rule 4 requires only that those motions be filed “within the time allowed by” the Civil Rules, and a motion filed within a properly granted extension is filed “within the time allowed by” those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

But if Appellate Rule 4 were not amended, Appellate Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this reason, the proposed amendment to Appellate Rule 4 replaces the phrase “if the motion is filed no later than 28 days after the judgment is entered” with the phrase “within the time allowed for filing a motion under Rule 59.”

Significantly, this proposed amendment to Appellate Rule 4 is not itself an emergency rule, but instead would be a regular, ordinary part of the Appellate Rules. At all times that no Civil Rules Emergency has been declared, the amended Rule 4 would function exactly as it has without the proposed amendment. A Civil Rule 60(b) motion would have resetting effect only if it were filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

When a Civil Rules Emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed. It does this by replacing the phrase “no later than 28 days after the judgment is entered” in Rule 4(a)(4)(A)(vi) with the phrase “within the time allowed for filing a motion under Rule 59.”

Discussion of Comments Received

The Advisory Committee received a total of six comments. Two were fully supportive. Two were broadly critical. One was irrelevant. One raised issues that the Advisory Committee had considered. The Advisory Committee did not make any changes in response to the public comment.

Fully supportive

The Federal Bar Association (comment 0009) “supports each of the revised and new rules developed . . . in response to . . . the CARES Act,” noting that they “provide important flexibility . . . in future unforeseen situations.” The Federal Bar Association “agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency. Conferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only

particular regions or other subsets of federal courts.” It also “applauds the Rules Committee’s success in achieving relative uniformity across all four emergency rules.”

Louis Koerner (comment 0003) thinks the proposed amendments are “entirely appropriate, well drafted, and even overdue.”

Broadly critical

Irvan Moritzky (comment 0004) opposes the emergency rules as impractical, complex, and centralized. He urges that issues be left to local district judges, noting that if large retailers are open, local judges should run their courts. He included the Supreme Court’s decision in *Duncan v Kahanamoku*, 327 U.S. 304 (1946), which held that Congress had not authorized the supplanting of courts in Hawaii with military tribunals.

Matthew Deinhardt (comment 0006) believes that the proposed amendments create an unequal playing field and lean heavily towards the government side. He urges notice to any defendant who is adversely affected by a suspension of the rules and the opportunity to postpone the proceeding. He also urges that the Judicial Conference not be empowered to terminate an emergency without input from the judge “presiding over that specific court.”

Neither of these critical comments convinced the Advisory Committee to make any changes. The Advisory Committee is confident that the Judicial Conference (or its executive committee) will consult as appropriate with the courts affected by any declaration of a rules emergency.

Irrelevant

Andrew Straw (comment 0005) states that no court of appeals should “hire an appellee who is before a panel of the Court to be a federal bankruptcy judge.”

Raised issues

Jane Castro, Chief Deputy Clerk, United States Court of Appeals for the Tenth Circuit (comment 0010) raised several thoughtful issues.

FRAP 2. Ms. Castro suggests that the proposed amendment to Rule 2 is “largely unnecessary” because courts, under the current rules, can enter form orders suspending a rule in individual cases. There is some power to the critique; the proposed amendment to Rule 2 does not add a lot. But it would provide clear authority for across-the-board actions. Some might question whether current Rule 2, which limits the suspension authority to “a particular case,” permits identical orders entered in every case.

She also suggests that perhaps “the circuits should be authorized to extend nonstatutory deadlines for good cause even without a declared emergency.” This suggestion is sufficiently broader than the current proposal that it would require republication. And current Rule 26(b) already imposes few limits on the court’s power to extend nonstatutory deadlines.

FRAP 4. Ms. Castro questions how the proposed amendment to Rule 4 will work in the context of Civil Rule 60 motions, noting that the proposed amendment “pegs the suspending effect of a Rule 60 motion to the time allowed for filing a motion under Rule 59.” She is concerned that if a party seeks, and the district court grants, a motion to extend only the time to file a Civil Rule 60(b) motion, the party will not get the benefit of the Rules Emergency declaration.

The reason for drafting the proposed amendment this way is that the non-emergency deadlines for Civil Rule 59 and Civil Rule 60(b) motions are quite different. A Rule 59 motion must be filed within 28 days of the judgment. FRCP 59(b). A Rule 60(b) motion, on the other hand, must be made “within a reasonable time.” FRCP 60(c)(1). It would seem unnecessary to allow an extension beyond a “reasonable time”; any emergency circumstances can be considered in determining what is reasonable. Motions made under FRCP 60(b)(1), (2), and (3) face the additional requirement that they must be brought no more than one year after judgment, FRCP 60(c)(1), so it is possible that an extension of this one-year deadline might be necessary in an emergency. But if the one-year deadline is the one that needs to be relaxed, the time to appeal the underlying judgment should not be reset.

FRCP 6. Finally, Ms. Castro noted that it is odd for a Civil Rule, rather than an Appellate Rule, to state the effect of an extension on the time to appeal. She added that “consistency and clarity for the public, courts, and practitioners” would seem to call for this to be included in FRAP 4, not FRCP 6.

In the abstract, there is much to be said for this critique. But drafting in this area proved daunting, and the placement in Emergency Civil Rule 6 resulted in the clearest drafting that could be found.

The provision is applicable only in a declared rules emergency, so all should know to look to the emergency rules. In addition, the effect on time to appeal in such an emergency arises in the context of extensions that are available only under Emergency Civil Rule 6, so anyone dealing with such an extension must already engage with Emergency Civil Rule 6. Having the relevant provisions in a single emergency rule—rather than spread over two sets of emergency rules—should promote ease of use.

Emergency Rules Report to the Standing Committee
Advisory Committee on Appellate Rules
May 13, 2022

Page 7

In the end, the Advisory Committee was reassured by Ms. Castro's careful submission. That is because such a thoughtful comment did not reveal that the Advisory Committee had overlooked important concerns, but instead pointed to issues that the Advisory Committee had grappled with earlier.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 2. Suspension of Rules**

2 **(a) In a Particular Case.** On its own or a party's
3 motion, a court of appeals may—to expedite its
4 decision or for other good cause—suspend any
5 provision of these rules in a particular case and order
6 proceedings as it directs, except as otherwise
7 provided in Rule 26(b).

8 **(b) In an Appellate Rules Emergency.**

9 **(1) Conditions for an Emergency.** The Judicial
10 Conference of the United States may declare
11 an Appellate Rules emergency if it
12 determines that extraordinary circumstances
13 relating to public health or safety, or affecting
14 physical or electronic access to a court,
15 substantially impair the court's ability to

¹ New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

16 perform its functions in compliance with
17 these rules.

18 (2) **Content.** The declaration must:

19 (A) designate the circuit or
20 circuits affected; and

21 (B) be limited to a stated period of
22 no more than 90 days.

23 (3) **Early Termination.** The Judicial
24 Conference may terminate a
25 declaration for one or more circuits
26 before the termination date.

27 (4) **Additional Declarations.** Additional
28 declarations may be made under
29 Rule 2(b).

30 (5) **Proceedings in a Rules Emergency.**
31 When a rules emergency is declared,
32 the court may:

- 33 (A) suspend in all or part of that
34 circuit any provision of these
35 rules, other than time limits
36 imposed by statute and
37 described in Rule 26(b)(1)-
38 (2); and
39 (B) order proceedings as it directs.

Committee Note

Flexible application of the Federal Rules of Appellate Procedure, including Rule 2, has enabled the courts of appeals to continue their operations despite the coronavirus pandemic. Future emergencies, however, may pose problems that call for broader authority to suspend provisions of the Federal Rules of Appellate Procedure. For that reason, the amendment adds a new subdivision authorizing broader suspension authority when the Judicial Conference of the United States declares an Appellate Rules emergency. The amendment is designed to add to the authority of courts of appeals; it should not be interpreted to restrict the authority previously exercised by the courts of appeals.

The circumstances warranting the declaration of an Appellate Rules emergency mirror those warranting a declaration of a Civil Rules emergency and a Bankruptcy Rules emergency: extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, that substantially impair the court's ability

4 FEDERAL RULES OF APPELLATE PROCEDURE

to perform its functions in compliance with these rules. A declaration must designate the circuit or circuits affected. It must also have a sunset provision so that the declaration is in effect for no more than 90 days unless the Judicial Conference makes an additional declaration. The Judicial Conference may also terminate the declaration for one or more circuits before the termination date.

When a rules emergency is declared, the court of appeals may suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). This enables the court of appeals to suspend the time to appeal or seek review set only by a rule, but it does not authorize the court of appeals to suspend jurisdictional time limits imposed by statute. Sometimes when a rule is suspended, there is no need to provide any alternative to the suspended rule. For example, if the requirement of submitting paper copies of briefs is suspended, it may be enough to rely on electronic submissions. However, to deal with situations in which an alternative is required, the amendment empowers the court to “order proceedings as it directs,” the same language that existed in Rule 2—now Rule 2(a)—before this amendment.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

Louis Koerner (AP-2021-0001-0003) - The proposed amendments are “entirely appropriate, well drafted, and even overdue.”

Irvan Moritzky (AP-2021-0001-0004) - The emergency rules are impractical, complex, and centralized. Issues should be left to local district judges; if large retailers are open, local judges should run their courts.

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Matthew Deinhardt (AP-2021-0001-0006) - The proposed amendments create an unequal playing field and lean heavily towards the government side. Any defendant who is adversely affected by a suspension of the rules should be provided notice and the opportunity to postpone the proceeding. The Judicial Conference should not be empowered to terminate an emergency without input from the judge “presiding over that specific court.”

Federal Bar Association (AP-2021-0001-0009) - The Federal Bar Association “supports each of the revised and new rules developed . . . in response to . . . the CARES Act,” noting that they “provide important flexibility . . . in future unforeseen situations.” It “agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency. Conferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only particular regions or other subsets of federal courts.” It also “applauds the Rules Committee’s success in achieving relative uniformity across all four emergency rules.”

Jane Castro, Chief Deputy Clerk, United States Court of Appeals for the Tenth Circuit (AP-2021-0001-0009) - The proposed amendment to Rule 2 is “largely

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unnecessary” because courts, under the current rules, can enter form orders suspending a rule in individual cases.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

- 1 **Rule 4. Appeal as of Right—When Taken**
- 2 **(a) Appeal in a Civil Case.**
- 3 **(1) Time for Filing a Notice of Appeal.**
- 4 (A) In a civil case, except as provided in
- 5 Rules 4(a)(1)(B), 4(a)(4), and 4(c),
- 6 the notice of appeal required by
- 7 Rule 3 must be filed with the district
- 8 clerk within 30 days after entry of the
- 9 judgment or order appealed from.
- 10 * * * * *
- 11 **(4) Effect of a Motion on a Notice of Appeal.**
- 12 (A) If a party files in the district court any
- 13 of the following motions under the
- 14 Federal Rules of Civil Procedure—
- 15 and does so within the time allowed

¹ New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

16 by those rules—the time to file an
17 appeal runs for all parties from the
18 entry of the order disposing of the last
19 such remaining motion:

20 (i) for judgment under
21 Rule 50(b);

22 (ii) to amend or make additional
23 factual findings under
24 Rule 52(b), whether or not
25 granting the motion would
26 alter the judgment;

27 (iii) for attorney's fees under
28 Rule 54 if the district court
29 extends the time to appeal
30 under Rule 58;

31 (iv) to alter or amend the judgment
32 under Rule 59;

- 33 (v) for a new trial under Rule 59;
 34 or
 35 (vi) for relief under Rule 60 if the
 36 motion is filed ~~no later than 28~~
 37 ~~days after the judgment is~~
 38 ~~entered~~ within the time
 39 allowed for filing a motion
 40 under Rule 59.
 41 * * * * *

Committee Note

The amendment is designed to make Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that emergency Civil Rule is ever in effect, while not making any change to the operation of Rule 4 at any other time. It does this by replacing the phrase “no later than 28 days after the judgment is entered” in Rule 4(a)(4)(A)(vi) with the phrase “within the time allowed for filing a motion under Rule 59.”

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court’s decision on these motions before pursuing an appeal, Rule 4(a)(4)(A) resets the time to appeal

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from the judgment so that it does not run until entry of an order disposing of the last such motion.

Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed “within a reasonable time,” and for certain Civil Rule 60(b) motions, no more than a year after judgment. For this reason, Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Rule 4(a)(4)(A) are governed simply by the general requirement that they be filed within the time allowed by the Civil Rules, but Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if “filed no later than 28 days after the judgment is entered.”

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). That means that when Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d), 52(b), 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

However, Emergency Civil Rule 6(b)(2)—which would be operative only if the Judicial Conference of the United States were to declare a Civil Rules emergency under Civil Rule 87—authorizes district courts to grant extensions that they are otherwise prohibited from granting. If that

emergency Civil Rule is in effect, district courts may grant extensions to file motions under Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). For all these motions except Civil Rule 60(b) motions, Rule 4 works seamlessly. Rule 4 requires only that those motions be filed “within the time allowed by” the Civil Rules, and a motion filed within a properly granted extension is filed “within the time allowed by” those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

Without amendment, Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this reason, the amendment replaces the phrase “if the motion is filed no later than 28 days after the judgment is entered” with the phrase “within the time allowed for filing a motion under Rule 59.”

At all times that no Civil Rules emergency has been declared, the amended Rule 4 functions exactly as it did prior to the amendment. A Civil Rule 60(b) motion has resetting effect only if it is filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

When a Civil Rules emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

Louis Koerner (AP-2021-0001-0003): The proposed amendments are “entirely appropriate, well drafted, and even overdue.”

Irvan Moritzky (AP-2021-0001-0004) - The emergency rules are impractical, complex, and centralized. Issues should be left to local district judges; if large retailers are open, local judges should run their courts.

Andrew Straw (AP-2021-0001-0005) - No court of appeals should “hire an appellee who is before a panel of the Court to be a federal bankruptcy judge.”

Matthew Deinhardt (AP-2021-0001-0006) - The proposed amendments create an unequal playing field and lean heavily towards the government side. Any defendant who is adversely affected by a suspension of the rules should be provided notice and the opportunity to postpone the proceeding. The Judicial Conference should not be empowered to terminate an emergency without input from the judge “presiding over that specific court.”

Federal Bar Association (AP-2021-0001-0009) - The Federal Bar Association “supports each of the revised and new rules developed . . . in response to . . . the CARES Act,” noting that they “provide important flexibility . . . in future unforeseen situations.” It “agrees that the Judicial

Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency. Conferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only particular regions or other subsets of federal courts.” It also “applauds the Rules Committee’s success in achieving relative uniformity across all four emergency rules.”

Jane Castro, Chief Deputy Clerk, United States Court of Appeals for the Tenth Circuit (AP-2021-0001-0009) - The proposed amendment “pegs the suspending effect of a Rule 60 motion to the time allowed for filing a motion under Rule 59,” which may be a problem if a party seeks, and the district court grants, a motion to extend only the time to file a Civil Rule 60(b) motion. It is odd that Civil Rule 6, rather than an Appellate Rule, states the effect of an extension on the time to appeal. To promote “consistency and clarity for the public, courts, and practitioners,” this should be included in FRAP 4, not FRCP 6.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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WASHINGTON, D.C. 20544

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

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CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Honorable John D. Bates, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Dennis R. Dow, Chair
Advisory Committee on Bankruptcy Rules

RE: Bankruptcy Rule 9038 (Bankruptcy Rules Emergency)

DATE: May 5, 2022

At the Advisory Committee’s spring meeting, members unanimously approved, as published, new Rule 9038, which would allow extensions of time limits in the Bankruptcy Rules to be granted if the Judicial Conference declared a bankruptcy rules emergency. As Professors Struve and Capra explain, subdivisions (a) and (b) of the rule are similar to the Civil and Criminal Emergency Rules in the way they define a rules emergency, provide authority to the Judicial Conference to declare such an emergency, and prescribe the content and duration of a declaration.

Rule 9038(c) is basically an expansion of existing Bankruptcy Rule 9006(b), which authorizes an individual bankruptcy judge to enlarge time periods for cause. During the COVID pandemic, many courts relied on this provision to grant extensions of time. The existing rule, however, does not fully meet the needs of an emergency situation. First, it has some exceptions—time limits that cannot be expanded. One of these is the time limit for holding meetings of creditors, a limitation that either caused problems for courts during the current

emergency or was honored in the breach. Also, it probably does not authorize an extension order applicable to all cases in a district. Rule 9038 is intended to fill in these gaps for situations in which the Judicial Conference declares a rules emergency. The chief bankruptcy judge can grant a district-wide extension for any time periods specified in the rules, and individual judges can do the same in specific cases.

Only one comment was submitted concerning Rule 9038. The Federal Bar Association submitted a comment (BK-2021-0002-0019) addressing all of the proposed emergency rules. It stated that it “supports each of the revised and new rules developed by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees in response to the rulemaking directive in Section 15002(b)(6) of the CARES Act.” It noted in particular that “the judiciary is best suited to declare an emergency concerning court rules of practice and procedure” and that it “agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency.” The Association also commended the “success in achieving relative uniformity across all four emergency rules.”

The Advisory Committee recommends that the Standing Committee give final approval to Rule 9038 as published.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

- 1 **Rule 9038. Bankruptcy Rules Emergency**
- 2 **(a) CONDITIONS FOR AN EMERGENCY.**
- 3 The Judicial Conference of the United States may declare a
- 4 Bankruptcy Rules emergency if it determines that
- 5 extraordinary circumstances relating to public health or
- 6 safety, or affecting physical or electronic access to a
- 7 bankruptcy court, substantially impair the court’s ability to
- 8 perform its functions in compliance with these rules.
- 9 **(b) DECLARING AN EMERGENCY.**
- 10 **(1) Content. The declaration must:**
- 11 **(A) designate the bankruptcy**
- 12 **court or courts affected;**
- 13 **(B) state any restrictions on the**
- 14 **authority granted in (c); and**

¹ New material is underlined in red.

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

15 (C) be limited to a stated period of
16 no more than 90 days.

17 (2) Early Termination. The Judicial
18 Conference may terminate a declaration for one or
19 more bankruptcy courts before the termination date.

20 (3) Additional Declarations. The
21 Judicial Conference may issue additional
22 declarations under this rule.

23 (c) TOLLING AND EXTENDING TIME
24 LIMITS.

25 (1) In an Entire District or Division.
26 When an emergency is in effect for a bankruptcy
27 court, the chief bankruptcy judge may, for all cases
28 and proceedings in the district or in a division:

29 (A) order the extension or tolling
30 of a Bankruptcy Rule, local rule, or order that
31 requires or allows a court, a clerk, a party in
32 interest, or the United States trustee, by a

FEDERAL RULES OF BANKRUPTCY PROCEDURE 3

33 specified deadline, to commence a
34 proceeding, file or send a document, hold or
35 conclude a hearing, or take any other action,
36 despite any other Bankruptcy Rule, local
37 rule, or order; or

38 (B) order that, when a Bankruptcy
39 Rule, local rule, or order requires that an
40 action be taken “promptly,” “forthwith,”
41 “immediately,” or “without delay,” it be
42 taken as soon as is practicable or by a date set
43 by the court in a specific case or proceeding.

44 (2) *In a Specific Case or Proceeding.*

45 When an emergency is in effect for a bankruptcy
46 court, a presiding judge may take the action
47 described in (1) in a specific case or proceeding.

48 (3) *When an Extension or Tolling Ends.*

49 A period extended or tolled under (1) or (2)

50 terminates on the later of:

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51 (A) the last day of the time period
52 as extended or tolled or 30 days after the
53 emergency declaration terminates, whichever
54 is earlier; or

55 (B) the last day of the time period
56 originally required, imposed, or allowed by
57 the relevant Bankruptcy Rule, local rule, or
58 order that was extended or tolled.

59 (4) Further Extensions or Shortenings.
60 A presiding judge may lengthen or shorten an
61 extension or tolling in a specific case or proceeding.
62 The judge may do so only for good cause after notice
63 and a hearing and only on the judge's own motion or
64 on motion of a party in interest or the United States
65 trustee.

66 (5) Exception. A time period imposed by
67 statute may not be extended or tolled.

Committee Note

The rule is new. It provides authority to extend or toll the time limits in these rules during times of major emergencies affecting the bankruptcy courts. The continuing operation of the bankruptcy courts during the COVID-19 pandemic showed that the existing rules are flexible enough to accommodate remote proceedings, service by mail, and electronic transmission of documents. Nevertheless, it appeared that greater flexibility than Rule 9006(b) provides might be needed to allow the extension of certain time periods in specific cases or any extension on a district-wide basis in response to an emergency.

Emergency rule provisions have also been added to the Civil, Criminal, and Appellate Rules. Along with the Bankruptcy Rule, these rules have been made as uniform as possible. But each set of rules serves distinctive purposes, shaped by different origins, traditions, functions, and needs. Different provisions were compelled by these different purposes.

Subdivision (a) specifies the limited circumstances under which the authority conferred by this rule may be exercised. The Judicial Conference of the United States has the exclusive authority to declare a Bankruptcy Rules emergency, and it may do so only under extraordinary circumstances. Those circumstances must relate to public health or safety or affect physical or electronic access to a bankruptcy court. And, importantly, the court's ability to operate in compliance with the Bankruptcy Rules must be substantially impaired.

Under subdivision (b)(1), a Bankruptcy Rules emergency declaration must specify the bankruptcy courts to which it applies because, instead of being nationwide, an emergency might be limited to one area of the country or even to a particular state. The declaration must also specify

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a termination date that is no later than 90 days from the declaration's issuance. Under subdivisions (b)(2) and (b)(3), however, that time period may be extended by the issuance of additional declarations or reduced by early termination if circumstances change. The declaration must also specify any limitations placed on the authority granted in subdivision (c) to modify time periods.

Subdivisions (c)(1) and (c)(2) grant the authority, during declared Bankruptcy Rules emergencies, to extend or toll deadlines to the chief bankruptcy judge of a district on a district- or division-wide basis or to the presiding judge in specific cases. Unless limited by the emergency declaration, this authority extends to all time periods in the rules that are not also imposed by statute. It also applies to directives to take quick action, such as rule provisions that require action to be taken “promptly,” “forthwith,” “immediately,” or “without delay.”

Subdivision (c)(3), which addresses the termination of extensions and tolling, provides a “soft landing” upon the termination of a Bankruptcy Rules emergency. It looks to three possible dates for a time period to expire. An extended or tolled time period will terminate either 30 days after the rules-emergency declaration terminates or when the original time period would have expired, whichever is later—unless the extension or tolling itself expires sooner than 30 days after the declaration's termination. In that case, the extended expiration date will apply.

Subdivision (c)(4) allows fine tuning in individual cases of extensions of time or tollings that have been granted.

Subdivision (c)(5) excepts from the authority to extend time periods any time provision imposed by statute. The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, does not authorize the Bankruptcy Rules to supersede conflicting

laws. Accordingly, a time limit in a rule that is a restatement of a deadline imposed by statute or an incorporation by reference of such a deadline may not be extended under this rule. However, if a statute merely incorporates by reference a time period imposed by a rule, that period may be extended.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

Federal Bar Association (BK-2021-0002-0019) – It supports each of the revised and new rules developed by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees in response to the rulemaking directive in Section 15002(b)(6) of the CARES Act and agrees that the judiciary is best suited to declare an emergency concerning court rules of practice and procedure.

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MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rule (Rule 87)

DATE: May 13, 2022

1 The dedicated hard work to develop emergency rules provisions by the Appellate,
2 Bankruptcy, Civil, and Criminal Rules Committees is well known. Civil Rule 87 was published
3 for comment in August 2021 and is now advanced for a recommendation that it be adopted as
4 published, with minor changes in the Committee Note.

5 Much of the work that went into the four published emergency rules was devoted to
6 achieving as much uniformity as possible, accepting disuniformities only to the extent required by
7 differences in the fundamental premises of the separate sets of rules. Rule 87 continues to differ
8 from the other emergency rules in a few ways. The standard for declaration of a Civil Rules
9 Emergency by the Judicial Conference is common to all four sets of rules, but does not include the
10 “no feasible alternative measures” addition that is unique to Criminal Rule 62(a)(2). That
11 difference has been discussed extensively and accepted as a response to the particularly sensitive
12 concerns raised by the emergency criminal rules provisions.

13 Another disuniformity arises from Rule 87(b)(1)(B), which directs that the Judicial
14 Conference declaration of a Civil Rules Emergency must “adopt all the emergency rules in Rule
15 87(c) unless it excepts one or more of them.” The parallel provisions in the Bankruptcy and
16 Criminal Rules direct that the declaration must “state any restrictions on the authority granted in”
17 their emergency provisions. This difference was accepted in careful discussions among the
18 reporters after publication of the proposed rules and approved by the advisory committees. The
19 character of the different emergency rules provisions accounts for the difference. Rule 87
20 authorizes adoption of five Emergency Rules 4, each of which allows the court to order service of
21 process by a means reasonably calculated to give notice. In addition, it authorizes adoption of
22 Emergency Rule 6(b)(2), which displaces the provision in Rule 6(b)(2) that absolutely prohibits
23 any extension of the times set to make post-judgment motions by Rules 50(b) and (d), 52(b), 59(b),
24 (d), and (e), and 60(b). It can make sense for the Conference to choose among the separate
25 Emergency Rules 4 in declaring a Civil Rules Emergency. Authority to allow service by alternative
26 means on corporations or other entities may seem appropriate, while it may not be appropriate to
27 authorize alternative means of service on individual defendants. But it is not feasible to ask the
28 Conference to identify categories of acceptable or unacceptable methods of service reasonably
29 calculated to give notice. The circumstances of an emergency may be hard to predict, and
30 appropriate alternative methods of service may depend on the nature of the litigation and of the
31 parties. The provisions of Emergency Rule 6(b)(2) that establish discretion to allow no more than
32 an additional 30 days for post-judgment motions are even less suitable for further refinement or
33 “restrictions.” Whether an extension is justified in the particular circumstances of case and parties,
34 and how long any extension might be, cannot be guessed in advance. Emergency Rule 6(b)(2),
35 moreover, presents intricate and carefully resolved questions of integration with the appeal time
36 provisions of Appellate Rule 4. A parallel amendment of Rule 4 is being recommended to ensure
37 effective integration for Rule 60(b) motions.

38 The provisions for completing acts authorized under Emergency Rules 4 or 6 after
39 expiration of an emergency declaration also differ from the parallel provisions in other rules. These
40 differences too are mandated by the distinctive function of these emergency rules.

41 Reporters Capra and Struve, who led the uniformity efforts, agree that -- in Professor
42 Capra’s words -- “We’re in a good place on uniformity.” The differences that remain “can be easily
43 explained.”

44 There were few public comments on Rule 87 as published. A few raised the “delegation”
45 question, vigorously debated during the early development of the emergency rules by the advisory
46 committees and in this committee. No new reasons were advanced to doubt the propriety of relying
47 on the Judicial Conference to declare a rules emergency and to choose from the menu of specific
48 emergency rules responses set out in each emergency rule. The American Association for Justice
49 lauded Rule 87 as published, but suggested that other of the civil rules should be the subject of
50 additional emergency rules to be specified in Rule 87(c) or should be directly amended to
51 accommodate responses to emergency circumstances. The suggestions are cogent. Each of them,
52 however, was carefully considered before Rule 87 was published, and as to each the CARES Act
53 Subcommittee and the Committee concluded that the corresponding civil rules preserve sufficient

54 flexibility and discretion to meet whatever needs may arise. The Committee Note encourages
 55 courts to make the best use of these qualities as deliberately built into the rules over the course of
 56 many years. As much as has been learned about adaptations to the Covid-19 pandemic seems to
 57 confirm this confidence in the rules as they are.

58 Rule 87 did not stimulate extensive Committee discussion. One member asked whether the
 59 definition of an emergency is too narrow because it focuses on the court's ability to perform its
 60 functions in compliance with the rules. Should not account be taken of an emergency's impact on
 61 the parties? Examination of the way in which this problem is addressed in the second paragraph
 62 of the Committee Note was found to satisfy this concern.

63 The Committee Note was revised to respond to a public comment in one respect, adding
 64 additional language to reinforce the need to evaluate all opportunities for serving process under
 65 Rule 4 before a court orders service by an alternative means under one of the Emergency Rules 4.

66 The Committee Note was further revised to resolve questions raised by portions that were
 67 published in brackets to invite comments. No comments were made. The final and long sentence
 68 in the paragraph on Rule 6(b)(1)(A) was deleted as an accurate but unnecessary and potentially
 69 confusing reflection on one aspect of the complicated process of integrating Emergency Rule
 70 6(b)(2) with the appeal time provisions of Appellate Rule 4. The final sentence in the paragraph
 71 on Emergency Rule 6(b)(2), item B(i), advising that a court should rule on a motion to extend the
 72 time for a post-judgment motion as promptly as possible was deleted as gratuitous advice on a
 73 point that all judges will understand without prompting. In the last line of the paragraph on
 74 resetting appeal time under Emergency Rule 6(b)(2), brackets around "original" will be removed,
 75 retaining "original." It seems useful to remind readers that an order finally resolving all issues
 76 raised by a Rule 60(b) motion is appealable as a final judgment that does not of itself support
 77 review of the earlier -- "original" -- final judgment challenged by the motion.

78 The Committee voted to advance Rule 87 for a recommendation to adopt as published,
 79 with the amendments of the Committee Note described above.

80 SUMMARY OF COMMENTS

81 Anonymous, 21-CV-0005: We have three branches of government. "Your job is to bring
 82 importance of a matter of emergency declaration then it should be evaluated between three
 83 branches of government with respect to our constitution. We can't respect a party that only has
 84 one point of you [sic] * * *."

85 Anonymous, CV-2021-0006: With an extensive quotation from Locke on delegating legislative
 86 powers, urges that "to leave any entity sole power over anything would be opposite of what our
 87 Constitution represents." So "changing any rule during a national emergency should be illegal.
 88 Emergency powers are clearly being abused and extended by many offenders in order to
 89 accommodate their agendas."

90 Federal Magistrate Judges Association, CV 2021-0007: Several members of the group thought the
 91 Committee might forgo any new rule for emergencies because the Civil Rules “already provide
 92 district courts with tools to address emergency circumstances.” There is a great deal of flexibility.
 93 But the consensus [apparently looking to Emergency Rule 6(b)(2)] was that the rule allows courts
 94 discretion to address unique challenges that might arise from different kinds of emergencies. “We
 95 did not identify any other areas of the Civil Rules where we thought emergency extensions would
 96 be required and are not already permitted by court Order.”

97 New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: Notes
 98 that comments it offered last year on possible Civil Rules amendments to respond to an emergency
 99 were based on assuming circumstances like the Covid-19 pandemic, “nationwide in scope, and of
 100 a sufficient severity to cause the closure of public access to the federal courts.” Proposed Rule 87
 101 does not require an Executive Branch determination of emergency. “Indeed, there is no expressed
 102 criteria by which the Judicial Conference can determine that such an emergency exists. We have
 103 concerns about such an approach.” If adopted, Rule 87 “should contain explicit criteria under
 104 which the Judicial Conference may determine that an Emergency, either national or local, exists.”

105 American Association for Justice, 21-CV-0012: This comment is detailed and provides strong
 106 support for Rule 87 as published, while suggesting additional provisions for Rule 87 and further
 107 rules changes to “facilitate flexibility in emergency situations.” These suggestions cover issues
 108 that were considered at length in subcommittee and committee, often by other advisory
 109 committees, and at times by the Standing Committee. They are important and will be described in
 110 some detail, with brief statements of the reasons why they were not recommended while generating
 111 Rule 87. The fact that the issues have been considered in the past does not mean that further
 112 consideration is inappropriate. But the reasons that proved persuasive once may remain persuasive.

113 AAJ conducted a survey at the end of January, 2021 to gather information from its members
 114 about experience during the first year of the Covid-19 pandemic. Its proposals rest in part on the
 115 112 responses, and in part on more a more general sense of experience during the pandemic.

116 AAJ strongly supports the provisions in Rule 87 as published. The definition of a rules
 117 emergency properly omits the “no feasible alternative measures” provision that appears in, and is
 118 appropriate for, Criminal Rule 62. Confiding authority to declare a rules emergency in the Judicial
 119 Conference is wise, although a “backup” provision should be added. The structure that provides
 120 that a declaration of a civil rules emergency adopts all the emergency rules in Rule 87(c) unless it
 121 excepts one or more of them “helps streamline the process and creates less work for the Judicial
 122 Conference.” The provisions for completing proceedings begun under an emergency rule after the
 123 declaration terminates also are proper.

124 AAJ suggests there should be a backup plan to cover a situation in which the Judicial
 125 Conference is unable to meet to declare a rules emergency. This subject was discussed and put
 126 aside by each of the advisory committees. In January, 2021, the Standing Committee thought it
 127 deserved further consideration. The advisory committees deliberated further, and again
 128 recommended that any attempt to create such a provision for a “doomsday” scenario would be
 129 unwise, for reasons described at pages 80-81 of the June, 2021 Standing Committee agenda
 130 materials.

131 More specific recommendations suggest review of “several specific rules that would clarify
132 what can be done virtually versus in-person during emergencies,” noting that “a hybrid of in-
133 person and virtual proceedings seems to be the direction courts are headed towards.” Indeed, it
134 may be time to consider broader rules provisions to facilitate virtual trials. Several clarifications
135 of “in-person court requirements” are suggested. It is not always clear whether the suggestions are
136 for new emergency civil rules to be added to Rule 87(c); perhaps none of them are. Instead, the
137 suggestions at times clearly contemplate adding provisions to the regular rules that are available
138 only in emergency circumstances, without describing what constitutes an emergency or who --
139 most likely the trial judge -- decides whether there is an emergency. Some of the proposals suggest
140 general amendment of a current rule without being limited to an emergency.

141 The three rules suggestions in the first set aim at allowing witnesses to appear by video
142 conference in emergency situations. (1) Rule 32(a)(4)(C) allows a deposition to be used at trial if
143 the witness is unable to attend because of age, illness, infirmity, or imprisonment. The suggestion
144 is to permit court and parties to determine the best ways to ensure the safety of witnesses while
145 protecting the rights of the parties “during a public health emergency.” The suggestion seems to
146 extend beyond allowing use of the witness’s deposition at trial, perhaps in part because of other
147 provisions in Rule 32(a) that allow a party’s deposition to be used for any purpose and allow the
148 court to permit use of a deposition in exceptional circumstances. (2) Rule 45(c) limits the
149 geographic reach of a subpoena to command a person to attend a trial, hearing, or deposition. The
150 rule is not qualified by conferring a right not to attend during an emergent event, or when travel is
151 otherwise challenging or burdensome. It should be amended to permit appearance by video
152 conference, or even telephone, for good cause. Rule 43(a) now permits testimony in open court by
153 contemporaneous transmission from a different location, on terms that should be readily met in
154 any circumstances that would qualify as an emergency. And see also the general protective order
155 provisions of Rule 26(c). (3) Rule 77(b) directs that no hearing may be conducted outside the
156 district unless all affected parties consent. This provision was considered by the subcommittee, by
157 all advisory committees -- most especially the Criminal Rules Committee. 28 U.S.C. § 141(b)(1),
158 which provides for special sessions outside the district, also was considered. The conclusion was
159 that remote proceedings satisfy the current rule, at least as long as the judge is participating from
160 a place within the district, and likely more broadly if an emergency forces a court’s judges to leave
161 the district. The question remains under consideration by other Judicial Conference committees.

162 The second set of three rules described by AAJ is more easily disposed of. (1) and (2):
163 Rules 28 and 30(b)(5)(A) direct that a deposition be conducted “before” an officer. AAJ recognizes
164 that courts have allowed remote connections to count as “before” during the pandemic, but
165 suggests time and resources would be saved by avoiding litigation of the issue. “Before” should
166 be clarified, they urge, to ensure that the reporter need not be in the same physical location as the
167 witness or counsel during an emergency situation. Subcommittee consideration of this issue
168 concluded that the present rule text meets the need. It seems likely that continuing practice during
169 the pandemic will confirm this conclusion. (3): Rule 30(b)(4) allows a deposition “by telephone
170 or other remote means.” AAJ proposes an amendment to expressly include “video conference” as
171 an appropriate remote means, and to make virtual hearings the default means “during certain
172 emergencies.” The present language suffices to authorize video conferencing. Defining “certain
173 emergencies” could prove difficult.

174 Finally, AAJ suggests that “language should be used” to clarify that local rules adopted
 175 during an emergency may not conflict with Rule 87 and must conform to 28 U.S.C. §§ 2072 and
 176 2075. 28 U.S.C. § 2071(a) and Rule 83(a)(2) suffice to ensure this proposition.

177 Federal Bar Association, CV-2021-0013: “[T]he FBA believes the judiciary is best suited to
 178 declare an emergency concerning court rules of practice and procedure. The proposed amendments
 179 * * * provide important flexibility for the U.S. Courts in unforeseen situations, some of which may
 180 not rise to the level of a national emergency.” The FBA also “agrees that the Judicial Conference
 181 exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules
 182 emergency.” This will help prevent a disjointed or balkanized response, particularly in
 183 circumstances that affect only particular regions or subsets of federal courts. And the FBA
 184 “applauds the Rules Committee’s success in achieving relative uniformity across all four
 185 emergency rules.”

186 Lawyers for Civil Justice, CV-2021-0014: The need for any Emergency Rule 4 provisions should
 187 be carefully considered. “Rule 4 has functioned well during the pandemic.” “Reasonably
 188 calculated to give notice” is a vague phrase that “could obviate established due process * * * by
 189 permitting courts to authorize alternative methods of service that will not necessarily ensure that
 190 actual notice occurs.” e-mail or social media service might be authorized. “The potential
 191 alternative methods of service are without limit * * *.” The risks of failure of notice are significant,
 192 particularly during an emergency situation. And the rule should provide that even if an alternative
 193 method of service is authorized, a default can be entered only after requiring service by a traditional
 194 method.

195 *Changes Since Publication*

196 No changes are recommended in the text of Rule 87 as published. The Committee Note is
 197 recommended for adoption with the changes described above, adding new language reinforcing
 198 the importance of considering the methods of service authorized by Rule 4 before ordering an
 199 alternative method under one of the Emergency Rules 4, removing two sentences published in
 200 brackets, and removing the brackets from a single word.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE¹**

- 1 **Rule 87. Civil Rules Emergency**
- 2 **(a) Conditions for an Emergency.** The Judicial
- 3 Conference of the United States may declare a Civil Rules
- 4 emergency if it determines that extraordinary circumstances
- 5 relating to public health or safety, or affecting physical or
- 6 electronic access to a court, substantially impair the court's
- 7 ability to perform its functions in compliance with these
- 8 rules.
- 9 **(b) Declaring an Emergency.**
- 10 **(1) Content.** The declaration must:
- 11 **(A) designate the court or courts affected;**
- 12 **(B) adopt all the emergency rules in**
- 13 **Rule 87(c) unless it excepts one or**
- 14 **more of them; and**

¹ New material is underlined in red.

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15 (C) be limited to a stated period of no
16 more than 90 days.

17 (2) *Early Termination.* The Judicial Conference
18 may terminate a declaration for one or more
19 courts before the termination date.

20 (3) *Additional Declarations.* The
21 Judicial Conference may issue
22 additional declarations under this
23 rule.

24 (c) *Emergency Rules.*

25 (1) *Emergency Rules 4(e), (h)(1), (i), and*
26 *(j)(2), and for serving a minor or*
27 *incompetent person.* The court may by order
28 authorize service on a defendant described in
29 Rule 4(e), (h)(1), (i), or (j)(2)—or on a minor
30 or incompetent person in a judicial district of
31 the United States—by a method that is
32 reasonably calculated to give notice. A

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33 method of service may be completed under
34 the order after the declaration ends unless the
35 court, after notice and an opportunity to be
36 heard, modifies or rescinds the order.

37 **(2) Emergency Rule 6(b)(2).**

38 **(A) Extension of Time to File Certain**
39 **Motions. A court may, by order, apply**
40 **Rule 6(b)(1)(A) to extend for a period**
41 **of no more than 30 days after entry of**
42 **the order the time to act under**
43 **Rules 50(b) and (d), 52(b), 59(b), (d),**
44 **and (e), and 60(b).**

45 **(B) Effect on Time to Appeal. Unless the**
46 **time to appeal would otherwise be**
47 **longer:**

48 **(i) if the court denies an**
49 **extension, the time to file an**
50 **appeal runs for all parties**

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51 from the date the order
52 denying the motion to extend
53 is entered;
54 (ii) if the court grants an
55 extension, a motion
56 authorized by the court and
57 filed within the extended
58 period is, for purposes of
59 Appellate Rule 4(a)(4)(A),
60 filed “within the time allowed
61 by” the Federal Rules of Civil
62 Procedure; and
63 (iii) if the court grants an
64 extension and no motion
65 authorized by the court is
66 made within the extended
67 period, the time to file an
68 appeal runs for all parties

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69 from the expiration of the
70 extended period.
71 (C) Declaration Ends. An act authorized
72 by an order under this emergency rule
73 may be completed under the order
74 after the emergency declaration ends.

Committee Note

Subdivision (a). This rule addresses the prospect that extraordinary circumstances may so substantially interfere with the ability of the court and parties to act in compliance with a few of these rules as to substantially impair the court's ability to effectively perform its functions under these rules. The responses of the courts and parties to the COVID-19 pandemic provided the immediate occasion for adopting a formal rule authorizing departure from the ordinary constraints of a rule text that substantially impairs a court's ability to perform its functions. At the same time, these responses showed that almost all challenges can be effectively addressed through the general rules provisions. The emergency rules authorized by this rule allow departures only from a narrow range of rules that, in rare and extraordinary circumstances, may raise unreasonably high obstacles to effective performance of judicial functions.

The range of the extraordinary circumstances that might give rise to a rules emergency is wide, in both time and space. An emergency may be local—familiar examples include hurricanes, flooding, explosions, or civil unrest. The circumstance may be more widely regional, or national. The

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emergency may be tangible or intangible, including such events as a pandemic or disruption of electronic communications. The concept is pragmatic and functional. The determination of what relates to public health or safety, or what affects physical or electronic access to a court, need not be literal. The ability of the court to perform its functions in compliance with these rules may be affected by the ability of the parties to comply with a rule in a particular emergency. A shutdown of interstate travel in response to an external threat, for example, might constitute a rules emergency even though there is no physical barrier that impedes access to the court or the parties.

Responsibility for declaring a rules emergency is vested exclusively in the Judicial Conference. But a court may, absent a declaration by the Judicial Conference, utilize all measures of discretion and all the flexibility already embedded in the character and structure of the Civil Rules.

A pragmatic and functional determination whether there is a Civil Rules emergency should be carefully limited to problems that cannot be resolved by construing, administering, and employing the flexibility deliberately incorporated in the structure of the Civil Rules. The rules rely extensively on sensible accommodations among the litigants and on wise management by judges when the litigants are unable to resolve particular problems. The effects of an emergency on the ability of the court and the parties to comply with a rule should be determined in light of the flexible responses to particular situations generally available under that rule. And even if a rules emergency is declared, the court and parties should explore the opportunities for flexible use of a rule before turning to rely on an emergency departure. Adoption of this rule, or a declaration of a rules emergency, does not imply any limitation of the courts' ability to respond to emergency

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circumstances by wise use of the discretion and opportunities for effective adaptation that inhere in the Civil Rules themselves.

Subdivision (b). A declaration of a rules emergency must designate the court or courts affected by the emergency. An emergency may be so local that only a single court is designated. The declaration adopts all of the emergency rules listed in subdivision (c) unless it excepts one or more of them. An emergency rule supplements the Civil Rule for the period covered by the declaration.

A declaration must be limited to a stated period of no more than 90 days, but the Judicial Conference may terminate a declaration for one or more courts before the end of the stated period. A declaration may be succeeded by a new declaration made under this rule. And additional declarations may be made under this rule before an earlier declaration terminates. An additional declaration may modify an earlier declaration to respond to new emergencies or a better understanding of the original emergency. Changes may be made in the courts affected by the emergency or in the emergency rules adopted by the declaration.

Subdivision (c). Subdivision (c) lists the only Emergency Rules that may be authorized by a declaration of a rules emergency.

Emergency Rules 4. Each of the Emergency Rules 4 authorizes the court to order service by means not otherwise provided in Rule 4 by a method that is appropriate to the circumstances of the emergency declared by the Judicial Conference and that is reasonably calculated to give notice. The nature of some emergencies will make it appropriate to rely on case-specific orders tailored to the particular emergency and the identity of the parties, ~~and take account~~

~~of.~~ The court should explore the opportunities to make effective service under the traditional methods provided by Rule 4, along with the difficulties that may impede effective service under Rule 4. Any means of service authorized by the court must be calculated to fulfill the fundamental role of serving the summons and complaint in providing notice of the action and the opportunity to respond. Other emergencies may make it appropriate for a court to adopt a general practice by entering a standing order that specifies one or possibly more than one means of service appropriate for most cases. Service by a commercial carrier requiring a return receipt might be an example.

The final sentence of Emergency Rule 4 addresses a situation in which a declaration of a civil rules emergency ends after an order for service is entered but before service is completed. Service may be completed under the order unless the court modifies or rescinds the order. A modification that continues to allow a method of service specified by the order but not within Rule 4, or rescission that requires service by a method within Rule 4, may provide for effective service. But it may be better to permit completion of service in compliance with the original order. For example, the summons and complaint may have been delivered to a commercial carrier that has not yet delivered them to the party to be served. Allowing completion and return of confirmation of delivery may be the most efficient course. Allowing completion of a method authorized by the order may be particularly important when a claim is governed by a statute of limitations that requires actual service within a stated period after the action is filed.

Emergency Rule 6(b)(2). Emergency Rule 6(b)(2) supersedes the flat prohibition in Rule 6(b)(2) of any extension of the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The court may extend those

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times under Rule 6(b)(1)(A). Rule 6(b)(1)(A) requires the court to find good cause. Some emergencies may justify a standing order that finds good cause in general terms, but the period allowed by the extension ordinarily will depend on case-specific factors as well.

Rule 6(b)(1)(A) authorizes the court to extend the time to act under Rules 50(b), 50(d), 52(b), 59(b), 59(d), 59(e), and 60(b) only if it acts, or if a request is made, before the original time allowed by those rules expires. For all but Rule 60(b), the time allowed by those rules is 28 days after the entry of judgment. For Rule 60(b), the time allowed is governed by Rule 60(c)(1), which requires that the motion be made within a reasonable time, and, for motions under Rule 60(b)(1), (2), or (3), no more than a year after the entry of judgment. The maximum extension is not more than 30 days after entry of the order granting an extension. If the court acts on its own, extensions for Rule 50, 52, and 59 motions can extend no later than 58 days after the entry of judgment. If an extension is sought by motion, an extension can extend no later than 30 days after entry of the order granting the extension. ~~[An extension of the time to file a Rule 60(b) motion would be superfluous so long as the motion is made within a reasonable time, except for the circumstance in which a rules emergency declaration is in effect and the emergency circumstances make it reasonable to permit a motion beyond the one-year limit for motions under Rule 60(b)(1), (2), or (3).]~~

Special care must be taken to ensure that the parties understand the effect of an order granting or denying an extension on the time for filing a notice of appeal. Appeal time must be reset to support an orderly determination whether to order an extension and, if an extension is ordered, to make and dispose of any motion authorized by the extension.

Subparagraph 6(b)(2)(B) integrates the emergency rule with Appellate Rule 4(a)(4)(A) for four separate situations.

The first situation is governed by the initial text: “Unless the time to appeal would otherwise be longer.” One example that illustrates this situation would be a motion by the plaintiff for a new trial within the time allowed by Rule 59, followed by a timely motion by the defendant for an extension of time to file a renewed motion for judgment as a matter of law under Rule 50(b). The court denies the motion for an extension without yet ruling on the plaintiff’s motion. The time to appeal after denial of the plaintiff’s motion is longer for all parties than the time after denial of the defendant’s motion for an extension.

Item (B)(i) resets appeal time to run for all parties from the date of entry of an order denying a motion to extend. ~~[The court may need some time to make a careful decision on the motion, although the time constraints imposed on post-judgment motions reflect the concerns that conduce to deciding as promptly as the emergency circumstances make possible.]~~

Items (B)(ii) and (iii) reset appeal time after the court grants an extended period to file a post-judgment motion. Appellate Rule 4(a)(4)(A) is incorporated, giving the authorized motion the effect of a motion filed “within the time allowed by” the Federal Rules of Civil Procedure. If more than one authorized motion is filed, appeal time is reset to run from the order “disposing of the last such remaining motion.” If no authorized motion is made, appeal time runs from the expiration of the extended period.

These provisions for resetting appeal time are supported for the special timing provisions for Rule 60(b) motions by a parallel amendment of Appellate Rule 4(a)(4)(A)(vi) that resets appeal time on a timely motion “for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59.” This Rule 4 provision, as amended, will assure that a Rule 60(b) motion resets appeal time for review of the final judgment only if it is filed within the 28 days ordinarily allowed for post-judgment motions under Rule 59 or any extended period for filing a Rule 59 motion that a court might authorize under Emergency Rule 6(b)(2). A timely Rule 60(b) motion filed after that period, whether it is timely under Rule 60(c)(1) or under an extension ordered under Emergency Rule 6(b)(2), supports an appeal from disposition of the Rule 60(b) motion, but does not support an appeal from the {original} final judgment.

Emergency Rule 6(b)(2)(C) addresses a situation in which a declaration of a Civil Rules emergency ends after an order is entered, whether the order grants or denies an extension. This rule preserves the integration of Emergency Rule 6(b)(2) with the appeal time provisions of Appellate Rule 4(a)(4)(A). An act authorized by the order, which may be either a motion or an appeal, may be completed under the order. If the order denies a timely motion for an extension, the time to appeal runs from the order. If an extension is granted, a motion may be filed within the extended period. Appeal time starts to run from the order that disposes of the last remaining authorized motion. If no authorized motion is filed within the extended period, appeal time starts to run on expiration of the extended period. Any other approach would sacrifice opportunities for post-judgment relief or appeal that could have been preserved if no emergency rule motion had been made.

Emergency rules provisions were added to the Appellate, Bankruptcy, Civil, and Criminal Rules in the wake of the COVID-19 pandemic. They were made as uniform as possible. But each set of rules serves distinctive purposes, shaped by different origins, traditions, functions, and needs. Different provisions were compelled by these different purposes.

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

JOHN D. BATES
CHAIR

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CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules (Rule 62)

DATE: May 11, 2022

Last June, the Standing Committee approved for publication proposed Criminal Rule 62, the draft emergency rule. In April, the Criminal Rules Committee met to consider the public comments on the proposed rule, which numbered ten or so. After considerable discussion, the Committee chose not to revise the proposed rule, but approved two changes in the note dealing with alternative public access.

The Committee recommends that Rule 62, with the two changes in the note, be approved for transmittal to the Judicial Conference with the recommendation that the Conference transmit the rule to the Supreme Court.

A. The recommended changes in the committee note

The Committee recommends two amendments to the published note accompanying paragraph (d)(1), which requires courts to provide reasonable alternative access for the public. As amended, the note would read as follows:

Paragraph (d)(1) addresses the courts' obligation to provide alternative access when emergency conditions have substantially impaired in-person attendance by the public at public proceedings. The term "public proceeding" ~~was~~ ^{is}¹ intended to capture proceedings that the rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments. The rule creates a duty to provide the public, ~~including victims,~~ with "reasonable alternative access," notwithstanding Rule 53's ban on the "broadcasting of judicial proceedings." Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding.

The duty arises only when the substantial impairment of in-person access by the public is caused by emergency conditions. The rule does not apply when reasons other than emergency conditions restrict access. The duty arises not only when emergency conditions substantially impair the attendance of anyone, but also when conditions would allow participants but not the public to attend, as when capacity must be restricted to prevent contagion.

Alternative access must be contemporaneous when feasible. For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided.

When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

a. Comments received

Three submissions commented on the reference to "victims" in the published committee note discussing (d)(1). They offered conflicting views.

The **Department of Justice (21-CR-0003-0008)** requested that the following sentence be added to the note: "When providing 'reasonable alternative access' courts must be mindful of victims' rights under the Crime Victims' Rights Act, 18 U.S.C. § 3771." It explained:

...without an explicit reference to the CVRA, the commentary's grouping of victims with the public for the purposes of providing "reasonable alternative access, contemporaneous if feasible" may result in courts providing reasonable alternative

¹ To keep the present tense consistent throughout the note, the Committee also accepted this stylistic change at the meeting. No change in meaning is intended.

access that falls short of the CVRA’s requirements. We believe a victim should be considered similar to a participant in the proceedings, and not the public. Most importantly, we think the CVRA must be scrupulously followed. When providing “reasonable alternative access,” courts must account for a victim who wishes to exercise her right: 1) to be “reasonably heard” at any public court proceeding involving the “release, plea, sentencing,” or parole of the accused; 2) to not be excluded from any such court proceeding subject to limited exceptions; and 3) to have reasonable, accurate, and timely notice of any public court proceeding involving the crime, release, or escape of the accused. 18 U.S.C. § 3771(a)(2)-(4). Non-contemporaneous access or access that allows a victim to watch or listen, but not participate in the public proceedings, may not satisfy the CVRA. To avoid confusion the Department recommends explicitly referencing courts’ obligations to comply with CVRA in the commentary.

The National Association of Criminal Defense Lawyers (NACDL) (21-CR-0003-0011) strongly disagreed with DOJ’s request, and it urged no change to the published note. NACDL argued:

The current draft Note is entirely correct to group alleged victims with other members of the public for this purpose. The CVRA does not dictate the details of “victim” notice or access, and in some respects is superseded by Fed.R.Crim.P. 60. As to procedural implementation, then, under the principles of the Rules Enabling Act the CVRA’s notice and attendance requirements are properly subordinated to the provisions of the new Rule (in the event of a qualifying emergency), just as it is to Rule 60(a) in ordinary times. The Department’s suggested addition to the Committee Note would not “avoid confusion” but rather would engender it, by encouraging challenges by alleged “victims,” either before or after the fact, to proceedings held in accordance with the Rule.

Professor Miller and the Federal Criminal Justice Clinic at the University of Chicago (FCJC) (21-CR-0003-0013) requested that the Committee eliminate the phrase “including victims’ from the phrase ‘duty to provide the public, including victims, with ‘reasonable alternative access.’” Alternatively, the FCJC suggested revising the note to reflect the Sixth Amendment’s priority of access for the friends and family of the defendant, and to ensure reasonable press access.

In addressing this topic and several others discussed below, the FCJC argued that some of the language in the proposed rule and note is misleading or inconsistent with existing constitutional standards:

The Note’s express reference to victims and silence about friends and family of the defendant may be interpreted to suggest that courts should prioritize the access rights of victims over others when space is limited. The Note thus appears to conflict with Supreme Court precedent that requires courts to provide access for friends and family of the accused, *Oliver*, 333 U.S. at 272.

The FCJC stated that “access problems can be felt most acutely by friends and family of the accused,” listing lack of technology or the knowledge to use it, “[i]mprecise instructions that impede their ability to access proceedings,” and the importance of their contributions at detention hearings and sentencings, under 18 U.S.C. §§ 3142(g)(3)(A); 3553(a)(1).”

b. Committee deliberations

The Committee accepted the subcommittee’s recommendation to revise the note to draw attention to the concerns about victim participation under the CVRA—and also the concerns raised by FCJC that any access comply with the First and Sixth Amendments—without suggesting a position on substantive issues of constitutional law, assigning priority to any particular group among the public, or attempting to recite the groups “included” in “the public.” After deleting the phrase “including victims,” the revision adds the following sentence to the note’s discussion of (d)(1):

When providing “reasonable alternative access,” courts must be mindful of the constitutional guarantees of public access, and any applicable statutory provision, including the Crime Victims’ Rights Act, 18 U.S.C. § 3771.

The phrase “any applicable statutory provision, including the Crime Victims’ Rights Act” is intended to encompass any other existing or future statutory provision that might be applicable.

The Committee agreed with the subcommittee’s approach to the issues raised by public comments. But members extensively discussed two points concerning the precise wording of the new sentence: namely, whether to refer specifically to the First and Sixth Amendments, and whether to include a reference to the common law right of access.

As proposed by the subcommittee, the new sentence advised courts to be “mindful of the constitutional guarantees of public access in the First and Sixth Amendments.” The proposal responded to the FCJC’s concern that courts may overlook these rights during emergencies. At the April meeting, Judge Furman raised the question whether there might be other constitutional bases for a right of public access. No one had raised that issue before, and the reporters had not researched it. But members thought that defendants might turn to the Due Process Clause if the Sixth Amendment were not applicable, and they were reluctant to adopt language that might preclude such an approach.

Discussion focused on the benefits of drawing courts’ attention to the extensive case law on the right of public access under the First and Sixth Amendments versus the potential for a negative implication that there were no other relevant constitutional rights. Members noted that the negative implication would be strengthened by the phrasing referring to statutory rights: “any applicable statutory provision, including the Crime Victims’ Rights Act.” There was some support for a revision to make the references to the constitutional and statutory provisions parallel, such as “the constitutional guarantees of public access, including the First and Sixth Amendments access and any applicable statutory provision, including the Crime Victims’ Rights Act, 18 U.S.C. § 3771.”

A majority of the Committee was persuaded that the better course was to refer generally to “the constitutional guarantees of public access,” without a reference in the new sentence to the First and Sixth Amendments. Members who supported that view pointed out that the note as published already referred to these amendments. Just three paragraphs earlier, the note to (d)(1) provided:

The term “public proceeding” was intended to capture proceedings that the rules require to be conducted “in open court,” proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments.

With this reference already in the note accompanying the very provision in question, members thought the new reference to the constitutional guarantees of public access would be construed to include the First and Sixth Amendments, while avoiding the potential for a negative implication.

The discussion of this issue also addressed a second question, raised by Judge Bates at the meeting: whether the note should refer to a common law right of public access. This issue had not been raised during the drafting process, nor in any of the public comments, and the reporters had not researched it. During the meeting the reporters recalled, in general, that they had found support for a common law right of access while researching the issues raised by efforts to protect cooperators through methods such as sealing court records. In order to avoid any negative implication, members expressed support for the inclusion of a reference to the common law.

By a vote of seven to three, the Committee voted at the meeting to revise the addition to the note as follows:

When providing “reasonable public access,” courts must be mindful of the constitutional and common law guarantees of public access and any applicable statutory provision, including the Crime Victims’ Rights Act, 18 U.S.C. § 3771.

After the meeting the reporters requested the assistance of the Rules Law Clerk, Mr. DeWitt, to determine whether there was a sufficient body of precedent on the common law right to physical presence at judicial proceedings to warrant an admonition that courts consider the common law in providing public access. His research found that only the Third Circuit had applied a common law right of access to proceedings, and all of the Third Circuit cases addressing the common law right of access did so while applying First and or Sixth Amendment rights to access as well.² None of these cases applied the common law right independently, or suggested that access under the common law right is any broader than access under the First or Sixth

² These cases from the Third Circuit enforce both the common law and constitutional rights simultaneously: *Gov’t of the V.I. v. Leonard A.*, 922 F.2d 1141, 1144-45 (3d Cir. 1991) (upholding district court decision to allow the daughter of a prosecution witness to remain in the courtroom); *US Investigations Servs., LLC v. Callihan*, No. 2:11-cv-0355, 2011 WL 1157256, at *1 (W.D. Pa. Mar. 29, 2011) (denying motion to close courtroom in civil case re trade secrets); *Harris v. City of Philadelphia*, No. CIV. A 82-1847, 1995 WL 385102, at *2 (E.D. Pa. June 26, 1995) (declining to close courtroom). And this one finds an exception to both constitutional and common law right of access and closed certain proceedings: *United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 149-50 (D. Del. 2020) (Stark, J), vacated as moot No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

Amendment. The Eleventh Circuit, and several district courts from other circuits, mentioned a common law right of access to judicial “proceedings and records” or “proceedings and documents” in cases addressing access to documents. Courts in other circuits by-and-large have not specifically addressed the issue, but turned to the common law only for discussion as to whether the public has a right to access certain documents.³

In light of this research, Judge Kethledge polled the Committee, which voted unanimously by email to delete the reference to “the . . . common law right” of access from the proposed addition to the committee note. The proposed addition provides:

When providing “reasonable alternative access,” courts must be mindful of the constitutional guarantees of public access, and any applicable statutory provision, including the Crime Victims’ Rights Act, 18 U.S.C. § 3771.

B. Provisions with public comments, no change recommended

1. Subdivision (a) – the role of the Judicial Conference

a. Comments received

Two comments addressed the language in subdivision (a) authorizing the Judicial Conference to declare a “judicial emergency.” The comments state conflicting views. The **Federal Magistrate Judges Association (FMJA) (21-CR-0003-0006)** expressed concern that “the Judicial Conference might not be well suited to addressing regional or District-specific emergencies of the type more likely to present in the future.” In contrast, the **Federal Bar Association (21-CR-0003-0009)** “agree[d] that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency.” It noted that “[c]onferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only particular regions or other subsets of federal courts.”

b. Committee deliberations

The Committee declined to revise the carefully crafted consensus about the authority of the Judicial Conference reflected in subdivision (a) as published. It was satisfied that the Judicial Conference has the ability to gather information and respond quickly to emergencies, through its executive committee if necessary. Moreover, it is important to have the Judicial Conference act as a national gatekeeper, charged with strictly limiting the authority to depart from the Rules of Criminal Procedure, which have been carefully designed to protect constitutional and statutory rights, as well as other interests.

³ The Sixth Circuit opinion in *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177-79 (6th Cir. 1983), for example, discussed the common law right of access to proceedings for a couple of paragraphs, but the issue in the case was sealing documents.

2. Paragraph (d)(1) - deleting or revising references to requiring public access to be “contemporaneous if feasible”

As published, paragraph (d)(1) provided:

(1) Public Access to a Proceeding. If emergency conditions substantially impair the public’s in-person attendance at a public proceeding, the court must provide reasonable alternative access, contemporaneous if feasible.

a. Comments received

Two comments expressed concern that the language “contemporaneous if feasible” in the text of (d)(1) and accompanying note did not convey adequately the importance of providing contemporaneous access and might be read as endorsing delayed access. They proposed different revisions to avoid this concern.

The **FMJA (21-CR-0003-0006)** requested that the Committee “eliminate the reference of contemporaneous if feasible” or revise the text to “indicate public access may only be denied if the interests of justice require a proceeding to go forward without public access.” The FMJA expressed concern that this phrase “might actually lead to more frequent denial of public access.”

The **FCJC (21-CR-0003-0013)** commented that the Committee should revise the proposed rule to “expressly provide that any limitations on public access during Rules Emergencies must satisfy *Waller*.” Specifically, “the Rule should be amended to expressly state that courts must provide both contemporaneous and audio-visual public access except where closure complies with the constitutional standard.” The FCJC objected to the statement in the note that “Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding.” Also, the FCJC urged that “the Rule and Note should clarify that feasibility and appropriateness are likewise governed by the constitutional standard.”

b. Committee deliberations

After extensive discussion (Draft Minutes, pp. 13-18), the Committee decided to retain the phrase “contemporaneous if feasible,” and not to add references to particular Supreme Court decisions defining the constitutional standards for public access. There was general agreement that it would not be appropriate for the rule or note to attempt to spell out the substantive constitutional requirements. But members found the decision whether to retain, reword, or eliminate the phrase “contemporaneous if feasible” more challenging.

During the drafting process, this phrase had been added to recognize the importance of contemporaneous access but also the possibility that such access might not be possible under emergency conditions that could be foreseen. By itself, the phrase “reasonable alternative access” is very general, and under emergency circumstances there was a concern that courts might not be attentive to the need for contemporaneous access. Adding this phrase to the text (as well as the note) was intended to serve as a reminder of this important norm, which might otherwise be overlooked in emergency situations. At the April meeting, there was a consensus that contemporaneous access should be the norm.

On the other hand, members recognized the need for flexibility given the impossibility of foreseeing the kinds of rules emergencies that might occur in the future. For example, in a situation like 9/11, telephone lines and the Internet could be down, and physical access interrupted as well. In that scenario, it might be impossible to provide public access contemporaneously.

But members also expressed concern that the limiting phrase, “contemporaneous *if feasible*” might, as the magistrate judges suggested, actually cause courts to provide less rather than more contemporary access. Members grappled with the tradeoff between the value of calling attention to the importance of contemporary access versus the possibility that the phrase might have such an unintended effect. Some possible compromises were discussed. The possibility of revising that phrase to the stronger wording of “contemporaneous if possible” was suggested, but several participants thought it would state too stringent a standard, potentially requiring herculean efforts. The possibility of deleting “contemporaneous if feasible” from the text but retaining it in the note was also considered. It was rejected because notes should not add requirements to the text, and they are also difficult for courts and litigants to access.

A member urged that when contemporaneous access cannot be provided proceedings should not occur, and she made a motion to revise the rule to require the court to provide “contemporaneous reasonable alternative access.” She argued that contemporaneous access to a public hearing is critical to allow victims and family members to participate, and the press to hear as the proceeding is occurring. If some form of contemporary access cannot be provided, she thought proceedings should not go forward. But other participants disagreed, citing the need for flexibility and noting that it would be inappropriate to delay some proceedings. For example, if someone was due to be released on bond, the proceedings should not be delayed if there was no phone line or the Internet that people could use to allow public access.

When there was no second to the motion to revise the rule, the Committee accepted the language of the rule as published.

3. Paragraph (d)(1) - adding references to the constitutional tests and various requirements regarding public access

Several other changes were proposed to paragraph (d)(1), quoted above, or to the note accompanying it.

a. Comment received

The FCJC (21-CR-0003-0013) proposed a series of additions to the text of (d)(1) and/or the note: requiring court participants to be able to see the public, barring courts from conditioning public access on advance permission of the court, and requiring prominently placed, district-wide announcement of any public access limitations.

The FCJC urged the Committee to revise the rule and note to “expressly require that court participants be able to see the public unless *Waller* can be satisfied.” Stating that during the pandemic at least 32 districts rendered spectators “effectively invisible” by reducing them to a phone number on a computer screen, the FCJC argued that the public should be visible to participants to the degree possible. It argued that “the presence of interested spectators may keep [the defendant’s] triers keenly alive to a sense of their responsibility and to the importance of their

functions.” *Waller*, 467 U.S. at 46 (quoting *Gannett Co.*, 443 U.S. at 380). Without being seen, the public may lose trust in the criminal justice system, the FCJC argued. Admitting that “*Waller* may well allow such restrictions based on technological capacity and courtroom decorum,” the FCJC argued that “such closures should be analyzed and justified, not taken as the default.”

The FCJC also asked the Committee to bar courts from conditioning public access on advance permission of the court, except as permitted by *Waller*. The submission states: “Eliminating advance registration requirements would bring public access during Rules Emergencies closer to the norm: The public could ‘walk into’ a courtroom at any time, with or without permission, unless the courtroom has been lawfully closed.”

And the FCJC proposed adding to the rule the requirement of a prominently placed, district-wide announcement of any public access limitations that (a) details the scope of the limitation, (b) explains in plain language how the public can access court, and (c) contains necessary constitutional findings.

b. Committee deliberations

The Committee declined to add the proposed details to the rule or the note. If guidance this detailed is necessary, it should come from other sources, such as the Benchbook or the Committee on Court Administration and Case Management.

4. Paragraph (d)(1) - barring courthouse-only access to remote proceedings

a. Comment received

The FCJC (21-CR-0003-0013) also objected to language in the published note that states: “For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided.” The FCJC argued that “[t]he Rule should prohibit courthouse-only [public] access to remote proceedings,” and “should recommend that districts allow remote access to any proceedings remotely or partially remotely. That remote access should not be within the courthouse itself.” Noting that several districts allowed only in-person public access, even to remote or partially remote hearings, the FCJC commented it is “debatable whether doing so during a deadly and contagious pandemic constitutes public access within the meaning of the First and Sixth Amendments.” But in any event, the FCJC contended, such a restriction is “unwise.” It explained: “when public health or safety is on the line—no one should have to choose between exercising their First or Sixth Amendment rights and risking their lives.”

b. Committee deliberations

The Committee declined to revise the rule to prohibit court-house only alternative access to remote proceedings or to delete the language referring to overflow courthouse space from the note. Rule 53 generally bans broadcasting, and the norm is in-person attendance. The FCJC suggestion would limit how courts could navigate around the prohibition against broadcasting

during emergencies, and would add an unprecedented prohibition regarding alternative in-person access. There was no support for making the proposed changes in the rule and note.

5. Paragraph (d)(2): written consents, waivers, and signatures of the defendant

This provision provides alternative signature requirements when emergency conditions limit a defendant's ability to sign. This was a particular problem for detained defendants who were unable to have in-person contact with counsel or receive and send documents electronically during the pandemic.

As published, (d)(2) states: "If any rule, including this rule, requires a defendant's signature, written consent, or written waiver—and emergency conditions limit a defendant's ability to sign—defense counsel may sign for the defendant if the defendant consents on the record." Paragraph (d)(2) also allows counsel to sign on behalf of a defendant who is not before the court at the time of consent; in that scenario, defense counsel must file an affidavit. The rule allows the judge to sign for the defendant only if the defendant is pro se and consents on the record.

As published, the note states:

Paragraph (d)(2) recognizes that emergency conditions may disrupt compliance with a rule that requires the defendant's signature, written consent, or written waiver. If emergency situations limit the defendant's ability to sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents. To ensure that there is a record of the defendant's consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the record, or, (2) without the defendant's consent on the record, defense counsel must file an affidavit attesting to the defendant's consent to the procedure. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. The written document signed by counsel on behalf of the defendant provides important additional evidence of the defendant's consent.

The court may sign for a pro se defendant, if that defendant consents on the record. There is no provision for the court to sign for a counseled defendant, even if the defendant provides consent on the record. The Committee concluded that rules requiring the defendant's signature, written consent or written waiver protect important rights, and permitting the judge to bypass defense counsel and sign once the defendant agrees could result in a defendant perceiving pressure from the judge to sign. Requiring a writing from defense counsel is an essential protection when the defendant's own signature is not reasonably available because of emergency conditions.

It is generally helpful for the court to conduct a colloquy with the defendant to ensure that defense counsel consulted with the defendant with regard to the substance and import of the pleading or document being signed, and that the consent to allow counsel to sign was knowing and voluntary.

a. Comments received

Judge Denise Cote (21-CR-0003-0005) recommended that (d)(2) be revised to provide that “defense counsel or the court may sign for the defendant.” She explained “it may be difficult and create unnecessary delay for the attorney to affix the defendant’s name to a signature line and then provide that document to the court.” She argued Rule 62 should focus exclusively on creating an unambiguous record of the defendant’s consent, regardless of who affixes the defendant’s signature. Describing her court’s experience during emergencies including the pandemic, Judge Cote noted that it regularly conducted proceedings where everyone participated remotely from different locations, and it was both useful and important for the court to be able to sign documents on the defendant’s behalf with proper safeguards:

Defense counsel were provided an opportunity to consult confidentially with the defendant and the judge confirmed on the record that the consultation had occurred, that the issue requiring the defendant’s signature had been discussed, and that the defendant had knowingly and voluntarily given consent. Defense counsel often ask the judge to add the defendant’s signature to the form or express relief when we volunteer to do so. Again, what is essential is that the consultation has occurred, that consent has been knowing and voluntary, and that there is an adequate contemporaneous record of this consultation and assent.

The **FMJA (21-CR-0003-0006)** agreed that the court should be able to sign for a defendant if the court can obtain “oral consent on the record.” It urged that:

Flexibility during emergencies is the key to ensuring a defendant can be seen promptly by the Court, especially when first arrested. Many members of the FMJA had to obtain oral consent on the record during the pandemic and believe the flexibility to do this was critical to ensuring that initial presentments, in particular, went forward without delay.

b. Committee deliberations

Allowing counsel to sign for the defendant was first suggested at the 2020 miniconference by defense attorneys, who said it was working well. The Committee discussed the issue again at its November 2020 meeting. There, in response to a suggestion that the judge should be permitted to sign for a defendant who consented on the record, Judge Dever (who then chaired the Emergency Rules subcommittee) noted that the written signature by counsel on the defendant’s behalf is an “extra piece of evidence to the extent someone later says, ‘I didn’t really consent, or the judge misunderstood me’ . . .” Minutes, at 19. Judge Dever raised an additional concern “that the judge might get in between that relationship, and that having the lawyer sign was better than allowing the judge to say, ‘you consent—don’t you?—and we’re going to do this today.’” *Id.* at 28. The Committee declined to revise the rule to allow the court to sign for a represented defendant.

At its April 2022 meeting, the Committee gave this question plenary consideration. The Committee’s discussion revealed little support for claims that defense counsel wanted judges to be able to sign for their clients. Nor was there much evidence that defense counsel have been unable themselves to sign on their clients’ behalf. To the contrary, every defense member, as well as

many judicial members, said that defense counsel have been able to sign and submit those documents without problems. One member summed it up this way: “it is a matter of expediency that maybe isn’t worth the possible infringement on rights if we have the judge get involved. The defense attorney should be doing the advising.” Draft Minutes, at p. 24.

6. Paragraph (d)(4): Rule 35 deadlines

Rule 62(d)(4) allows a court to extend the time to take action under Rule 35 as reasonably necessary when emergency conditions provide good cause to do so. The published committee note states the rationale for this provision:

Paragraph (d)(4) provides an emergency exception to Rule 45(b)(2), which prohibits the court from extending the time to take action under Rule 35 “except as stated in that rule.” When emergency conditions provide good cause for extending the time to take action under Rule 35, the amendment allows the court to extend the time for taking action “as reasonably necessary.” The amendment allows the court to extend the 14-day period for correcting a clear error in the sentence under Rule 35(a) and the one-year period for government motions for sentence reductions based on substantial assistance under Rule 35(b)(1). Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35. This emergency rule does not address the extension of other time limits because Rule 45(b)(1) already provides the necessary flexibility for courts to consider emergency circumstances. It allows the court to extend the time for taking other actions on its own or on a party’s motion for good cause shown.

a. Comment received

The **Department of Justice (21-CR-0003-0008)** recommended that the Committee add to the note accompanying this paragraph the following language to make it clear that the extension is “limited to sentences imposed immediately prior to or during the criminal rules emergency.” It explained:

The extension of time to take action under Rule 35 only applies to sentences imposed within 14 days immediately prior to the declaration of a criminal rules emergency or to sentences imposed during the criminal rules emergency. Nothing in this rule is intended to provide relief for a defendant who had the benefit of a full 14-day period under Rule 35, but failed to take action.

b. Committee deliberations

The Department did not raise this proposed addition during the drafting process. It did previously suggest limiting language for the note. At the Department’s suggestion the Committee approved the sentence that reads: “Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35.”

The subcommittee recommended that the Committee reject the new addition suggested by

the Department. The subcommittee concluded that the rule was clear and no additional language in the note was needed to address any frivolous motions seeking relief, including motions by those who had the benefit of a full 14-day period under Rule 35 before the emergency declaration but failed to take action.

At the April Committee meeting, Mr. Wroblewski said the Department was satisfied with these deliberations by the subcommittee, and that he did not intend to renew the request for new note language. Draft Minutes, at p. 42.

7. Paragraphs (e)(1), (2), and (3): consultation opportunities with counsel

Subdivision (e) provides authority to use virtual conferencing technology when emergency conditions limit the physical presence of participants at criminal proceedings. The Advisory Committee concluded that, given the critical interests served by holding proceedings in court, any authority to substitute virtual for physical presence must extend no further than necessary.

Paragraph (e)(1) addresses proceedings that courts may already conduct by videoconference with the defendant's consent under existing Rules 5, 10, 40, and 43(b)(2) (initial appearances, arraignments, and certain misdemeanor proceedings). The committee note explains that paragraph (e)(1) –

does not change the court's existing authority to use videoconferencing for these proceedings, except that it requires the court to address emergency conditions that significantly impair the defendant's opportunity to consult with counsel. In that situation, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2).

Paragraphs (e)(2) and (3), addressing the use of videoconferencing in other proceedings, also require that the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings.

a. Comments received

Three of the comments received by the Committee addressed the language requiring an adequate opportunity to consult confidentially with counsel.

The **FMJA (21-CR-0003-0006)** recommended deleting from paragraph (e)(1) the requirement "that if emergency conditions substantially impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to do so confidentially before and during those proceedings." That paragraph addresses videoconferencing authorized by current Rules 5, 10, 40, and 43(b)(2). The FMJA expressed concern that this requirement "appears to impose a duty on the Court only in emergency situations," and implies that this obligation does not exist in the non-emergency times.

Judge Cote (21-CR-0003-0005) recommended revising the proposed consultation requirements in (e)(1) and (2) so that they require that the defendant have an “adequate opportunity” to consult with counsel “confidentially either before ~~and~~ or during” certain videoconference proceedings. She explained:

Our experience . . . has been that consultation between the defendant and defense counsel might be very difficult to arrange, particularly if a defendant is incarcerated. If the record created by the judge during the proceeding establishes that an adequate opportunity for consultation has been provided for the particular proceeding (that is, for whatever the defendant must understand from that proceeding and do at it), that should be sufficient.

A third comment from **NACDL (21-CR-0003-0011)** supported retaining the requirement as published but recommended adding to the note more explanation of what an “adequate opportunity” would entail. NACDL expressed strong support for the requirement of an adequate opportunity to consult with counsel before (as well as during) proceedings under proposed Rule 62(e). During the pandemic, NACDL’s members were “often unable to consult with clients—a critical aspect of rendering effective assistance of counsel—as frequently, for as long, or with sufficient privacy, as is required for us to establish a proper attorney-client relationship and fulfill our professional duties and constitutional mission.” NACDL urged an addition to the committee note stating that “an ‘adequate opportunity’ will ordinarily require an unhurried and confidential meeting between the accused and counsel that occurs well before—and whenever feasible, not on the same day as—the proceeding itself.” Noting that the current note is silent on what “before” means, NACDL urged that it should not be sufficient to have only a few minutes of contact just before the proceeding, while the other participants are waiting.

b. Committee deliberations

At the April 2022 meeting, members did not share the FMJA’s concern that the requirement in (e)(1) that the court ensure an adequate opportunity for confidential consultation for proceedings under Rules 5, 10, 40, and 43(b) would somehow imply that the same obligation is absent in non-emergency times. The requirement, the subcommittee had concluded, is clearly conditioned on the impairment of consultation opportunities by emergency conditions—and will not suggest that courts can dispense with consultation opportunities in non-emergency times.

Members were similarly unpersuaded by Judge Cote’s suggestion to require only an adequate opportunity before *or* during the proceeding. Arguably the top priority for the defense bar with respect to the emergency rule has been to ensure an adequate opportunity to consult with clients. Members likewise emphasized the importance of these consultations, and saw no practical reason to dilute this requirement.

As for NACDL’s request for added language defining when consultation would be adequate, the subcommittee recommendation to the Committee was that no change to the rule or note as published be made, and no Committee member opted to discuss this issue further.

8. Paragraph (e)(3): defendant’s written request for videoconferencing for pleas and sentencings

This provision prompted lengthy discussion at the Committee’s April meeting. Paragraph (e)(3), like the CARES Act, imposes more restrictions on the use of videoconferencing at pleas and sentencings than it imposes on its use in other proceedings. In addition to the consultation requirement, videoconferencing for pleas or sentencings are permissible only if (1) the chief judge of the district makes a district-wide finding that emergency conditions substantially impair a court’s ability to hold felony pleas and sentencings in person in that district, (2) “the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing,” and (3) the court finds “that further delay in that particular case would cause serious harm to the interests of justice.”

As published, the committee note accompanying this provision states:

Paragraph (e)(3) addresses the use of videoconferencing for a third set of proceedings: felony pleas and sentencings under Rules 11 and 32. The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of defendant’s physical presence at plea and sentence is reflected in Rules 11 and 32. The Committee’s intent was to carve out emergency authority to substitute virtual presence for physical presence at a felony plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence include three circumstances in addition to those required for the use of videoconferencing under (e)(2).

Subparagraph (e)(3)(A) requires that the chief judge of the district (or alternate under 28 U.S.C. § 136(e)) make a district-wide finding that emergency conditions substantially impair a court’s ability to hold felony pleas and sentencings in person in that district within a reasonable time. This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Although the finding serves as assurance that videoconferencing might be necessary in the district, as under (e)(2), individual courts within the district may not conduct virtual plea and sentencing proceedings in individual cases unless they find the remaining criteria of (e)(3) and (4) are satisfied.

Subparagraph (e)(3)(B) states that the defendant must request in writing that the proceeding be conducted by videoconferencing, after consultation with counsel. The substitution of “request” for “consent” was deliberate, as an additional protection against undue pressure to waive physical presence. This requirement of writing is, like other requirements of writing in the rules, subject to the emergency

provisions in (d)(2), unless the relevant emergency declaration excludes the authority in (d)(2). To ensure that the defendant consulted with counsel with regard to this decision, and that the defendant's consent was knowing and voluntary, the court may need to conduct a colloquy with the defendant before accepting the written request.

Subparagraph (e)(3)(C) requires that before a court may conduct a plea or sentencing proceeding by videoconference, it must find that the proceeding in that particular case cannot be further delayed without serious harm to the interests of justice. Examples may include some pleas and sentencings that would allow transfer to a facility preferred by the defense, or result in immediate release, home confinement, probation, or a sentence shorter than the time expected before conditions would allow in-person proceedings. A judge might also conclude that under certain emergency conditions, delaying certain guilty pleas under Rule 11(c)(1)(C), even those calling for longer sentences, may result in serious harm to the interests of justice.

a. Comments received

The Committee received comments from **Judge Denise Cote (21-CR-0003-0005)** and **Judge Mark R. Hornak (21-CR-0003-0012)** on this portion of the rule.

Judge Cote recommended omitting the requirement that felony pleas and sentencing can occur by videoconferencing only if the defendant, after consulting with counsel, requests in writing that the proceeding be conducted by videoconferencing. She urged that the rule be revised to allow videoconferencing if “the court finds during the proceeding that the defendant, following consultation with counsel, has requested that the proceeding be conducted by videoconferencing.”

Judge Cote contended there is no need for a written request received *before* the proceeding, and if a written request is required, the rule should allow signature by the defendant, defense counsel, *or the court* on behalf of and with authorization from the defendant on the record. She urged that the focus should be on whether there is consent, based on consultation with defense counsel, and that the record adequately reflect informed and voluntary consent. She stressed practical difficulties:

During an emergency it may be particularly difficult for a defendant to sign and transmit any writing to his/her counsel or the court. A defendant, particularly an incarcerated defendant, may lack access to the technology needed to sign and electronically transmit a request to his/her counsel or the court, and during an emergency such as a pandemic, defense counsel and the court may not be able to receive a signed writing by mail. Even if the Rule envisions that defense counsel may sign the written request on behalf of the defendant, defense counsel may in many emergencies find it difficult to create the writing and to transmit it.

Judge Hornak concurred in this portion of Judge Cote's comment. Based on his court's experience, he concluded:

the requirement of an advance writing signed by the defendant (1) would likely be inconsistent with the circumstances generating the emergency that would warrant such proceedings in the first place, (2) would generate a procedure that would be functionally impractical in most every case during an emergency, (3) would create a precondition for which there does not appear to be empirical or anecdotal evidence of necessity, and (4) addresses a concern which may be readily addressed in alternative ways.

Judge Hornak stated that in his court the defendant's consent has been placed on the record and then confirmed in a colloquy with the defendant and counsel at each video-conference proceeding. He concluded that "imposing the 'written request signed by the defendant' requirement is almost certainly inconsistent with the existence of the emergency that would require it in the first place." Difficulties of access "will be particularly acute for those in detention, but even for defendants on bond/conditions of release, physical or other access in order to exchange and process written and signed request documents will likely be most challenging and difficult for their own reasons."

Judge Hornak also stated that in his experience the courts have been conducting "a detailed on-the-record colloquy to confirm the counseled consent and desire of the defendant to proceed via videoconferencing, and in those in which I have presided, there has been no doubt about that counseled consent and desire before the hearing proceeded." In his role as chief judge, he had received no formal or informal concerns about the counseled voluntary nature of the defendants' consent. Moreover, he argued, imposing this requirement is inconsistent with the type and level of judgments that district judges make in every plea proceeding. Finally, he concluded that allowing counsel to sign the required writing would not solve the problem because the existence of the emergency would almost always impede counsel's access.

Accordingly, Judge Hornak recommended either retaining the current consent procedures under the CARES Act, or requiring confirmation of counseled consent and a desire to proceed by videoconferencing via a judicial colloquy with the defendant at the beginning of the proceeding in question.

b. Committee deliberations.

To the extent these comments reflected concern about any inability of defendants themselves to sign, that concern is already addressed in (d)(2). The Committee's discussion as to (e)(3) itself focused on whether the rule meant that the written request must be submitted *in advance* of the videoconference in which the plea proceeding takes place, or whether instead the defendant can somehow make that written request during a videoconference proceeding.

Throughout the discussion of (e)(3), Judge Kethledge and other members stressed the Committee's animating concern for the requirement that any request for remote pleas or sentencing originate from the *defendant*, in writing. That concern is that some judges do not share the Committee's view that conducting a plea or sentencing remotely is truly a last resort. Instead, some judges have emphasized convenience or efficiency more than whether the defendant himself

would prefer an in-person proceeding. As Judge Kethledge explained (Draft Minutes, at p. 36):

Institutionally we come with a different perspective. He remembered from his early days on the Committee where we would get these requests, it seemed once a year. He recalled one from a judge in another district who had a lake house in Maine, and he wanted to sentence people when he was in Maine. The Committee has received these requests every year for remote pleas and sentencing. Institutionally it has a sense that there are many judges who want to do this more often than they should.

And . . . the defense bar never came to us with this. The defense bar never came saying, “We’re having a problem. My guy wants to make it a plea and he can’t.” We have never heard a peep along those lines from the defense bar. The Department of Justice hasn’t come to us. It has always been judges who wanted this, and we’re a little paranoid about that. This is the most important thing that happens in a courtroom. It is much more important than what happens in our appellate courtrooms. That, he said, was the concern.

Similar comments at the meeting included statements describing judges who had expressed “frustration and anger about not being able to force a defendant to go forward virtually” and attorneys “being pressured by the courts to get their clients . . . pled, and out of whatever jail system they were in . . . having that barrier between the client and the court is a very important protection.” Judge Kethledge reiterated that “there are many judges who want to do a lot of remote pleas and sentencings That’s the concern.”

Request v. Consent

The requirement that the *request* for a video proceeding come from the defendant—after consultation with counsel—is aimed to prevent a defendant from feeling pressured to *consent* to a remote plea or sentencing if that were suggested by the judge. The Committee’s concern was “that the judge could be really nice about it and not say anything objectionable when you read the record, but a criminal defendant might feel pressured to agree to do these proceedings remotely” when the person who will sentence him is asking. Draft Minutes, at p. 26.

Judge Bates asked whether his district’s practice of including a consent to video in the plea agreement would comply with the requirement of “request” in proposed rule. He asked if the idea of holding a plea or sentence by video could come initially from the prosecution instead of the defendant. Judge Kethledge’s response was yes, so long as in the document submitted to the court, the defendant says, “I request” or “I want my proceeding to be remote,” rather than just “I agree” or “I consent.” It can’t be the judge saying to the defendant, “Do you have a problem with this?”

A judicial member echoed this understanding: “[W]e’re all experiencing during the pandemic some slippage into Zoom court appearances and Zoom arguments. This language signals this last line, that when it comes to plea discussions and sentencings, that should be done in person unless the defendant affirmatively requests it.” Draft Minutes, at p. 27. This member described her interpretation of the rule:

. . . [S]he did not read the rule as requiring that the defendant has to be the initiator of the idea. If the defendant is not going to serve a whole lot more time and the logistical difficulties are such that everybody's motivated to get the plea agreement on the record as soon as possible, the prosecutor could go to defense counsel and say, "Hey, is he interested in doing it by video? Maybe we need to talk about that? Can you go talk to your client about that?" It doesn't matter who initiated the discussion so long as the request is initiated by the defendant as far as the court is concerned. There has to be a formal request rather than having it come up impromptu during the middle of discussion. In that sense, this requirement, in context, is very different than just consent. This is something that after careful consideration and discussion with counsel, the defendant asks that the court go forward with the video conferencing.

Id. at 28.

Timing of the request

The comments of both Judge Cote and Judge Hornak assumed that the written request must be submitted prior to the plea or sentencing proceeding. They opposed that requirement. Judge Furman shared that opposition to a requirement that the written request be filed in advance. He did not read the language of the rule to require that the request be filed in advance. He thus urged the Committee to add language to the note stating two things: first, that the preferred approach would be to schedule a video plea or sentence only if the defense had already filed a request to that effect with the court; but second, the rule as written would permit a court to convert an ongoing videoconference—originally convened for some other purpose—to a remote plea or sentencing if the defense wrote out a request to that effect and held it up to the camera for the judge to see. Judge Furman said that this process was frequently used in his district.

Judge Bates and some Committee members read the rule to allow what Judge Furman described, but most did not. They thought that the nature of a written request to a court is that the court must have the request in hand for the request to be effective. Judge Kethledge and some members also thought that any process that allows judges to accept a defendant's mid-hearing request for a remote plea or sentence would open the door to actual or perceived pressure by the judge upon the defendant to make that request—which is precisely what this requirement seeks to avoid.

Ultimately, no member of the Committee moved to add the note language that Judge Furman requested. A member did move to amend the rule expressly to require that the defendant's request for videoconferencing be "filed," but the motion was withdrawn because of uncertainty about whether that revision would require republication.

9. Adding a new subdivision on grand juries

The **Department of Justice (21-CR-0003-0008)** also recommended adding a new paragraph (d)(5) to allow courts to extend the term of sitting grand juries during judicial emergencies. In its submission **NACDL (21-CR-0003-0011)** opposed this proposal.

Because this new provision could not be added without republication of the whole rule, derailing the accelerated schedule set by the Standing Committee for all of the emergency rules,

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the Committee treated this as a new suggestion. It is discussed as an information item in the Committee's general report.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE¹**

- 1 **Rule 62. Criminal Rules Emergency**
- 2 **(a) Conditions for an Emergency.** The Judicial
- 3 Conference of the United States may declare a
- 4 Criminal Rules emergency if it determines that:
- 5 (1) extraordinary circumstances relating to public
- 6 health or safety, or affecting physical or
- 7 electronic access to a court, substantially impair
- 8 the court's ability to perform its functions in
- 9 compliance with these rules; and
- 10 (2) no feasible alternative measures would
- 11 sufficiently address the impairment within a
- 12 reasonable time.
- 13 **(b) Declaring an Emergency.**
- 14 **(1) Content.** The declaration must:
- 15 **(A) designate the court or courts affected;**

¹ New material is underlined in red.

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16 (B) state any restrictions on the authority
17 granted in (d) and (e); and

18 (C) be limited to a stated period of no more
19 than 90 days.

20 (2) *Early Termination.* The Judicial Conference
21 may terminate a declaration for one or more
22 courts before the termination date.

23 (3) *Additional Declarations.* The Judicial
24 Conference may issue additional declarations
25 under this rule.

26 (c) *Continuing a Proceeding After a Termination.*
27 Termination of a declaration for a court ends its authority
28 under (d) and (e). But if a particular proceeding is already
29 underway and resuming compliance with these rules for the
30 rest of the proceeding would not be feasible or would work
31 an injustice, it may be completed with the defendant's
32 consent as if the declaration had not terminated.

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33 **(d) Authorized Departures from These Rules After a**
34 **Declaration.**

35 **(1) Public Access to a Proceeding.** If emergency
36 conditions substantially impair the public's
37 in-person attendance at a public proceeding,
38 the court must provide reasonable alternative
39 access, contemporaneous if feasible.

40 **(2) Signing or Consenting for a Defendant.** If
41 any rule, including this rule, requires a
42 defendant's signature, written consent, or
43 written waiver—and emergency conditions
44 limit a defendant's ability to sign—defense
45 counsel may sign for the defendant if the
46 defendant consents on the record. Otherwise,
47 defense counsel must file an affidavit
48 attesting to the defendant's consent. If the
49 defendant is pro se, the court may sign for the

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50 defendant if the defendant consents on the
51 record.

52 (3) *Alternate Jurors.* A court may impanel more
53 than 6 alternate jurors.

54 (4) *Correcting or Reducing a Sentence.* Despite
55 Rule 45(b)(2), if emergency conditions
56 provide good cause, a court may extend the
57 time to take action under Rule 35 as
58 reasonably necessary.

59 (e) *Authorized Use of Videoconferencing and*
60 *Teleconferencing After a Declaration.*

61 (1) *Videoconferencing for Proceedings*
62 *Under Rules 5, 10, 40, and 43(b)(2).*

63 This rule does not modify a court's
64 authority to use videoconferencing
65 for a proceeding under Rules 5, 10,
66 40, or 43(b)(2), except that if
67 emergency conditions substantially

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68 impair the defendant's opportunity to
69 consult with counsel, the court must
70 ensure that the defendant will have an
71 adequate opportunity to do so
72 confidentially before and during
73 those proceedings.

74 **(2) Videoconferencing for Certain**
75 **Proceedings at Which the Defendant**
76 **Has a Right to Be Present.** Except for
77 felony trials and as otherwise
78 provided under (e)(1) and (3), for a
79 proceeding at which a defendant has
80 a right to be present, a court may use
81 videoconferencing if:

82 (A) the district's chief judge finds
83 that emergency conditions
84 substantially impair a court's
85 ability to hold in-person

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86 proceedings in the district
87 within a reasonable time;
88 (B) the court finds that the
89 defendant will have an
90 adequate opportunity to
91 consult confidentially with
92 counsel before and during the
93 proceeding; and
94 (C) the defendant consents after
95 consulting with counsel.
96 **(3) *Videoconferencing for Felony Pleas***
97 **and *Sentencings*.** For a felony
98 proceeding under Rule 11 or 32, a
99 court may use videoconferencing
100 only if, in addition to the requirement
101 in (2)(B):
102 (A) the district's chief judge finds
103 that emergency conditions

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104 substantially impair a court's
105 ability to hold in-person
106 felony pleas and sentencings
107 in the district within a
108 reasonable time;
109 (B) the defendant, after consulting
110 with counsel, requests in a
111 writing signed by the
112 defendant that the proceeding
113 be conducted by
114 videoconferencing; and
115 (C) the court finds that further
116 delay in that particular case
117 would cause serious harm to
118 the interests of justice.
119 **(4) Teleconferencing by One or More**
120 **Participants.** A court may conduct a

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121 proceeding, in whole or in part, by
122 teleconferencing if:
123 (A) the requirements under any
124 applicable rule, including this
125 rule, for conducting
126 the proceeding by
127 videoconferencing have been
128 met;
129 (B) the court finds that:
130 (i) videoconferencing is
131 not reasonably
132 available for any
133 person who would
134 participate by
135 teleconference; and
136 (ii) the defendant will
137 have an adequate
138 opportunity to consult

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139 confidentially with
 140 counsel before and
 141 during the proceeding
 142 if held by
 143 teleconference; and
 144 (C) the defendant consents.

Committee Note

Subdivision (a). This rule defines the conditions for a Criminal Rules emergency that would support a declaration authorizing a court to depart from one or more of the other Federal Rules of Criminal Procedure. Rule 62 refers to the other, non-emergency rules—currently Rules 1-61—as “these rules.” This committee note uses “these rules” or “the rules” to refer to the non-emergency rules, and uses “this rule” or “this emergency rule” to refer to new Rule 62.

The rules have been promulgated under the Rules Enabling Act and carefully designed to protect constitutional and statutory rights and other interests. Any authority to depart from the rules must be strictly limited. Compliance with the rules cannot be cast aside because of cost or convenience, or without consideration of alternatives that would permit compliance to continue. Subdivision (a) narrowly restricts the conditions that would permit a declaration granting emergency authority to depart from the rules and defines who may make that declaration.

First, subdivision (a) specifies that the power to declare a rules emergency rests solely with the Judicial

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Conference of the United States, the governing body of the judicial branch. To find that a rules emergency exists, the Judicial Conference will need information about the ability of affected courts to comply with the rules, as well as the existence of reasonable alternatives to continue court functions in compliance with the rules. The judicial council of a circuit, for example, may be able to provide helpful information it has received from judges within the circuit regarding local conditions and available resources.

Paragraph (a)(1) requires that before declaring a Criminal Rules emergency, the Judicial Conference must determine that circumstances are extraordinary and that they relate to public health or safety or affect physical or electronic access to a court. These requirements are intended to prohibit the use of this emergency rule to respond to other challenges, such as those arising from staffing or budget issues. Second, those extraordinary circumstances must substantially impair the ability of a court to perform its functions in compliance with the rules.

In addition, paragraph (a)(2) requires that even if the Judicial Conference determines the extraordinary circumstances defined in (a)(1), it cannot declare a Criminal Rules emergency unless it also determines that no feasible alternative measures would sufficiently address the impairment and allow the affected court to perform its functions in compliance with the rules within a reasonable time. For example, in the districts devastated by hurricanes Katrina and Maria, the ability of courts to function in compliance with the rules was substantially impaired for extensive periods of time. But there would have been no Criminal Rules emergency under this rule because those districts were able to remedy that impairment and function effectively in compliance with the rules by moving proceedings to other districts under 28 U.S.C. § 141.

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Another example might be a situation in which the judges in a district are unable to carry out their duties as a result of an emergency that renders them unavailable, but courthouses remain safe. The unavailability of judges would substantially impair that court's ability to function in compliance with the rules, but temporary assignment of judges from other districts under 28 U.S.C. § 292(b) and (d) would eliminate that impairment.

Subdivision (a) also recognizes that emergency circumstances may affect only one or a small number of courts—familiar examples include hurricanes, floods, explosions, or terroristic threats—or may have widespread impact, such as a pandemic or a regional disruption of electronic communications. This rule provides a uniform procedure that is sufficiently flexible to accommodate different types of emergency conditions with local, regional, or nationwide impact.

Paragraph (b)(1). Paragraph (b)(1) specifies what must be included in a declaration of a Criminal Rules emergency. Subparagraph (A) requires that each declaration of a Criminal Rules emergency designate the court or courts affected by the Criminal Rules emergency as defined in subdivision (a). Some emergencies may affect all courts, some will be local or regional. The declaration must be no broader than the Criminal Rules emergency. That is, every court identified in a declaration must be one in which extraordinary circumstances that relate to public health or safety or that affect physical or electronic access to the court are substantially impairing its ability to perform its functions in compliance with these rules, and in which compliance with the rules cannot be achieved within a reasonable time by alternative measures. A court may not exercise authority under (d) and (e) unless the Judicial Conference includes the court in its declaration, and then only in a manner consistent

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with that declaration, including any limits imposed under (b)(1)(B).

Subparagraph (b)(1)(B) provides that the Judicial Conference's declaration of a Criminal Rules emergency must state any restrictions on the authority granted by subdivisions (d) and (e) to depart from the rules. For example, if the emergency arises from a disruption in electronic communications, there may be no reason to authorize videoconferencing for proceedings in which the rules require in-person appearance. But (b)(1)(B) does not allow a declaration to expand departures from the rules beyond those authorized by subdivisions (d) and (e).

Under (b)(1)(C), each declaration must state when it will terminate, which may not exceed 90 days from the date of the declaration. This sunset clause is included to ensure that these extraordinary deviations from the rules last no longer than necessary.

Paragraph (b)(2). If emergency conditions end before the termination date of the declaration for some or all courts included in that declaration, (b)(2) provides that the Judicial Conference may terminate the declaration for the courts no longer affected. This provision also ensures that any authority to depart from the rules lasts no longer than necessary.

Paragraph (b)(3) recognizes that the conditions that justified the declaration of a Criminal Rules emergency may continue beyond the term of the declaration. The conditions may also change, shifting in nature or affecting more districts. An example might be a flood that leads to a contagious disease outbreak. Rather than provide for extensions, renewals, or modifications of an initial declaration, paragraph (b)(3) gives the Judicial Conference

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the authority to respond to such situations by issuing additional declarations. Each additional declaration must meet the requirements of subdivision (a), and must include the contents required by (b)(1).

Subdivision (c). In general, the termination of a declaration of emergency ends all authority to depart from the other Federal Rules of Criminal Procedure. It does not terminate, however, the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3), because the proceeding authorized by (d)(3) is the completed impanelment. In addition, subdivision (c) carves out a narrow exception for certain proceedings commenced under a declaration of emergency but not completed before the declaration terminates. If it would not be feasible to conclude a proceeding commenced before a declaration terminates with procedures that comply with the rules, or if resuming compliance with the rules would work an injustice, the court may complete that proceeding using procedures authorized by this emergency rule, but only if the defendant consents to the use of emergency procedures after the declaration ends. Subdivision (c) recognizes the need for some accommodation and flexibility during the transition period, but also the importance of returning promptly to the rules to protect the defendant's rights and other interests.

Subdivisions (d) and (e) describe the authority to depart from the rules after a declaration.

Paragraph (d)(1) addresses the courts' obligation to provide alternative access when emergency conditions have substantially impaired in-person attendance by the public at public proceedings. The term "public proceeding" was intended to capture proceedings that the rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open

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to the public under the First and Sixth Amendments. The rule creates a duty to provide the public, ~~including victims~~, with “reasonable alternative access,” notwithstanding Rule 53’s ban on the “broadcasting of judicial proceedings.” Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding.

The duty arises only when the substantial impairment of in-person access by the public is caused by emergency conditions. The rule does not apply when reasons other than emergency conditions restrict access. The duty arises not only when emergency conditions substantially impair the attendance of anyone, but also when conditions would allow participants but not the public to attend, as when capacity must be restricted to prevent contagion.

Alternative access must be contemporaneous when feasible. For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided.

When providing “reasonable alternative access,” courts must be mindful of the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims’ Rights Act, 18 U.S.C. § 3771.

Paragraph (d)(2) recognizes that emergency conditions may disrupt compliance with a rule that requires the defendant’s signature, written consent, or written waiver. If emergency situations limit the defendant’s ability to sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents. To ensure that there is a record of the defendant’s consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the record, or, (2) without the defendant’s consent on the record,

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defense counsel must file an affidavit attesting to the defendant's consent to the procedure. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. The written document signed by counsel on behalf of the defendant provides important additional evidence of the defendant's consent.

The court may sign for a pro se defendant, if that defendant consents on the record. There is no provision for the court to sign for a counseled defendant, even if the defendant provides consent on the record. The Committee concluded that rules requiring the defendant's signature, written consent, or written waiver protect important rights, and permitting the judge to bypass defense counsel and sign once the defendant agrees could result in a defendant perceiving pressure from the judge to sign. Requiring a writing from defense counsel is an essential protection when the defendant's own signature is not reasonably available because of emergency conditions.

It is generally helpful for the court to conduct a colloquy with the defendant to ensure that defense counsel consulted with the defendant with regard to the substance and import of the pleading or document being signed, and that the consent to allow counsel to sign was knowing and voluntary.

Paragraph (d)(3) allows the court to impanel more than six alternate jurors, creating an emergency exception to the limit imposed by Rule 24(c)(1). This flexibility may be particularly useful for a long trial conducted under emergency conditions—such as a pandemic—that increase the likelihood that jurors will be unable to complete the trial. Because it is not possible to anticipate all of the situations in which this authority might be employed, the amendment leaves to the discretion of the district court whether to

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impanel more alternates, and if so, how many. The same uncertainty about emergency conditions that supports flexibility in the rule for the provision of additional alternates also supports avoiding mandates for additional peremptory challenges when more than six alternates are provided. Nonetheless, if more than six alternates are impaneled and emergency conditions allow, the court should consider permitting each party one or more additional peremptory challenges, consistent with the policy in Rule 24(c)(4).

Paragraph (d)(4) provides an emergency exception to Rule 45(b)(2), which prohibits the court from extending the time to take action under Rule 35 “except as stated in that rule.” When emergency conditions provide good cause for extending the time to take action under Rule 35, the amendment allows the court to extend the time for taking action “as reasonably necessary.” The amendment allows the court to extend the 14-day period for correcting a clear error in the sentence under Rule 35(a) and the one-year period for government motions for sentence reductions based on substantial assistance under Rule 35(b)(1). Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35. This emergency rule does not address the extension of other time limits because Rule 45(b)(1) already provides the necessary flexibility for courts to consider emergency circumstances. It allows the court to extend the time for taking other actions on its own or on a party’s motion for good cause shown.

Subdivision (e) provides authority for a court to use videoconferencing or teleconferencing under specified circumstances after the declaration of a Criminal Rules emergency. The term “videoconferencing” is used throughout, rather than the term “video teleconferencing” (which appears elsewhere in the rules), to more clearly

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distinguish conferencing with visual images from “teleconferencing” with audio only. The first three paragraphs in (e) describe a court’s authority to use videoconferencing, depending upon the type of proceeding, while the last describes a court’s authority to use teleconferencing when videoconferencing is not reasonably available. The defendant’s consent to the use of conferencing technology is required for all proceedings addressed by subdivision (e).

Subdivision (e) applies to the use of videoconferencing and teleconferencing for the proceedings defined in paragraphs (1) through (3), for all or part of the proceeding, by one or more participants. But it does not regulate the use of video and teleconferencing technology for all possible proceedings in a criminal case. It does not speak to or prohibit the use of videoconferencing or teleconferencing for proceedings, such as scheduling conferences, at which the defendant has no right to be present. Instead, it addresses three groups of proceedings: (1) proceedings for which the rules already authorize videoconferencing; (2) certain other proceedings at which a defendant has the right to be present, excluding felony trials; and (3) felony pleas and sentencings. The new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct.

Paragraph (e)(1) addresses first appearances, arraignments, and certain misdemeanor proceedings under Rules 5, 10, 40, and 43(b)(2), where the rules already provide for videoconferencing if the defendant consents. *See* Rules 5(f), 10(c), 40(d), and 43(b)(2) (written consent). This paragraph was included to eliminate any confusion about the interaction between existing videoconferencing authority and this rule. It clarifies that this rule does not change the

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court's existing authority to use videoconferencing for these proceedings, except that it requires the court to address emergency conditions that significantly impair the defendant's opportunity to consult with counsel. In that situation, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2). Paragraphs (e)(2) through (4) apply this requirement to all emergency video and teleconferencing authority granted by the rule after a declaration.

The requirement is based upon experience during the COVID-19 pandemic, when conditions dramatically limited the ability of counsel to meet or even speak with clients. The Committee believed it was essential to include this prerequisite for conferencing under Rules 5, 10, 40, and 43(b)(2), as well as conferencing authorized only during a declaration by paragraphs (e)(2), (3), and (4), in order to safeguard the defendant's constitutional right to counsel. The rule does not specify any particular means of providing an adequate opportunity for private communication.

Paragraph (e)(2) addresses videoconferencing authority for proceedings "at which a defendant has a right to be present" under the Constitution, statute, or rule, excluding felony trials and proceedings addressed in either (e)(1) or (e)(3). Such proceedings include, for example, revocations of release under Rule 32.1, preliminary hearings under Rule 5.1, and waivers of indictment under Rule 7(b). During a declaration, an affected court may use videoconferencing for these proceedings, but only if the three circumstances are met.

First, subparagraph (e)(2)(A) restricts videoconferencing authority to affected districts in which the chief judge (or alternate under 28 U.S.C. § 136(e)) has found

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that emergency conditions substantially impair a court's ability to hold proceedings in person within a reasonable time. Recognizing that important policy concerns animate existing limitations in Rule 43 on virtual proceedings, even with the defendant's consent, this district-wide finding is not an invitation to substitute virtual conferencing for in-person proceedings without regard to conditions in a particular division, courthouse, or case. If a proceeding can be conducted safely in-person within a reasonable time, a court should hold it in person.

Second, subparagraph (e)(2)(B) conditions videoconferencing upon the court's finding that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding. If emergency conditions prevent the defendant's presence, and videoconferencing is employed as a substitute, counsel will not have the usual physical proximity to the defendant during the proceeding and may not have ordinary access to the defendant before and after the proceeding.

Third, subparagraph (e)(2)(C) requires that the defendant consent to videoconferencing after consulting with counsel. Insisting on consultation with counsel before consent assures that the defendant will be informed of the potential disadvantages and risks of virtual proceedings. It also provides some protection against potential pressure to consent, from the government or the judge.

The Committee declined to provide authority in this rule to conduct felony trials without the physical presence of the defendant, even if the defendant wishes to appear at trial by videoconference during an emergency declaration. And this rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct. Nor does it address if or

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when trial participants other than the defendant may appear by videoconferencing.

Paragraph (e)(3) addresses the use of videoconferencing for a third set of proceedings: felony pleas and sentencings under Rules 11 and 32. The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of defendant's physical presence at plea and sentence is reflected in Rules 11 and 32. The Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at a felony plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence include three circumstances in addition to those required for the use of videoconferencing under (e)(2).

Subparagraph (e)(3)(A) requires that the chief judge of the district (or alternate under 28 U.S.C. § 136(e)) make a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district within a reasonable time. This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Although the finding serves as assurance that videoconferencing might be necessary in the district, as under (e)(2), individual courts within the district may not conduct virtual plea and sentencing proceedings in individual cases unless they find the remaining criteria of (e)(3) and (4) are satisfied.

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Subparagraph (e)(3)(B) states that the defendant must request in writing that the proceeding be conducted by videoconferencing, after consultation with counsel. The substitution of “request” for “consent” was deliberate, as an additional protection against undue pressure to waive physical presence. This requirement of writing is, like other requirements of writing in the rules, subject to the emergency provisions in (d)(2), unless the relevant emergency declaration excludes the authority in (d)(2). To ensure that the defendant consulted with counsel with regard to this decision, and that the defendant’s consent was knowing and voluntary, the court may need to conduct a colloquy with the defendant before accepting the written request.

Subparagraph (e)(3)(C) requires that before a court may conduct a plea or sentencing proceeding by videoconference, it must find that the proceeding in that particular case cannot be further delayed without serious harm to the interests of justice. Examples may include some pleas and sentencings that would allow transfer to a facility preferred by the defense, or result in immediate release, home confinement, probation, or a sentence shorter than the time expected before conditions would allow in-person proceedings. A judge might also conclude that under certain emergency conditions, delaying certain guilty pleas under Rule 11(c)(1)(C), even those calling for longer sentences, may result in serious harm to the interests of justice.

Paragraph (e)(4) details conditions for the use of teleconferencing to conduct proceedings for which videoconferencing is authorized. Videoconferencing is always a better option than an audio-only conference because it allows participants to see as well as hear each other. To ensure that participants communicate through

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audio alone only when videoconferencing is not feasible, (e)(4) sets out four prerequisites. Because the rule applies to teleconferencing “in whole or in part,” it mandates these prerequisites whenever the entire proceeding is held by teleconference from start to finish, or when one or more participants in the proceeding are connected by audio only, for part or all of a proceeding.

The first prerequisite, in (e)(4)(A), is that all of the conditions for the use of videoconferencing for the proceeding must be met before a court may conduct a proceeding, in whole or in part, by audio-only. For example, videoconferencing for a sentencing under Rule 32 requires compliance with (e)(3)(A), (B), and (C). No part of a felony sentencing proceeding may be held by teleconference, nor may any person participate in such a proceeding by audio only, unless those videoconferencing requirements have been met. Likewise, for a misdemeanor proceeding, teleconferencing requires compliance with (e)(1) and Rule 43(b)(2).

Second, (e)(4)(B)(i) requires the court to find that videoconferencing for all or part of the proceeding is not reasonably available before allowing participation by audio only. Because it focuses on what is “reasonably available,” this requirement is flexible. It is intended to allow courts to use audio only connections when necessary, but not otherwise. For example, it precludes the use of teleconferencing alone if videoconferencing—though generally limited—is available for all participants in a particular proceeding. But it permits the use of teleconferencing in other circumstances. For example, if only an audio connection with a defendant were feasible because of security concerns at the facility where the defendant is housed, a court could find that videoconferencing for that defendant in the particular

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proceeding is not reasonably available. Or, if the video connection fails for one or more participants during a proceeding started by videoconference and audio is the only option for completing that proceeding expeditiously, this rule permits the affected participants to use audio technology to finish the proceeding.

Third, (e)(4)(B)(ii) provides that the court must find that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the teleconferenced proceeding. Opportunities for confidential consultation may be more limited with teleconferencing than they are with videoconferencing as when a defendant or a defense attorney has only one telephone line to use to call into the conference, and there are no “breakout rooms” for private conversations like those videoconferencing platforms provide. This situation may arise not only when a proceeding is held entirely by phone, but also when, in the midst of a videoconference, video communication fails for either the defendant or defense counsel. An attorney or client may have to call into the conference using the devices they had previously been using for confidential communication. Experiences like these prompted this requirement that the court specifically find that an alternative opportunity for confidential consultation is in place before permitting teleconferencing in whole or in part.

Finally, recognizing the differences between videoconferencing and teleconferencing, subparagraph (e)(4)(C) provides that the defendant must consent to teleconferencing for the proceeding, even if the defendant previously requested or consented to videoconferencing. A defendant who is willing to be sentenced with a videoconference connection with the judge may balk, understandably, at being sentenced over the phone. Subparagraph (e)(4)(C) does not require that consent to

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teleconferencing be given only after consultation with counsel. By requiring only “consent,” it recognizes that the defendant would have already met the consent requirements for videoconferencing for that proceeding, and it allows the court more flexibility to address varied situations. To give one example, if the video but not audio feed drops for the defendant or another participant near the very end of a videoconference, and the judge asks the defendant, “do you want to talk to your lawyer about finishing this now without the video?,” an answer “No, I’m ok, we can finish now” would be sufficient consent under (e)(4)(C).

Changes After Publication

The note accompanying (d)(1), which requires courts to provide reasonable alternative public access, was revised to draw attention to the need to consider the constitutional guarantees of public access and applicable statutory provisions, including the Crime Victims’ Rights Act. In light of this addition, an earlier parenthetical reference to victims was deleted.

In addition, two stylistic changes were made for consistency.

TAB 2B

Discussion on this amendment can be accessed by clicking [this link](#) or by referencing the Appellate Rules Report at page 201 of this agenda book

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 26. Computing and Extending Time**
2 **(a) Computing Time.** The following rules apply in
3 computing any time period specified in these rules, in any
4 local rule or court order, or in any statute that does not
5 specify a method of computing time.

6 * * * * *

7 **(6) “Legal Holiday” Defined.** “Legal holiday”
8 means:
9 (A) the day set aside by statute for
10 observing New Year’s Day, Martin
11 Luther King Jr.’s Birthday,
12 Washington’s Birthday, Memorial
13 Day, Juneteenth National
14 Independence Day, Independence
15 Day, Labor Day, Columbus Day,

¹ New material is underlined in red; matter to be omitted is lined through.

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16 Veterans Day, Thanksgiving Day, or

17 Christmas Day;

18 * * * * *

Committee Note

The amendment adds “Juneteenth National Independence Day” to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)).

[Discussion on this amendment can be accessed by clicking this link or by referencing the Appellate Rules Report at page 201 of this agenda book](#)

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

- 1 **Rule 45. Clerk's Duties**
- 2 **(a) General Provisions.**
- 3 (1) **Qualifications.** The circuit clerk must take
- 4 the oath and post any bond required by law. Neither the clerk
- 5 nor any deputy clerk may practice as an attorney or
- 6 counselor in any court while in office.
- 7 (2) **When Court Is Open.** The court of appeals
- 8 is always open for filing any paper, issuing and returning
- 9 process, making a motion, and entering an order. The clerk's
- 10 office with the clerk or a deputy in attendance must be open
- 11 during business hours on all days except Saturdays, Sundays,
- 12 and legal holidays. A court may provide by local rule or by
- 13 order that the clerk's office be open for specified hours on
- 14 Saturdays or on legal holidays other than New Year's Day,
- 15 Martin Luther King, Jr.'s Birthday, Washington's Birthday,

¹ New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

16 Memorial Day, Juneteenth National Independence Day,
17 Independence Day, Labor Day, Columbus Day, Veterans’
18 Day, Thanksgiving Day, and Christmas Day.

19 * * * * *

Committee Note

The amendment adds “Juneteenth National Independence Day” to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)). A stylistic change was made.

Discussion on this amendment can be accessed by clicking [this link](#) or by referencing the Bankruptcy Rules Report at page 254 of this agenda book

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

1 **Rule 9006. Computing and Extending Time; Time for**
2 **Motion Papers**

3 (a) COMPUTING TIME. The following rules
4 apply in computing any time period specified in these rules,
5 in the Federal Rules of Civil Procedure, in any local rule or
6 court order, or in any statute that does not specify a method
7 of computing time.

8 * * * * *

9 (6) “*Legal Holiday*” *Defined*. “Legal
10 holiday” means:

11 (A) the day set aside by statute for
12 observing New Year’s Day, Martin Luther
13 King Jr.’s Birthday, Washington’s Birthday,
14 Memorial Day, Juneteenth National
15 Independence Day; Independence Day,

¹ New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

16 Labor Day, Columbus Day, Veterans' Day,
17 Thanksgiving Day, or Christmas Day;

18 (B) any day declared a holiday by
19 the President or Congress; and

20 (C) for periods that are measured
21 after an event, any other day declared a
22 holiday by the state where the district court is
23 located. (In this rule, "state" includes the
24 District of Columbia and any United States
25 commonwealth or territory.)

26 * * * * *

Committee Note

In response to the Juneteenth National Independence Day Act, P.L. 117-17 (2021), subdivision (a)(6) is amended to add Juneteenth National Independence Day as a legal holiday.

Discussion on this amendment can be accessed by clicking [this link](#) or by referencing the Civil Rules Report at page 730 of this agenda book

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE¹**

- 1 **Rule 6. Computing and Extending Time; Time**
2 **for Motion Papers**
- 3 **(a) Computing Time. * * ***
- 4 **(6) “Legal Holiday” Defined.** “Legal
5 holiday” means:
- 6 (A) the day set aside by statute for
7 observing * * * Memorial
8 Day, Juneteenth National
9 Independence Day,
10 Independence Day, * * *;
11 * * * * *

Committee Note

Rule 6(a)(6) is amended to add Juneteenth National Independence Day to the days set aside by statute as legal holidays.

¹ New material is underlined in red; matter to be omitted is lined through.

Discussion on this amendment can be accessed by clicking [this link](#) or by referencing the Criminal Rules Report at page 810 of this agenda book

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 45. Computing and Extending Time**

2 **(a) Computing Time.** The following rules apply in
3 computing any time period specified in these rules,
4 in any local rule or court order, or in any statute that
5 does not specify a method of computing time.

6 * * * * *

7 **(6) “Legal Holiday” Defined.** “Legal holiday”
8 means:

9 (A) the day set aside by statute for
10 observing New Year’s Day, Martin
11 Luther King Jr.’s Birthday,
12 Washington’s Birthday, Memorial
13 Day, Juneteenth National
14 Independence Day, Independence
15 Day, Labor Day, Columbus Day,

¹ New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF CRIMINAL PROCEDURE

16 Veterans' Day, Thanksgiving Day, or

17 Christmas Day.

18 * * * * *

Committee Note

The amendment adds Juneteenth National Independence Day to the days set aside by statute as legal holidays.

Discussion on this amendment can be accessed by clicking [this link](#) or by referencing the Criminal Rules Report at page 810 of this agenda book

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 56. When Court is Open**

2 * * * * *

3 (c) **Special Hours.** A court may provide by local rule or
4 order that its clerk’s office will be open for specified
5 hours on Saturdays or legal holidays other than those
6 set aside by statute for observing New Year’s Day,
7 Martin Luther King, Jr.’s Birthday, Washington’s
8 Birthday, Memorial Day, Juneteenth National
9 Independence Day, Independence Day, Labor Day,
10 Columbus Day, Veterans’ Day, Thanksgiving Day,
11 and Christmas Day.

Committee Note

The amendment adds Juneteenth National Independence Day to the days set aside by statute as legal holidays. A stylistic change was made.

¹ New material is underlined in red; matter to be omitted is lined through.

TAB 2C

Report on Pro Se Electronic Filing Project

This item will be an oral report.

Electronic Filing Times in Federal Courts

**Federal Judicial Center
2022**

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, this publication does not reflect policy or recommendations of the Board of the Federal Judicial Center.

This report was produced at U.S. taxpayer expense.

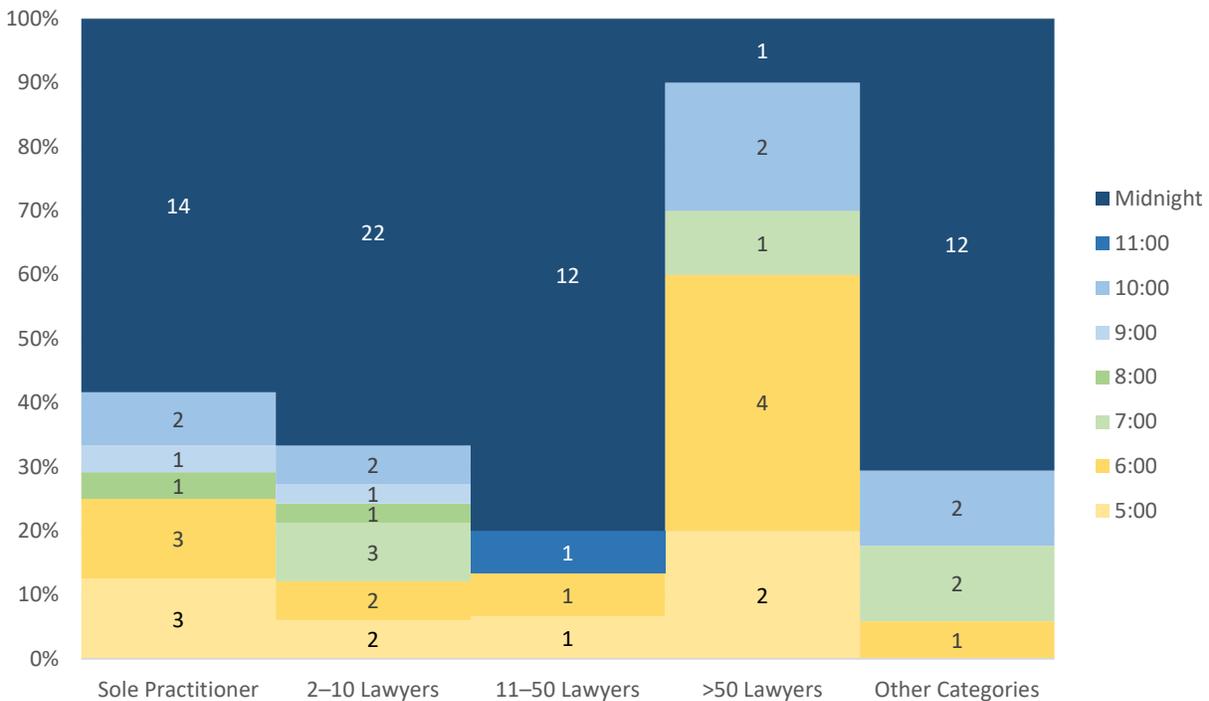
ELECTRONIC FILING TIMES IN FEDERAL COURTS

Tim Reagan, Carly Giffin, Jessica Snowden,
George Cort, Jana Laks, Roy Germano, Marie Leary,
Saroja Koneru, Jasmine Elmasry, Nafeesah Attah,
Rachel Palmer, Annmarie Khairalla, and Danielle Rich

Federal Judicial Center 2022

This empirical research was completed to inform the Judicial Conference’s standing Committee on Rules of Practice and Procedure as the committee considers whether the due time for a filing in a federal court should be some time before midnight on the due date. We have charted the time of day for all docket entries¹ made in 2018 in all federal courts of appeals, district courts, and bankruptcy courts. We have charted separately and together various types of filer for each court, and we have additionally charted motions and responses for courts both together and separately.

Filing Deadline Preference by Law Practice



We planned to ask a random sample of judges and attorneys about their practices and preferences, but we brought the survey to a close during its pilot phase because of the still-present COVID-19 pandemic. Our pilot data were

1. The expressions “docket entries” and “filings” are used in this report substantially interchangeably.

too limited for nuanced analyses, but as the preceding chart shows, attorneys working for large firms were most likely to have a preference for a filing deadline earlier than midnight.²

Attorneys participating in the pilot survey were identified from a random selection of filings in one court of appeals, three district courts, and three bankruptcy courts, excluding assistant U.S. attorneys, whom we would have needed additional permission to include in the final survey. The response rate was 54%.

Courts

There are thirteen federal courts of appeals and ninety-four district courts. The three territorial districts—Guam, Northern Mariana Islands, and Virgin Islands—have bankruptcy divisions rather than separate bankruptcy courts. A single bankruptcy court serves both districts in Arkansas, but there are separate filing data for the two districts in that bankruptcy court. There is a separate bankruptcy court for each of the other districts, ninety in all.

We examined the local rules and electronic filing administrative procedures for each court, and we summarize the relevant provisions in Appendix I for the courts of appeals,³ Appendix II for the district courts,⁴ and Appendix III for the bankruptcy courts.⁵

Because the COVID-19 pandemic disrupted filing practices, we did not do the comprehensive survey of clerks of court that we had planned.

Office Hours

Our research on the courts' office hours was conducted before the COVID-19 pandemic. Many courts made temporary adjustments to their counter hours because of the pandemic. We did not look for permanent changes, which we think have been modest in scope and uncertain in longevity.

Clerks' offices open as early as 8:00 for paper filing, and they stay open as late as 5:00. All clerks' offices are open during the hours from 9:00 to noon in the morning and from 1:30 to 3:00 in the afternoon.

Two courts of appeals, eighteen district courts, and eleven bankruptcy courts are open as many as nine hours. Nineteen district courts and twenty-two bankruptcy courts are open for as few as six to seven hours. The rest are open for about eight hours.

2. Numbers in the chart refer to how many attorneys of each practice organization type preferred each filing deadline. For example, fourteen sole practitioners, twenty-two attorneys working in firms with two to ten lawyers, twelve attorneys working in firms with eleven to fifty lawyers, one attorney working in a firm with more than fifty lawyers, and twelve attorneys working in other organizations preferred a midnight deadline.

Other organizations included federal, state, and local governments; corporations; and nonprofit organizations.

3. www.fjc.gov/sites/default/files/materials/39/FilingTimesCourtsOfAppeals.pdf.

4. www.fjc.gov/sites/default/files/materials/39/FilingTimesDistrictCourts.pdf.

5. www.fjc.gov/sites/default/files/materials/27/FilingTimesBankruptcyCourts.pdf.

For the following summaries of filing hours, if a court has different hours in different offices, the summaries are based on prevailing hours in main offices.

Morning Opening

Ten courts of appeals, seventy-two district courts, and sixty-nine bankruptcy courts are open at 8:30. Two courts of appeals, thirty-one district courts, and thirty-three bankruptcy courts open at 8:00.

Lunch Closing

Clerks' offices in six district courts and one bankruptcy court are closed from noon to 1:00, clerks' offices in two district courts are closed from 12:30 to 1:30, and the clerk's office in one bankruptcy court is closed from 1:00 to 1:30.

Afternoon Closing

Clerks' offices for the district courts and the bankruptcy courts in the District of Guam and the Eastern District of Kentucky and for the bankruptcy court in the Northern District of Oklahoma close at 3:00. Eighteen other district courts and thirty-five other bankruptcy courts close at 4:00. Three courts of appeals, thirty-five district courts, and thirty-three bankruptcy courts close at 4:30. Ten courts of appeals, thirty-eight district courts, and twenty-two bankruptcy courts remain open until 5:00.

Websites

Many courts clearly post their operating hours on their public websites. However, for four courts of appeals, fifteen district courts, and two bankruptcy courts, it took two researchers to find counter hours online. For an additional three district courts and three bankruptcy courts, we had to call to learn the hours.

Drop Boxes

Our research on physical drop boxes was not comprehensive, but we feel confident of summary findings derived from several dozen conversations with clerks of court and members of their staffs for another project.

Many courts stopped using drop boxes with the advent of electronic twenty-four-hour filing. Some courts began to use them again because of COVID-19 pandemic counter closures. Some of these courts stopped using them when counter availability resumed normal hours.

A few courts have drop boxes available at all hours and from outside the court's building. More typically, the drop box is within the federal building where the court sits, and it is available during building hours: from some time before the clerk's counter opens until some time after the clerk's counter closes, not at all times.

Drop boxes often have time stamps attached. They are checked by court staff regularly.

Deadlines Before Midnight

Three district courts have afternoon filing deadlines on the days that filings are due: 5:00 in the Eastern District of Arkansas and 6:00 in the Districts of Delaware and Massachusetts. The District of Massachusetts's bankruptcy court has a 4:30 deadline. Replies in the Southern District of New York's bankruptcy court generally are due at 4:00 p.m. three days before the hearing. The District of Delaware's bankruptcy court explicitly declines to follow the district court's afternoon deadline.

The reason for the afternoon deadline in Delaware is unusual. The federal courts there extend filing privileges only to local attorneys, who frequently work with out-of-state attorneys—many in western time zones—because of the nature of federal litigation in Delaware. The afternoon filing deadline protects local attorneys from evening waits for documents submitted by other attorneys for the local attorneys to file in the district court. Because bankruptcy practice is different, bankruptcy attorneys did not request a due time earlier than midnight.

Docket Entries

We examined 47,420,684 docket entries made in 2018, the calendar year preceding our beginning the research. Most docket entries were made between 8:00 a.m. and 5:00 p.m. About one in fifty was made before that in the courts of appeals and the district courts, but 17% were made before 8:00 in the bankruptcy courts. There was a lot of nighttime robotic filing of notices in the bankruptcy courts.

About one in ten of the docket entries in the courts of appeals and the district courts was made after 5:00 p.m., about one in twenty after 6:00 p.m. In the bankruptcy courts, 16% of the docket entries were made after 5:00 p.m., and 12% were made after 6:00 p.m.

The data for the district courts and the bankruptcy courts distinguished filings by attorneys and filings by others, such as the court. The data for the courts of appeals do not reliably identify filer type, but they do identify which filings are briefs, and those are predominantly what attorneys file in the courts of appeals. About four out of five attorney filings in all three types of courts were made between 8:00 a.m. and 5:00 p.m. About one in fifty was made before 8:00, about one in six was made after 5:00, and about one in ten was made after 6:00.

In the district courts and the bankruptcy courts, filings are classified by type and subtype. Looking at the type and subtype data for each court, we identified combinations for each court that identified motions and responses approximately as well as we would have had we examined each of the several million docket entries individually.

Most motions and responses were filed between 8:00 a.m. and 5:00 p.m., but nearly a third of the responses filed in district courts were filed after 5:00 p.m. (31%). Somewhat more than one in five was filed after 6:00 p.m. (21%).

We examined random samples of individual motions and responses filed in a random sample of district courts.⁶ A document is usually filed on the day that it is due. A document filed at night is typically due on that day, but sometimes it is due on the following day.

Docket Entries in All Courts⁷

<i>Court Type</i>	<i>Docket Entries</i>	<i>Before 8:00</i>	<i>Between</i>		
			<i>8:00 and 5:00</i>	<i>After 5:00</i>	<i>After 6:00</i>
Appeals	1,321,506	2.5%	89%	8.9%	4.9%
District	15,267,093	2.0%	87%	11%	5.4%
Bankruptcy	30,832,085	17%	67%	16%	12%
ALL COURTS	47,420,684	12%	74%	14%	9.8%

Attorney Filings in All Courts

<i>Court Type</i>	<i>Filings</i>	<i>Before 8:00</i>	<i>Between</i>		
			<i>8:00 and 5:00</i>	<i>After 5:00</i>	<i>After 6:00</i>
Appeals (Briefs)	135,561	1.7%	83%	15%	10%
District	5,106,353	1.6%	79%	19%	11%
Bankruptcy	10,853,500	2.4%	82%	15%	8.3%
ALL COURTS	16,095,414	2.2%	81%	16%	9.3%

Motions Filed in District and Bankruptcy Courts

<i>Court Type</i>	<i>Motions</i>	<i>Before 8:00</i>	<i>Between</i>		
			<i>8:00 and 5:00</i>	<i>After 5:00</i>	<i>After 6:00</i>
District	1,350,949	1.4%	78%	20%	12%
Bankruptcy	1,444,190	2.3%	83%	14%	7.6%
ALL	2,795,139	1.9%	81%	17%	9.7%

Responses Filed in District and Bankruptcy Courts

<i>Court Type</i>	<i>Responses</i>	<i>Before 8:00</i>	<i>Between</i>		
			<i>8:00 and 5:00</i>	<i>After 5:00</i>	<i>After 6:00</i>
District	553,285	1.9%	67%	31%	21%
Bankruptcy	285,539	2.3%	81%	17%	9.8%
ALL	838,824	2.0%	71%	26%	17%

6. See Appendix IV. An Analysis of When Responses Were Filed in a Sample of Cases in a Sample of Courts:

www.fjc.gov/sites/default/files/materials/22/SpecificCasesMotionsAndResponses.pdf.

7. Note that in tables of this sort, the data in the “After 6:00” column are a subset of the data in the “After 5:00” column.

Appendices

This report has four appendices. The first three chart times for docket entries in each court. The fourth appendix examines filing times for random samples of motions and responses in thirteen district courts.

- I. The Courts of Appeals (44 pages)
www.fjc.gov/sites/default/files/materials/39/FilingTimesCourtsOfAppeals.pdf
- II. The District Courts (1,032 pages)
www.fjc.gov/sites/default/files/materials/39/FilingTimesDistrictCourts.pdf
- III. The Bankruptcy Courts (1,435 pages)
www.fjc.gov/sites/default/files/materials/27/FilingTimesBankruptcyCourts.pdf
- IV. An Analysis of When Responses Were Filed in a Sample of Cases in a Sample of Courts (54 pages)
www.fjc.gov/sites/default/files/materials/22/SpecificCasesMotionsAndResponses.pdf

Reading Charts

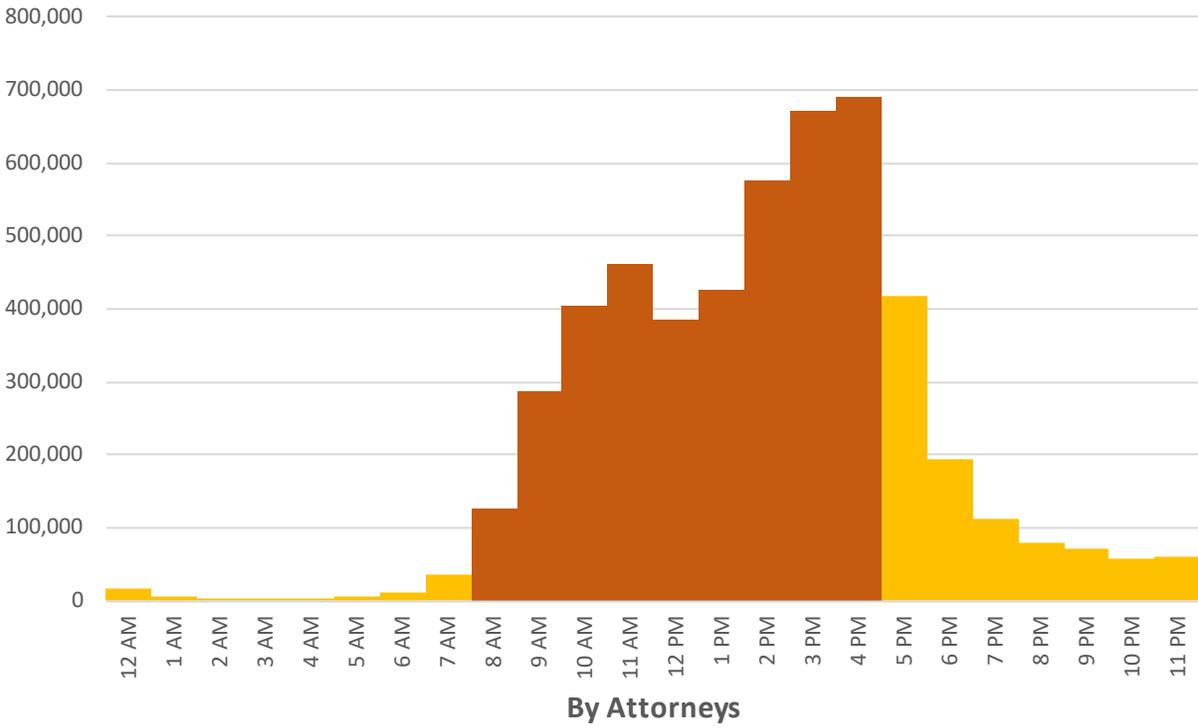
Many appendix charts show number of docket entries by hour time block for all filers or for a specific group of filers, such as the first chart on the next page. Color shading identifies the customary office hours of 8:00 a.m. to 5:00 p.m. Paired with these charts are charts showing the data in seven time blocks expressed as average docket entries made per hour over the course of the year, holidays and weekends included. The time blocks include customary office hours, the hour before midnight, the hour after midnight, the time block between the hour after midnight and the beginning of customary office hours, the hour immediately after customary office hours (5:00 to 6:00 p.m.), the evening hours (6:00 to 8:00 p.m.), and the nighttime hours between evening and the hour before midnight (8:00 to 11:00 p.m.).

We prepared charts similar to the first chart on the next page for briefs in the courts of appeals and motions and responses in the district and bankruptcy courts.

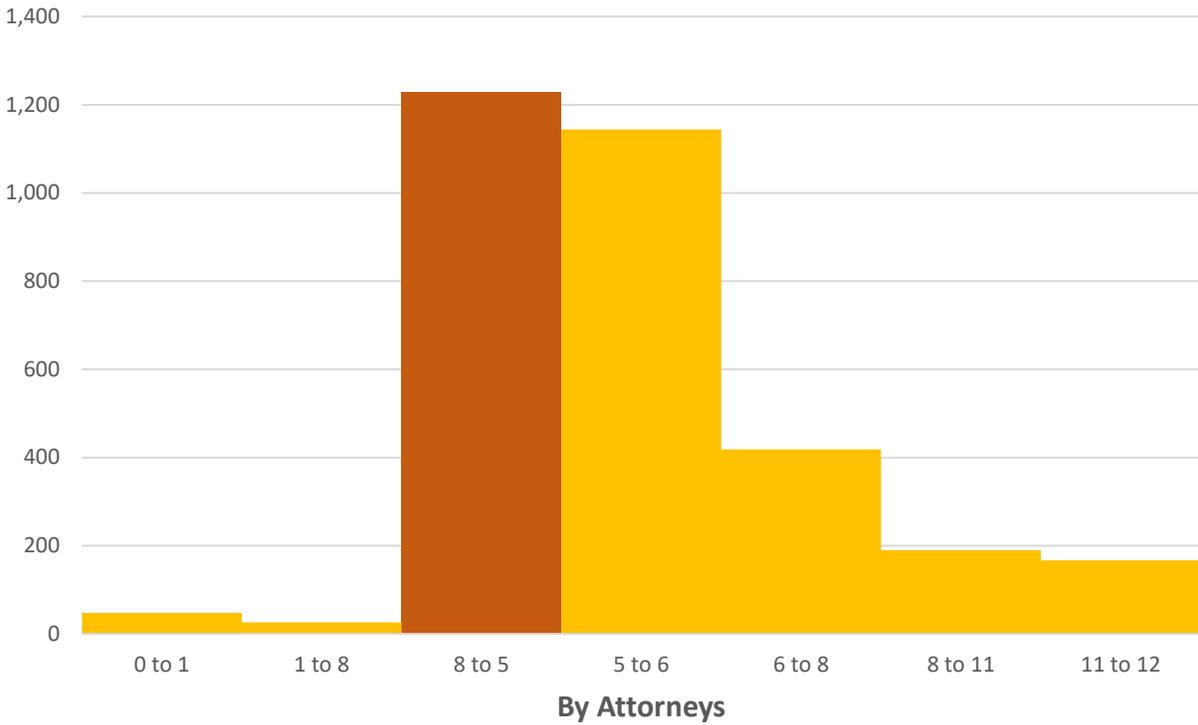
For some charts, we used color to show case type, and in those charts we did not use color to highlight customary office hours. Representative examples follow the charts on the next page. Note that for these statistical purposes, prosecutions against each defendant in a multidefendant case are regarded as separate cases.

Following those examples are four example charts showing how we illustrated nighttime filings by attorneys. We charted the number of docket entries made by attorneys each month, using color to show the docket entries made after 8:00 p.m. Following each chart showing number of filings is a chart showing percentage of filings that were made after 8:00 p.m. Usually the chart range is from 0% to 16%, but for some courts we expanded the range to 40% and used red value labels as a signal that the chart range was atypical. We made similar charts for days of the week, usually using 40% as the top of the range for percentage of filings made on a day of the week, but sometimes using 50% as the top of the range.

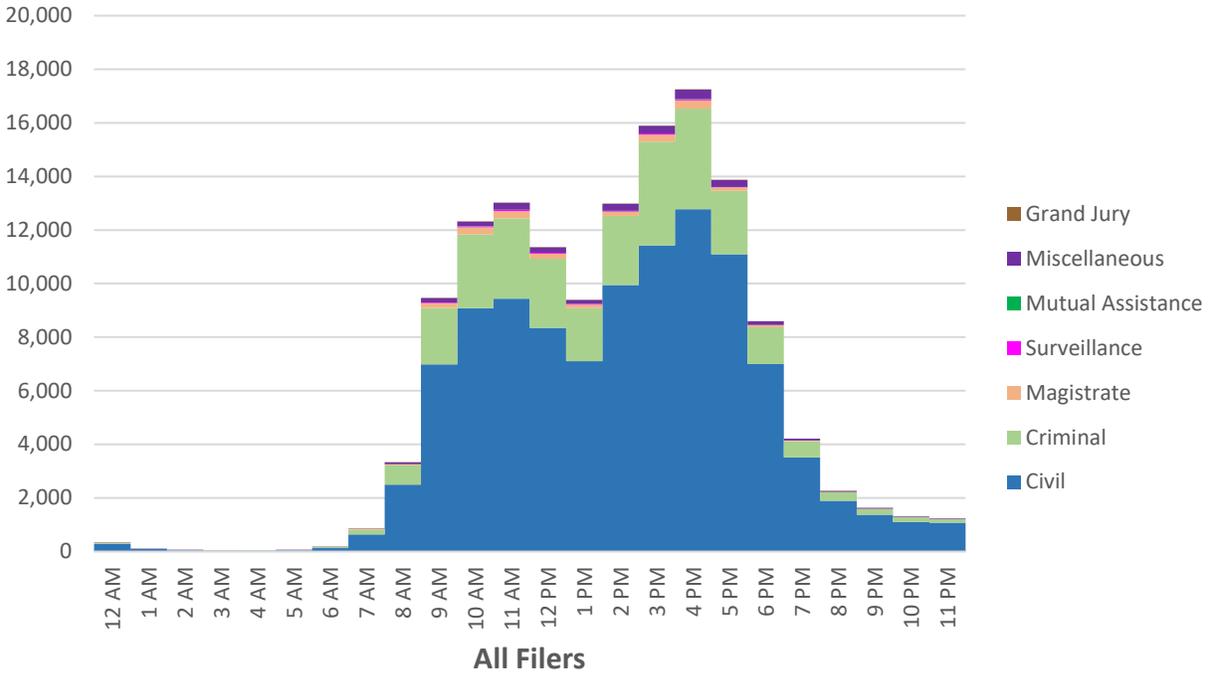
Filings by Hour of Day in the District Courts



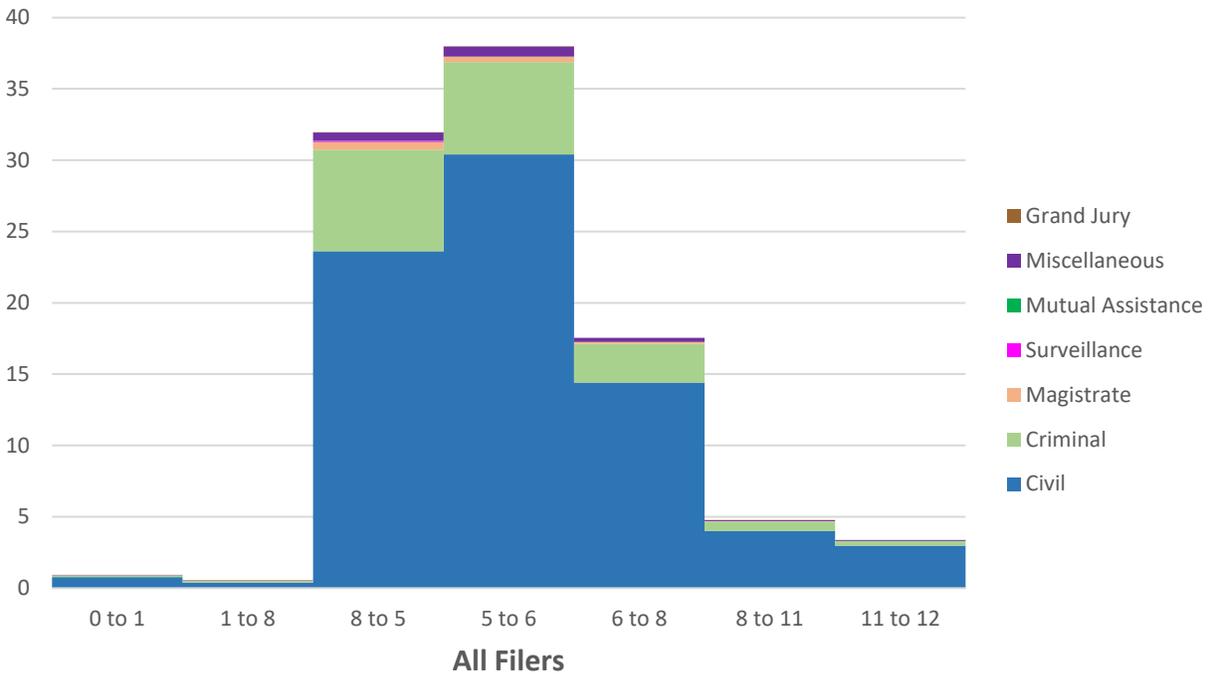
Filings per Hour by Time Period in the District Courts



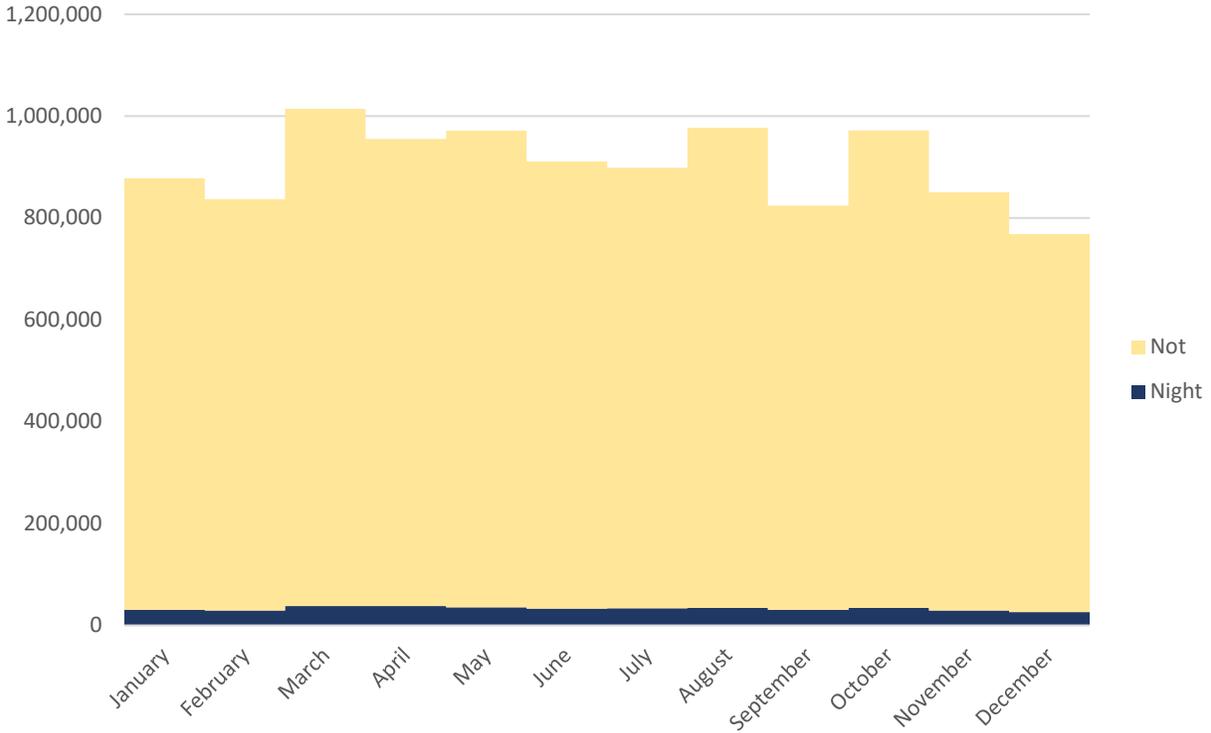
District of Columbia District Court Filings in 2018 by Hour of Day



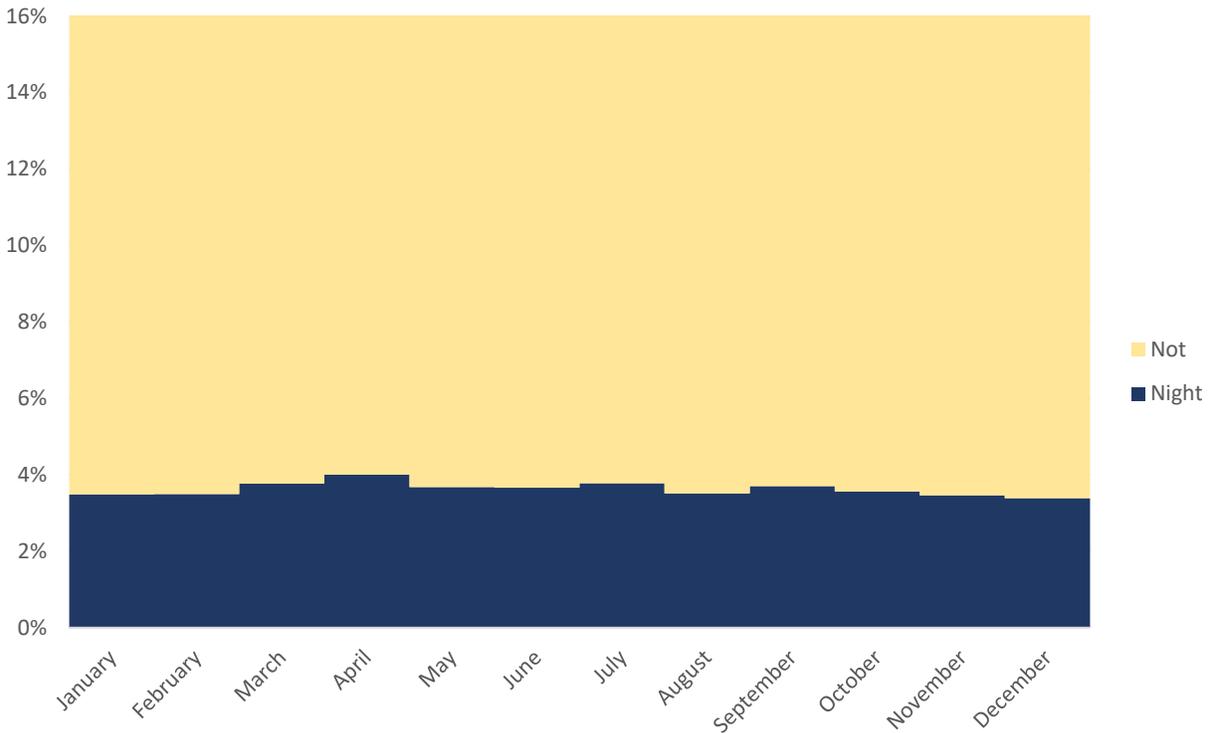
District of Columbia District Court Filings per Hour in 2018 by Time Period



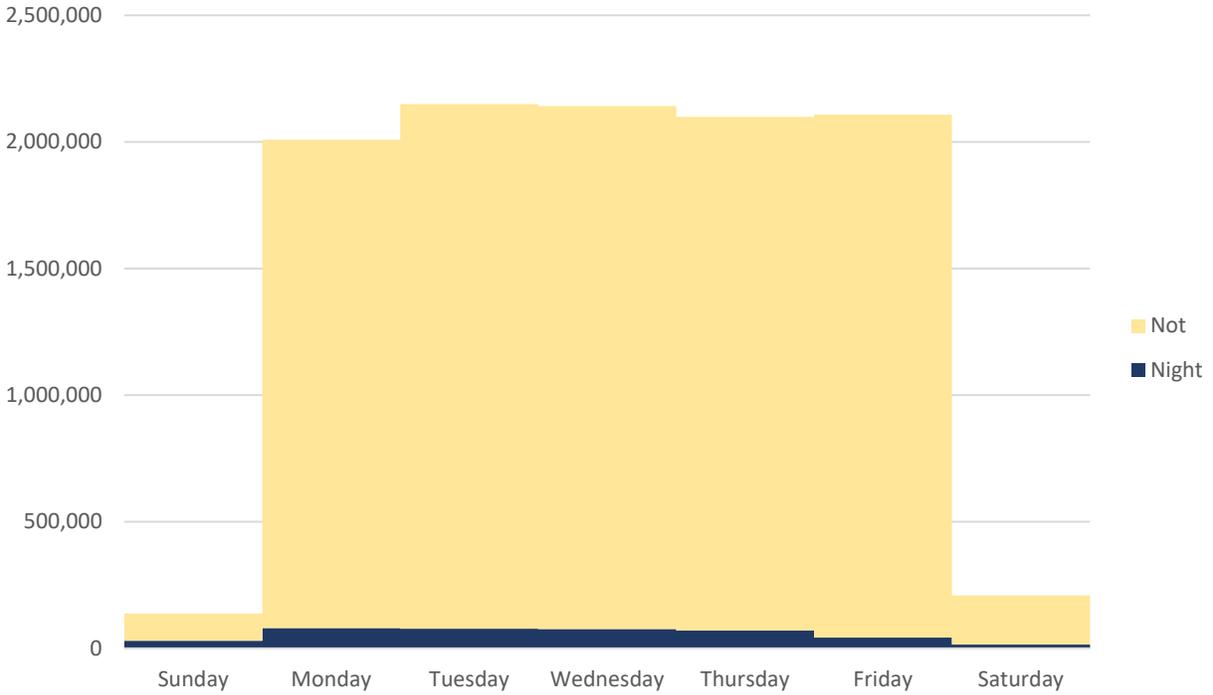
Bankruptcy Court Nighttime Attorney Filings by Month



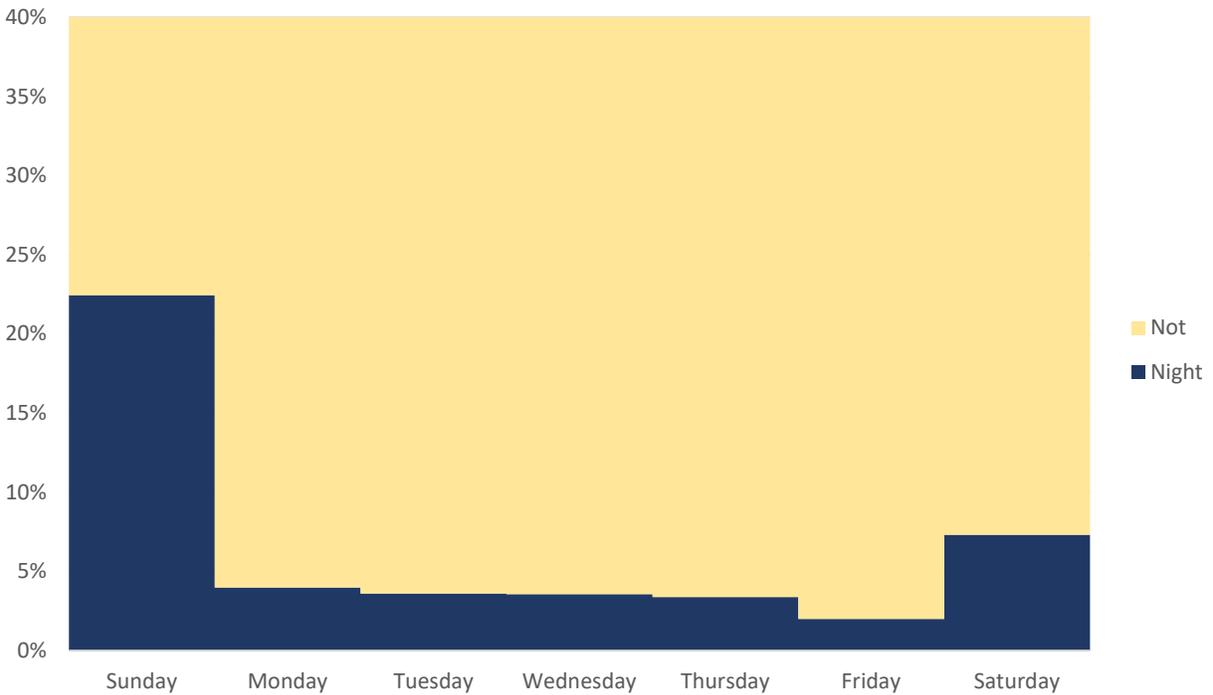
Bankruptcy Court Nighttime Attorney Filings by Month



Bankruptcy Court Nighttime Attorney Filings by Day of the Week



Bankruptcy Court Nighttime Attorney Filings by Day of the Week



TAB 3

TAB 3A

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

ROBERT M. DOW, JR.
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Judge Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 13, 2022

I. Introduction

The Advisory Committee on Appellate Rules met on Wednesday, March 30, 2022, in San Diego, California. The draft minutes from the meeting are attached to this report.

The Advisory Committee seeks final approval of two matters.

First, it seeks final approval of proposed amendments to Appellate Rule 2 and Appellate Rule 4. These proposed amendments are discussed in a separate memo contained in the agenda book as part of the package of CARES Act amendments.

Second, it seeks final approval of proposed amendments to Appellate Rule 26 and Appellate Rule 45 to reflect a new federal holiday, Juneteenth National Independence Day, June 19. These proposed amendments have not been published for public notice and comment. The Advisory Committee does not believe that publication and comment are necessary, because these amendments simply conform to a new statute. (Part II of this report.)

The Advisory Committee also seeks publication of a minor change to the Appendix of Length Limits. (Part III of this report.)

Other matters under consideration (Part IV of this report) are:

- expanding disclosures by amici curiae;
- clarifying the process for challenging the allocation of costs on appeal;
- regularizing the criteria for granting in forma pauperis status and revising Form 4;
- in conjunction with other Advisory Committees, expanding electronic filing by pro se litigants;
- in conjunction with other Advisory Committees, making the deadline for electronic filing earlier than midnight;
- in conjunction with the Civil Rules Committee, amendments to Civil Rules 42 and 54 to respond to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that consolidated actions retain their separate identity for purposes of appeal; and
- a new suggestion to identify the amicus or counsel who triggered the striking of an amicus brief.

The Advisory Committee also considered one item and removed it from its agenda (Part V of this report):

- a suggestion to create standards for recusal based on the submission of amicus briefs.

II. Action Item for Final Approval

Juneteenth

On June 17, 2021, President Biden signed into law the Juneteenth National Independence Day Act, P.L. 117-17 (2021) which amends 5 U.S.C. § 6103(a) to add to the list of public legal holidays “Juneteenth National Independence Day, June 19.”

To reflect the new public legal holiday, the Advisory Committee approved an amendment to Federal Rule of Appellate Procedure 26(a)(6)(A) to insert the words “Juneteenth National Independence Day,” immediately following the words “Memorial Day.” The Advisory Committee further recommends that this amendment be given final approval without publication. See Procedures for Committees on Rules of Practice and Procedure § 440.20.40 (“The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary.”).

After the meeting, the Advisory Committee noticed that the list of holidays is repeated in Federal Rule of Appellate Procedure 45(a)(2) and voted by email to add Juneteenth to that Rule as well.

Other Advisory Committees have considered parallel amendments. Here is the proposed amended text of Rule 26(a)(6):

- 1 **Rule 26. Computing and Extending Time**
- 2 **(a) Computing Time. * * ***
- 3 * * * * *
- 4 **(6) “Legal Holiday” Defined.** “Legal holiday” means:
- 5 (A) the day set aside by statute for observing New Year’s Day,
6 Martin Luther King Jr.’s Birthday, Washington’s
7 Birthday, Memorial Day, Juneteenth National
8 Independence Day, Independence Day, Labor Day,
9 Columbus Day, Veterans Day, Thanksgiving Day, or
10 Christmas Day;
- 11 (B) any day declared a holiday by the President or Congress;
12 and
- 13 (C) for periods that are measured after an event, any other day
14 declared a holiday by the state where either of the following

15 is located: the district court that rendered the challenged
16 judgment or order, or the circuit clerk’s principal office.

17 * * * * *

18 **Committee Note**

19 The amendment adds “Juneteenth National Independence Day” to the
20 list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-
21 17 (2021) (amending 5 U.S.C. § 6103(a)).

And here is the proposed amended text of Rule 45(a)(2):

22 **Rule 45. Clerk’s Duties**

23 **(a) General Provisions.**

24 * * * * *

25 (2) **When Court Is Open.** The court of appeals is always open for
26 filing any paper, issuing and returning process, making a motion,
27 and entering an order. The clerk's office with the clerk or a deputy
28 in attendance must be open during business hours on all days
29 except Saturdays, Sundays, and legal holidays. A court may
30 provide by local rule or by order that the clerk's office be open for
31 specified hours on Saturdays or on legal holidays other than New
32 Year's Day, Martin Luther King, Jr.'s Birthday, Washington's
33 Birthday, Memorial Day, Juneteenth National Independence
34 Day, Independence Day, Labor Day, Columbus Day, Veterans’
35 Day, Thanksgiving Day, and Christmas Day.

36 * * * * *

37 **Committee Note**

38 The amendment adds “Juneteenth National Independence Day” to the
39 list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-
40 17 (2021) (amending 5 U.S.C. § 6103(a)). A stylistic change was made.

III. Action Item for Approval for Publication

Appendix on Length Limits (18-AP-A)

At its last meeting in January 2022, the Standing Committee approved proposed amendments to Rules 35 and 40, along with conforming amendments to Rule 32(g) and the Appendix of Length Limits, for publication. These proposed amendments are scheduled to be published in August 2022.

Subsequently, the Advisory Committee learned that one additional conforming amendment should be made to the Appendix of Length Limits. As approved in January, the proposed amendment to the Appendix of Length Limits would change the table that lists the document types and applicable limits, but it would not change the bullet points prior to the table.

The third bullet point currently reads:

* * *

- For the limits in Rules 5, 21, 27, 35, and 40:

* * *

Given the proposal to transfer the content of Rule 35 to Rule 40, the reference to Rule 35 should be deleted. This bullet point should be amended as follows:

* * *

- For the limits in Rules 5, 21, 27, ~~35~~, and 40:

* * *

This correction can be made before publication if the Standing Committee approves.

IV. Other Matters Under Consideration

A. Amicus Disclosures—FRAP 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A)

In October 2019, after learning of a bill introduced in Congress that would institute a registration and disclosure system for amici curiae like the one that applies to lobbyists, the Advisory Committee appointed a subcommittee to address amicus disclosures. In February 2021, after correspondence with the Clerk of the Supreme Court, Senator Whitehouse and Congressman Johnson wrote to Judge Bates requesting the establishment of a working group to address the disclosure requirements for organizations that file amicus briefs. Judge Bates was able to respond that the Advisory Committee on the Federal Rules of Appellate Procedure had already established a subcommittee to do so.

Appellate Rule 29(a)(4)(E) currently requires that most amicus briefs include a statement that indicates whether:

- (i) a party’s counsel authored the brief in whole or in part;
- (ii) a party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief; and
- (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

The Advisory Committee has not yet decided whether to propose any amendments in this area. As previously reported to the Standing Committee, the Advisory Committee believes that changes to the disclosure requirements of Rule 29 are within the purview of the rulemaking process under the Rules Enabling Act, but public registration and fines are not, and that any change to Rule 29 should not be limited to those who file multiple amicus briefs. It also resists treating amicus briefs as akin to lobbying. Lobbying is done in private, while an amicus filing is made in public and can be responded to.

The question of amicus disclosures involves important and complicated issues. One concern is that amicus briefs filed without sufficient disclosures can enable parties to evade the page limits on briefs or produce a brief that appears independent of the parties but is not. Another concern is that, without sufficient disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. There are also broader concerns about the influence of “dark money” on the amicus process. Any disclosure

requirement must also consider First Amendment rights of those who do not wish to disclose themselves. *See, e.g., Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

In order to focus the Advisory Committee’s consideration of these issues, it reviewed a discussion draft of a possible amendment to Rule 29 prepared by a subcommittee. Neither the Advisory Committee nor its subcommittee endorsed this discussion draft. Again, the point was to provide a basis for a focused discussion of the issues. Underscoring that point, the discussion draft included a series of questions to prompt the Advisory Committee’s consideration.

The discussion draft was not presented as a redlined amendment to Rule 29(a)(4)(E), but instead as two new subdivisions of Rule 29, one dealing with disclosures of the relationship between the amicus and a party, Rule 29(c) and one dealing with disclosures of the relationship between the amicus and a nonparty, Rule 29(d).

Here is the discussion draft:

1 **Rule 29. Brief of an Amicus Curiae**

2 * * * * *

3 **(c) Disclosures of Relationship Between the Amicus and a Party.**

4 Unless the amicus curiae is one listed in the first sentence of Rule
5 29(a)(2), an amicus brief must include the following disclosures:

6 (1) whether a party or its counsel authored the brief in whole or in
7 part;

8
9 (2) whether a party or its counsel contributed or pledged to
10 contribute money intended to fund (or intended as compensation
11 for) drafting, preparing, or submitting the brief;

12
13 (3) whether a party is a member of the amicus curiae;

14

[Issue to discuss: should the rule require disclosure that a party is a member of the amicus curiae?

In evaluating the arguments made by an amicus, it is important for a court to know whether an amicus is independent of a party. If an amicus is understood to speak for its members, and one of the members for which it is speaking is a party, but the court does not know about this relationship, the court might think the amicus is more independent of the party than it is.

On the other hand, a party may be a member of an amicus for reasons that have nothing to do with the amicus brief. The risk of disclosure might dissuade some people from joining an organization. And the need to disclose might dissuade an organization from filing an amicus brief. Depending on the size and structure of an organization, an individual member may have little or no control over decisions by the amicus.

A narrower means of furthering the goal of determining whether an amicus is independent of a party might be the next provision.]

- 15 (4) whether a party or its counsel has (or two or more parties or their
16 counsel collectively have) a 50% or greater interest in the
17 ownership or control of the amicus curiae; and

[Issue to discuss: should the rule require disclosure that a party or its counsel has control over an amicus, or require disclosure of some lesser interest in the amicus?

As with the prior provision, in evaluating the arguments made by an amicus, it is important for a court to know whether an amicus is independent of a party. If a party has majority ownership or control of an amicus, but the court does not know about this relationship, the court is likely to think that the amicus is more independent of the party than it is.

On the other hand, the need to disclose might dissuade some from filing an amicus brief.

Setting the percentage at 50% means that some parties with considerable influence over an amicus will not be disclosed. Consider, for example, someone with a 40% interest where no one else has more than a 2% interest.

On the other hand, setting the percentage at a lower rate increases the risk that the need to disclose might dissuade some from filing an amicus brief.

The higher percentage might be viewed as a narrower means of furthering the goal of determining whether an amicus is independent of a party. It is less burdensome. But it is also underinclusive.]

- 18 (5) whether a party or its counsel has (or two or more parties or their
19 counsel collectively have) contributed 10% or more of the gross
20 annual revenue of the amicus curiae during the twelve-month
21 period preceding the filing of the amicus brief. Amounts unrelated
22 to the amicus curiae's amicus activities that were received in the
23 form of investments or in commercial transactions in the ordinary
24 course of business may be disregarded.

[Issue to discuss: should the rule require disclosure of contributions to an amicus by a party or its counsel and, if so, at what level?

Again, in evaluating the arguments made by an amicus, it is important for a court to know whether an amicus is independent of a party. A party that makes significant contributions to an amicus may have significant influence over that amicus. And if the court does not know about this relationship, it may think that the amicus is more independent of the party than it is.

On the other hand, a party may make significant contributions to an amicus for reasons that have nothing to do with the amicus brief. And the need to disclose contributors might dissuade some people from making significant contributions. Or it might dissuade some recipients of contributions from filing an amicus brief. Depending on the size and structure of an organization, a contributor—even a significant contributor—may have little or no control over decisions by the amicus.

The lower the percentage that triggers disclosure, the greater the burden. But the higher the percentage that triggers disclosure, the greater the likelihood that some parties with considerable influence over an amicus will not be disclosed.

As with the prior provision, the higher percentage might be viewed as a narrower means of furthering the goal of determining whether an amicus is independent of a party. But it is also underinclusive.]

25 Any required disclosure must identify the name of the party or counsel.

26 **(d) Disclosures of Relationship Between the Amicus and a**
27 **Nonparty.** Unless the amicus curiae is one listed in the first sentence
28 of Rule 29(a)(2), an amicus brief must include the following disclosures:

29 (1) whether any person—other than the amicus, its members, or its
30 counsel—contributed or pledged to contribute money intended to
31 fund (or intended as compensation for) drafting, preparing, or
32 submitting the brief;

[Issue to discuss: should the rule exclude from the disclosure requirement those earmarked contributions to an amicus that are given by a nonparty who is a member of the amicus curiae?

The current rule requires disclosure of earmarked contributions by nonparties, but it excludes earmarked contributions by members of the amicus.

The current rule can be understood as seeking to make sure that the amicus is speaking for itself and its members, rather than simply being a paid mouthpiece for someone else. If an amicus is serving as a paid mouthpiece for someone else but the court does not know this, the court may think that the amicus is presenting its own views rather than the views of the one who funded this brief.

The current rule is easily evaded so long as the nonparty making the earmarked contribution is willing to become a member of the amicus. The distinction between a member and a contributor

might be viewed as artificial, depending on the structure of the amicus. Expanding the disclosure requirement so that earmarked contributions by members must be revealed would block this easy evasion.

On the other hand, members of an organization speak through the organization, and an organization speaks for its members. Having to disclose that a nonparty member made earmarked contributions would discourage members from making such contributions and discourage organizations from submitting such amicus briefs. And the direction of causation may not be clear: Did the member make the earmarked contribution because the amicus wanted to file the brief, needed funding, and asked a generous member? Or did the member make the contribution to prompt the filing of the brief?

The current rule might be viewed as a narrower means of furthering the goal of determining whether an amicus is speaking for itself. But it is also underinclusive because of the possibility of evasion.]

- 33 (2) whether any person has a 50% or greater interest in the
34 ownership or control of the amicus curiae; and

[Issue to discuss: should the rule require disclosure that a nonparty has control over an amicus, or require disclosure of some lesser interest in the amicus?

In evaluating the arguments made by an amicus, a court may want to know whether an amicus is controlled by someone else. A person who controls the amicus might have interests that would affect a court’s evaluation of the amicus brief but that are obscured by speaking through the amicus. Knowing the identity of such a person would allow a court to take those interests into account.

On the other hand, the need to disclose might dissuade some from filing an amicus brief. This would be more likely than if such disclosure were limited to a controlling interest in the amicus by a party. That’s because a rule that requires disclosure of a controlling interest by a nonparty would require disclosure in *every* amicus brief filed by that amicus.

Setting the percentage at 50% means that some nonparties with considerable influence over an amicus will not be disclosed. On the other hand, setting the percentage at a lower rate increases the risk that the need to disclose might dissuade some from filing an amicus brief.

A higher percentage might be viewed as a narrower means of furthering the goal of determining whether an amicus is independent of a nonparty. It is less burdensome. But it is also underinclusive.

There is another approach to the problem that an amicus might effectively be a front for someone else: caveat lector. That is, perhaps courts should simply be skeptical of amicus briefs submitted by unknown entities that do not provide an adequate account of their “interest” as required by Rule 29(a)(3)(A). An amicus with a long track record is far less likely to be a front than one created during litigation.]

- 35 (3) whether any person has contributed 40% or more of the gross
36 annual revenue of the amicus curiae during the twelve-month
37 period preceding the filing of the amicus brief. Amounts unrelated
38 to the amicus curiae’s amicus activities that were received in the
39 form of investments or in commercial transactions in the ordinary
40 course of business may be disregarded.

[Issue to discuss: should the rule require disclosure of contributions to an amicus by a nonparty and, if so, at what level?

In evaluating the arguments made by an amicus, a court may want to know whether an amicus is being influenced by someone else. A party that makes significant contributions to an amicus may have significant influence over that amicus. A person with significant influence over the amicus might have interests that would affect a court’s evaluation of the amicus brief but that are obscured by speaking through the amicus. Knowing the identity of such a person would allow a court to take those interests into account. And knowing the identity of significant contributors behind a number of amici in a given case would enable the court to see that what may appear to be broad support for a position has been manufactured.

On the other hand, a party may make significant contributions to an amicus for reasons that have nothing to do with the amicus brief. And the need to disclose contributors might dissuade some people from making significant contributions. Or it might dissuade some recipients of contributions from filing an amicus brief. Depending on the size and structure of an organization, a contributor—even a significant contributor—may have little or no control over decisions by the amicus.

The lower the percentage that triggers disclosure, the greater the burden. But the higher the percentage that triggers disclosure, the greater the likelihood that some persons with considerable influence over an amicus will not be disclosed.

In balancing these two, it might be appropriate to set a higher percentage for nonparty contributors than party contributors. A party obviously has a stake in the outcome, while a nonparty contributor may not.

Here again, caveat lector might be an alternative. If a court doesn’t know—and can’t tell from the statement of interest submitted by the amicus—that an amicus (or group of amici) warrants trust, it shouldn’t provide that trust.]

- 41 Any required disclosure must identify the person.

Rule 29(c)—Relationship Between the Amicus and a Party

Rule 29(c)(3). The discussion draft includes a provision, Rule 29(c)(3), that would require the disclosure of whether a party is a member of the amicus. The Advisory Committee does not think that this information is sufficiently helpful to warrant disclosure. Membership by itself does not indicate influence by the party over the amicus. And disclosure may produce substantial costs.

Rule 29(c)(4). The discussion draft includes a provision, Rule 29(c)(4), that would require the disclosure of whether a party or counsel has a 50% or greater interest in the ownership or control of the amicus. There is more support for this kind of disclosure because it does indicate whether a party can tell an amicus what to file.

Rule 29(c)(5). The discussion draft includes a provision, Rule 29(c)(5), that would require the disclosure of whether a party or counsel has contributed 10% or more of the gross annual revenue of the amicus during the prior twelve months. The 10% figure was drawn from the corporate disclosure rule, Rule 26.1, but only as a place to start discussion.

Members of the Advisory Committee have a variety of views on this provision. One view is that it should not be adopted at any level: no matter how high the percentage of contributions, what matters is control, and that is covered by (c)(4); alternatively, the percentage should be 50%. Another view is that while 10% is too low, once a contributor is providing 25% or 33% of the revenue of an amicus, that's substantial.

And whatever level is set here, perhaps it should be the same in (c)(4) and (c)(5). There may not be a sufficient difference between the ownership and control issue in (c)(4) and the contribution issue in (c)(5) to warrant different percentages.

Rule 29(d)—Relationship Between the Amicus and a Nonparty

Rule 29(d)(1). The current rule requires disclosure of earmarked contributions by nonparties, but it excludes earmarked contributions by members of the amicus. A key question here is whether to maintain that exclusion.

The Advisory Committee is struggling with this issue. One perspective is that the worry is an amicus serving as a paid mouthpiece. Because an amicus speaks for its members, the exclusion should remain.

Another perspective is that if someone is funding a specific brief—as opposed to supporting the organization more generally—judges are entitled to know. In addition, a member exclusion makes for easy evasion: an outsider who wants to make an earmarked contribution without disclosure can simply become a member.

But different amicus organizations operate differently. Some may do more general funding. Others may do funding project by project. The risk of evasion by becoming a member may be low compared to the chilling effect of disclosure. Perhaps only earmarked contributions by members that are sufficiently large should be disclosed. Disclosure that many people have contributed small amounts is not useful.

Disclosure of whether someone funded more than one amicus brief in a case might be useful, but no one amicus may know this information and be able to disclose it.

The Advisory Committee will give more thought to (d)(1).

Rule 29(d)(2). The discussion draft includes a provision, Rule 29(d)(2), that would require the disclosure of whether a nonparty has a 50% or greater interest in the ownership or control. It is parallel to Rule 29(c)(4).

Rule 29(d)(3). The discussion draft includes a provision, Rule 29(d)(3), that would require the disclosure of whether a nonparty has contributed 40% or more of the gross annual revenue of the amicus during the prior twelve months. It is parallel to Rule 29(c)(5), but with a 40% threshold.

Both provisions might help courts and the parties get a better understanding of who is behind amicus briefs and whether someone is single handedly creating what looks like a broad array of amicus briefs—without earmarking contributions for those briefs. There is also a concern that when this happens, it can erode faith and trust in the judiciary by giving the appearance of judges tolerating it and being hoodwinked.

But there are substantial doubts among members of the Advisory Committee whether there is a sufficient interest in having such information about nonparties to outweigh the concerns, including constitutional concerns, with requiring disclosure. One less intrusive way to deal with the risk of less disclosure is *caveat lector*: perhaps courts should be skeptical of amicus briefs that do not provide enough information to warrant trust.

B. Costs on Appeal—Rule 39 (21-AP-D)

The Advisory Committee is exploring whether any amendments to Federal Rule of Appellate Procedure 39 might be appropriate in light of the Supreme Court’s decision in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). There, the Court held that Appellate Rule 39 does not permit a district court to alter a court of appeals’ allocation of the costs listed in subdivision (e) of that Rule. The Supreme Court observed that the current rules could specify more clearly the procedure that a party should follow to bring their arguments about costs to the court of appeals. It also

noted, without further comment, an argument that the current Rule impermissibly allows for the recovery of costs not listed in 28 U.S.C. § 1920.

The Advisory Committee believes that while costs on appeal are usually modest, one kind of cost—the premium paid for a bond to preserve rights pending appeal (traditionally known as a supersedeas bond)—can be considerable. These bonds are approved by the district court to secure a stay of enforcement of a judgment. For that reason, while the court of appeals allocates which party must pay these costs, the bill of costs is filed in the district court.

While the Advisory Committee is not yet making a proposal, it is currently considering adding a short provision to Appellate Rule 39 that would make clear that a party may seek reconsideration of the allocation of appellate costs by filing a motion in the court of appeals within 14 days after entry of judgment.

The Advisory Committee considered other alternatives. One possibility was an explicit authorization of a motion in the court of appeals after the bill of costs has been filed in the district court. But at that point, the mandate would already have issued. And there would be proceedings involving the same bill of costs pending in both the district court and the court of appeals at the same time. The Advisory Committee also considered the possibility of empowering the district court to do what the Supreme Court held that the current rule does not allow: allocate the costs itself. But this would mean that the district court (which had just been reversed) would be evaluating the relative success of the parties in the court of appeals.

The major difficulty presented by the Advisory Committee's preferred approach is that the party who prevailed in the district court may not know the premium paid for the supersedeas bond at that time. Under the current rules, disclosure of the premium paid might not be made until the party who lost in the district court but prevailed on appeal files the bill of costs in the district court on remand. For that reason, the Advisory Committee suggests that this amendment be coordinated with the Civil Rules Committee. Perhaps Civil Rule 62—which already requires the district court to approve the bond or other security before the stay takes effect—could be amended to require that the premium paid for the bond be disclosed before the bond is approved. That way, the prevailing party in the district court would know well in advance the cost it might be facing if the court of appeals reverses. (Indeed, it might inform some prevailing parties who would otherwise be unaware that they face this risk at all.) Such knowledge might induce the prevailing party to suggest lower cost options or even waive the requirement for a bond. It might also encourage parties to negotiate not only over the face value of the bond, but perhaps even agree on some “other security,” Civil Rule 62(b), that protects the interests of the district court winner at little or no out-of-pocket cost to the district court loser.

Negotiations might be more fruitful if the district court's approval of the cost of the premium were required as well.

It might be worth pursuing the amendment to Appellate Rule 39 even if the Civil Rules Committee declines to act. But there is no urgency and there are benefits to coordination. In addition to possible coordination with the Civil Rules Committee, the Appellate Rules Committee also intends to further explore where in Rule 39 the new provision is best placed and whether some time frame other than 14 days may be better.

Here is a working draft:

1 **Rule 39. Costs**

2 **(a) Against Whom Assessed.** The following rules apply unless the law
3 provides or the court orders otherwise:

4 (1) if an appeal is dismissed, costs are taxed against the appellant,
5 unless the parties agree otherwise;

6 (2) if a judgment is affirmed, costs are taxed against the appellant;

7 (3) if a judgment is reversed, costs are taxed against the appellee;

8 (4) if a judgment is affirmed in part, reversed in part, modified, or
9 vacated, costs are taxed only as the court orders.

10 A party may seek reconsideration of the allocation of costs by filing a motion
11 within 14 days after entry of judgment.

12 **(b) Costs For and Against the United States.** Costs for or against the
13 United States, its agency, or officer will be assessed under Rule 39(a)
14 only if authorized by law.

15 **(c) Costs of Copies.** Each court of appeals must, by local rule, fix the
16 maximum rate for taxing the cost of producing necessary copies of a brief
17 or appendix, or copies of records authorized by Rule 30(f). The rate must
18 not exceed that generally charged for such work in the area where the
19 clerk's office is located and should encourage economical methods of
20 copying.

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

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

25 (2) Objections must be filed within 14 days after service of the bill of
26 costs, unless the court extends the time.

27 (3) The clerk must prepare and certify an itemized statement of costs
28 for insertion in the mandate, but issuance of the mandate must
29 not be delayed for taxing costs. If the mandate issues before costs
30 are finally determined, the district clerk must—upon the circuit
31 clerk’s request—add the statement of costs, or any amendment of
32 it, to the mandate.

33 **(e) Costs on Appeal Taxable in the District Court.** The following costs
34 on appeal are taxable in the district court for the benefit of the party
35 entitled to costs under this rule:

36 (1) the preparation and transmission of the record;

37 (2) the reporter’s transcript, if needed to determine the appeal;

38 (3) premiums paid for a bond or other security to preserve rights
39 pending appeal; and

40 (4) the fee for filing the notice of appeal.

The Supreme Court in *Hotels.com* also dropped a footnote to mention an issue that it was not deciding:

As the United States points out, see Brief for United States as *Amicus Curiae* 19, n. 4, we have interpreted Rule 54(d) to provide for taxing only the costs already made taxable by statute, namely, 28 U.S.C. § 1920. See *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 441–442 (1987). Supersedeas bond premiums, despite being referenced in Appellate Rule 39(e)(3), are not listed as taxable costs in § 1920. San Antonio has not raised any argument that Rule 39 is inconsistent with § 1920 in this respect. We accordingly do not consider this issue.

Hotels.com, 141 S. Ct. at 1636 n.4.

The inclusion of the premium for a supersedeas bond as a recoverable cost has been a part of the Federal Rules of Appellate Procedure since their promulgation in 1967. The Advisory Committee at the time noted:

Provision for taxation of the cost of premiums paid for supersedeas bonds is common in the local rules of district courts and the practice is established in the Second, Seventh, and Ninth Circuits. *Berner v. British Commonwealth Pacific Air Lines, Ltd.*, 362 F.2d 799 (2d Cir. 1966); *Land Oberoesterreich v. Gude*, 93 F.2d 292 (2d Cir., 1937); *In re Northern Ind. Oil Co.*, 192 F.2d 139 (7th Cir., 1951); *Lunn v. F. W. Woolworth*, 210 F.2d 159 (9th Cir., 1954).

A few years before the promulgation of the Federal Rules of Appellate Procedure, the Supreme Court had suggested in dictum that district judges may use Civil Rule 54 to tax costs not specifically authorized by statute. *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235-36 (1964). But the Supreme Court disapproved that dictum in *Crawford*. 482 U.S. at 443. It held “that § 1920 defines the term ‘costs’ as used in Rule 54(d). Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d). It is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party.” *Id.* at 441-42. *See also Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 878 (2019) (“Our cases, in sum, establish a clear rule: A statute awarding ‘costs’ will not be construed as authorizing an award of litigation expenses beyond the six categories listed in §§ 1821 and 1920, absent an explicit statutory instruction to that effect.”).

The Court of Appeals for the Seventh Circuit has treated Rule 39(e)(3) as valid under the supersession clause of the Rules Enabling Act,¹ stating that “Congress approved Rule 39 after it passed § 1920.” “In short, because Rule 39(e) expressly authorizes the taxation of supersedeas bond costs, it is binding on district courts regardless of whether § 1920 authorizes an award of those costs. By contrast, Rule 54(d) does not outline any specific costs taxable by the district court, and therefore, as discussed in *Crawford*, remains limited by § 1920.” *Republic Tobacco Co. v. N. A. Trading Co., Inc.*, 481 F.3d 442, 448 (7th Cir. 2007). *But see Winniczek v. Nagelberg*, 400 F.3d 503, 504 (7th Cir. 2005) (“The counterpart to Rule 54(d) of the civil rules is Rule 39 of the appellate rules, and since section 1920 applies to all federal courts, Rule 39 should likewise be subject to that statute.”). The Solicitor General has noted

¹ 28 U.S.C § 2072 (“Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”).

that the opinion in *Republic Tobacco* overstates the approval of Congress: failure to reject is not the same as affirmative approval.

Wright and Miller takes the position that *Republic Tobacco* represents the better view:

28 U.S.C.A. § 1920 provides a statutory basis for the recovery of certain costs on appeal. Rule 39(e) contemplates the taxation of some other costs besides those listed in Section 1920; it provides that “premiums paid for a bond or other security to preserve rights pending appeal” are “taxable in the district court.” Though the Supreme Court held in the *Crawford Fitting* case that Civil Rule 54(d)’s directive that “costs” should generally be allowed to the prevailing party does not permit a district court to include among those costs items not listed in Section 1920, and though one court has applied the *Crawford Fitting* approach to Appellate Rule 39, the better view is that Appellate Rule 39 merits a different approach: The rulemakers, when they adopted and later amended Rule 39, were well aware that Section 1920 did not list the cost of a bond, and they nonetheless deliberately specified that cost in Rule 39(e).

16AA Fed. Prac. & Proc. Juris. § 3985 (5th ed.) (footnotes omitted). The Solicitor General has noted that clear intentions by rulemakers do not provide rulemakers with authority.

While the Advisory Committee acknowledges these questions, it is not inclined to revisit whether Rule 39(e)(3) is valid under the Rules Enabling Act. That provision has been a part of the Federal Rules of Appellate Procedure for more than fifty years, and the Advisory Committee does not believe that it is necessary to revisit its validity in order to proceed with the minor amendment under consideration.

C. IFP Status Standards—Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

The Advisory Committee has been considering suggestions to establish more consistent criteria for granting in forma pauperis (IFP) status and to revise the FRAP Form 4 to be less intrusive. It focused its attention on the one aspect of the issue that is clearly within the purview of the Committee, Form 4. Form 4 is a form adopted through the Rules Enabling Act, not a form created by the Administrative Office.

Based on informal information gathering about IFP practice in the courts of appeals, the Advisory Committee thinks that IFP status is rarely denied because the applicant has too much wealth or income and that Form 4 could be substantially simplified while still providing the courts of appeals with enough detail to decide

whether to grant IFP status. Attached to this report is a working draft of a revised Form 4, drawing upon existing and proposed forms created for similar purposes.

Before proceeding further with this project, the Advisory Committee plans to consult first with senior staff attorneys in the circuits. In addition, because Supreme Court Rule 39.1 calls for the use of Appellate Form 4 by applicants for IFP status in the Supreme Court, the Advisory Committee would confer with the Clerk of the Supreme Court before recommending publication.

In reviewing this working draft, the Standing Committee should bear in mind the governing statute. The statute, as amended by the Prison Litigation Reform Act, makes little sense. It provides, in relevant part, that:

any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.

28 U.S.C. § 1915. It switches, mid-sentence, from referring to a “person” who submits an affidavit to “such prisoner” whose assets must be stated in the affidavit and then back again to the “person” who is unable to pay fees. To make sense of this provision, courts have generally read it to require any *person* seeking IFP status to submit a statement of all assets such *person* possesses, even if the person is not a prisoner.

The working draft Form 4 does require that applicants for IFP status state their total assets. It does not, however, require applicants to separately state each asset. Perhaps some big-ticket items should be broken out.

D. Joint Projects

The Advisory Committee has nothing new to report regarding:

- 1) the joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight; and
- 2) the joint subcommittee considering the final judgment rule in consolidated actions after *Hall v. Hall*, 138 S. Ct. 1118 (2018), decided that consolidated actions retain their separate identity.

With regard to the issue of electronic filing by pro se litigants, the reporters have met and discussed a preliminary draft of a detailed study by the Federal Judicial

Center. At this preliminary stage, what appears most significant from the perspective of the Appellate Rules is that some courts of appeals generally permit pro se litigants to use electronic filing, that all do at least sometimes, and that courts that have allowed electronic filing generally find that the reality is better than their fears.

E. New Suggestions

Three comments have already been received regarding amicus disclosures. Because there has not yet been a proposal published for public comment, these comments have been docketed as new suggestions. (21-AP-G; 21-AP-H; 22-AP-A). The amicus subcommittee has treated these comments as intended.

Another new suggestion is related to amicus briefs and disqualification. The suggestion is that when an amicus brief is not allowed to be filed or is struck under Rule 29, the court identify each amicus or counsel that would cause the disqualification. (22-AP-B). It will be considered by a subcommittee and is related to—but distinct from—the item discussed below that the Advisory Committee removed from its agenda.

V. Item Removed from the Advisory Committee Agenda

Amicus Briefs and Recusal—Rule 29 (20-AP-G)

In 2018, Rule 29 was amended to empower a court of appeals to prohibit the filing of an amicus brief or strike an amicus brief if that brief would result in a judge's disqualification. The Rule, however, does not provide any standards for when an amicus brief triggers disqualification. Dean Alan Morrison suggested that the Advisory Committee, or perhaps the Administrative Office or the Federal Judicial Center, study the issue and recommend guidelines for adoption.

The Advisory Committee concluded that this matter is not within its purview and removed the suggestion from its agenda.

Appendix
 Length Limits Stated in the
 Federal Rules of Appellate Procedure

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, ~~35~~, and 40:

* * *

		* * *			
Rehearing and en banc filings	35(b)(2) & 40(b) <u>40(d)(3)</u>	<ul style="list-style-type: none"> • Petition for <u>initial</u> hearing en banc • Petition for panel rehearing; petition for rehearing en banc • <u>Response if requested by the court</u> 	3,900	15	Not applicable

UNITED STATES DISTRICT COURT

for the

< _____ > DISTRICT OF < _____ >

<Name(s) of plaintiff(s)>,)	
)	
Plaintiff(s))	
)	
v.)	
)	Case No. <Number>
<Name(s) of defendant(s)>,)	
)	
Defendant(s))	
)	

**AFFIDAVIT ACCOMPANYING MOTION
FOR PERMISSION TO APPEAL IN FORMA PAUPERIS**

Affidavit in Support of Motion	Instructions
<p>I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)</p>	<p>Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.</p>
Signed:	Date:

My issues on appeal are:

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$	\$	\$	\$
Self-employment	\$	\$	\$	\$
Income from real property (such as rental income)	\$	\$	\$	\$
Interest and dividends	\$	\$	\$	\$
Gifts	\$	\$	\$	\$
Alimony	\$	\$	\$	\$
Child support	\$	\$	\$	\$
Retirement (such as social security, pensions, annuities, insurance)	\$	\$	\$	\$
Disability (such as social security, insurance payments)	\$	\$	\$	\$
Unemployment payments	\$	\$	\$	\$
Public-assistance (such as welfare)	\$	\$	\$	\$
Other (specify):	\$	\$	\$	\$
Total monthly income:	\$	\$	\$	\$

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
			\$
			\$
			\$

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
			\$
			\$
			\$

4. How much cash do you and your spouse have? \$ _____

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of Account	Amount you have	Amount your spouse has
		\$	\$
		\$	\$
		\$	\$

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home	Other real estate	Motor vehicle #1
(Value) \$	(Value) \$	(Value) \$
		Make and year:
		Model:
		Registration #:

Motor vehicle #2	Other assets	Other assets
(Value) \$	(Value) \$	(Value) \$
Make and year:		
Model:		

Registration #:		
-----------------	--	--

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	\$	\$
	\$	\$
	\$	\$
	\$	\$

7. *State the persons who rely on you or your spouse for support.*

Name [or, if under 18, initials only]	Relationship	Age

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No	\$	\$
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$	\$
Home maintenance (repairs and upkeep)	\$	\$
Food	\$	\$
Clothing	\$	\$
Laundry and dry-cleaning	\$	\$
Medical and dental expenses	\$	\$
Transportation (not including motor vehicle payments)	\$	\$

Recreation, entertainment, newspapers, magazines, etc.	\$	\$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's:	\$	\$
Life:	\$	\$
Health:	\$	\$
Motor vehicle:	\$	\$
Other:	\$	\$
Taxes (not deducted from wages or included in mortgage payments) (specify):	\$	\$
Installment payments		
Motor Vehicle:	\$	\$
Credit card (name):	\$	\$
Department store (name):	\$	\$
Other:	\$	\$
Alimony, maintenance, and support paid to others	\$	\$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$	\$
Other (specify):	\$	\$
Total monthly expenses:	\$	\$

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*

Yes No If yes, describe on an attached sheet.

10. *Have you spent — or will you be spending — any money for expenses or attorney fees in connection with this lawsuit? Yes No*

If yes, how much? \$ _____

11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

12. *State the city and state of your legal residence.*

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

Last four digits of your social-security number: _____

UNITED STATES DISTRICT COURT

for the

< _____ > DISTRICT OF < _____ >

<Name(s) of plaintiff(s)>,)

Plaintiff(s))

v.)

Case No. <Number>

<Name(s) of defendant(s)>,)

Defendant(s))

AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed: _____ Date _____

The court may grant a motion to proceed in forma pauperis if you show that you cannot pay the filing fees and you have a non-frivolous legal issue on appeal. Please state your issues on appeal. (Attach additional pages if necessary.)

My issues on appeal are: [Table with 10 empty rows for text entry]

1.	Do you receive SNAP (Supplemental Nutrition Assistance Program)?	Yes No
2.	Do you receive Medicaid?	Yes No
3.	Do you receive SSI (Supplemental Security Income)?	Yes No
4.	What is your monthly take home pay from work?	\$ _____
5.	What is your monthly income from any other source?	\$ _____
6.	How much are your monthly housing costs (such as rent and utilities)?	\$ _____
7.	How much are your monthly costs for other necessary expenses (such as food, medicine, childcare, and transportation)?	\$ _____
8.	What are your total assets (such as bank accounts, investments, market value of car or house)?	\$ _____
9.	How much debt do you have (such as credit cards, mortgage, student loans)?	\$ _____
10.	How many people (including yourself) do you support?	

No matter how you answered the questions above, if you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

If there is anything else that you think affects your ability to pay the filing fee, please feel free to explain below. (Attach additional pages if necessary.)

TAB 3B

Minutes of the Spring 2022 Meeting of the
Advisory Committee on the Appellate Rules

March 30, 2022

San Diego, California

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, March 30, 2022, at 9:00 a.m. PDT.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present in person: Justice Leondra R. Kruger, Judge Carl J. Nichols, Judge Paul J. Watford, and Lisa Wright. Solicitor General Elizabeth Prelogar was represented by H. Thomas Byron III, Senior Appellate Counsel, Department of Justice. Professor Stephen E. Sachs, Danielle Spinelli, and Judge Richard C. Wesley attended via Teams.

Also present in person were: Judge Frank Hull, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; Molly Dwyer, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Bridget M. Healy, Acting Chief Counsel, Rules Committee Staff (RCS); Brittany Bunting, Administrative Analyst, RCS; Burton DeWitt, Rules Law Clerk, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; and Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure.

Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; and Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure, attended via Teams.

I. Introduction

Judge Bybee opened the meeting and welcomed everyone. He expressed appreciation both to those who were in person and those who were participating remotely, voicing hope that we would be able to see them in person in the future. He invited those participating in the meeting to introduce themselves and thanked members of the public for attending.

Burton DeWitt, the Rules Law Clerk, discussed the legislative tracker (Agenda book page 26), and added that a new version of the Amicus Act had been introduced. One significant change in the latest version is that it no longer has a threshold of three amicus briefs to trigger its coverage.

II. Report on Meeting of the Standing Committee

Judge Bybee called attention to the draft minutes of the January Standing Committee meeting and the report of the Standing Committee to the Judicial Conference. (Agenda book page 34).

III. Approval of the Minutes

The Reporter noted two typos in the draft minutes of the October 7, 2021, Advisory Committee meeting. (Agenda book page 90). With those corrected, the minutes were approved.

IV. Discussion of Matters for Final Approval

CARES Act. Judge Bybee presented the report of the CARES Act subcommittee. (Agenda book page 101). This large-scale project, undertaken across advisory committees in response to the enactment by Congress of the CARES Act, resulted in proposed amendments to Rule 2 and Rule 4. These proposed amendments were published for public comment.

We received six comments. Two were supportive. The others did not lead the subcommittee to recommend any changes to the Rules as published.

A comment submitted by the Chief Deputy Clerk for the Tenth Circuit raised issues that the subcommittee had previously identified. The subcommittee was pleased that this thoughtful comment did not reveal issues that had been overlooked.

Judge Bybee invited discussion. Professor Struve stated that the Civil Rules Committee had approved Emergency Civil Rule 87, with some minor changes to the Committee Note and the deletion of some bracketed language.

A motion to approve the proposed amendments to Rule 2 and Rule 4, and to recommend that the Standing Committee give final approval to them, was approved without opposition.

Juneteenth. The Reporter presented a report concerning Juneteenth. (Agenda book page 123). A new law, effective June of 2021, created a new federal holiday, Juneteenth National Independence Day, June 19. Rule 26 should be amended to reflect this new holiday. There is no need for public notice and comment.

A motion to approve the proposed amendment to Rule 26, and to recommend that the Standing Committee give final approval to that amendment, was approved without opposition.

V. Discussion of Matter Approved for Public Comment

Rules 35 and 40. Judge Bybee presented an update concerning the proposed amendments to Rules 35 and 40. He explained that these proposed amendments would consolidate the provisions dealing with panel rehearing and rehearing en banc, eliminate duplication, and transfer the provisions of Rule 35 to Rule 40. He stated that the Standing Committee had accepted these amendments with minor changes, and thanked Professor Sachs for his work on this project.

The Reporter added that the Standing Committee had approved these proposed amendments for publication and public comment, including conforming amendments to Rule 32(g) and the Appendix of Length Limits. But after this approval, Professor Struve discovered that an additional conforming amendment should be made to the third bullet point in the Appendix of Length Limits to delete Rule 35. (Agenda book page 130).

Because the Standing Committee has already approved the rest of the proposed amendments for publication, and publication will not take place until August of 2022, this correction can be made prior to publication.

The Advisory Committee approved, without opposition, recommending that the Standing Committee publish this change as part of the publication of the proposed amendments.

VI. Discussion of Matters Before Subcommittees

A. Amicus Disclosures

Danielle Spinelli presented the report of the amicus subcommittee. (Agenda book page 158). She noted that the Committee had discussed this issue at length at the last two meetings. The AMICUS Act has been reintroduced in Congress, with some changes from the prior version.

She explained that current Rule 29(a)(4)(E) requires disclosure whether:

- (i) a party's counsel authored the brief in whole or in part;
- (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
- (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

There are concerns about this Rule and its Supreme Court counterpart. One concern is that it is too easy to evade the purpose of the disclosure rule by funneling money to an amicus indirectly, without earmarking the money for a particular brief. Another concern is that the current disclosure rule doesn't adequately reveal who is paying for an amicus brief. Some critics worry that the rule allows anonymous advocacy without disclosure of who is behind the brief. Prior detailed discussions at the last two meetings have sought to elicit the thoughts of the full Committee on these issues.

The new memo in the agenda book is shorter than the prior memos. It sets out language to facilitate discussion and to obtain more guidance from the full Committee. The language in the report is not a recommendation by the subcommittee. Ms. Spinelli invited the Reporter and other members of the subcommittee to jump in as she turned to a discussion of the language in the agenda book.

She first noted that the language separates disclosure of the relationship between the amicus and a party from disclosure of the relationship between the amicus and a nonparty. The current rule does not draw this distinction. But the purpose of disclosure in each situation—and the potential concerns in each situation—are different. The comment to the existing rule describes the purpose of the rule as to parties as not allowing a party effectively to have another brief. That isn't a concern with nonparties.

The Reporter directed the Committee's attention to 29(c)(3) of the discussion draft, which would call for disclosure of whether a party is a member of the amicus, and invited discussion.

A judge member asked whether there is any evidence or empirical data to suggest that there is a real problem. Ms. Spinelli responded that the current agenda book does not include everything from prior agenda books. The proponents of the AMICUS Act point to anecdotal evidence in the Supreme Court, including underlying connections between a party and an amicus and between amici that were not disclosed. Correspondence with the Clerk of the Supreme Court with some anecdotal evidence was also included in prior agenda books. There is a legitimate concern about evasion.

A different judge member said that knowing that a party is merely a member of an amicus is not helpful on its own. There is a good reason to compel disclosure if the information is valuable, but not if it isn't useful. Unlike the draft language in 29(c)(4) and (5), the draft language in (c)(3) should be deleted.

An academic member agreed that (c)(3)—the provision that would call for disclosure of whether a party is a member of the amicus—should be deleted. Knowing that someone is a member doesn't tell us much about their influence on an amicus.

For example, knowing that someone is a member of the Sierra Club tells us little about their influence. But disclosure does impose substantial costs, hurting unpopular groups and chilling speech.

And what counts as a problem? People disagree. We know what the Cato Institute says; do we need to know who funds it? The threshold for disclosure should be very high. There are two interests furthered by disclosure: knowing whether a party has control over an amicus and knowing whether an amicus is speaking for itself. Cato would blow its credibility if it filed any brief that came with a \$20 bill attached, simply providing a fee for service. Even if someone donates lots of money to Cato, the brief is still from the organization. Not only (c)(3), but also (c)(5)—which would require disclosure of contributions above a 10% level—should be deleted.

Ms. Spinelli suggested that if a disclosure would not be helpful to judges, it shouldn't be required. Judge Bybee wondered whether there might be disclosures that could aid judges in making ethical decisions. A judge member pointed out that at this point we are focused on the relationship between a party and an amicus, and a judge would already know who the parties are.

There did not appear to be support for (c)(3). Discussion then turned to (c)(4).

Ms. Spinelli stated that (c)(4) is drafted to address the ability to evade disclosure requirements that are limited to earmarked contributions. As currently drafted for discussion purposes, it is quite different than the 3% threshold of the AMICUS Act. Instead, this draft focuses on the ability of a party to control the amicus, and therefore refers to a 50% or greater ownership or control. In response to a question from Judge Bybee, an academic member explained that the draft focuses on voting power. Who is the amicus owned by? Whose orders must it follow? Who can tell the amicus what to file? If less than 50%, the person might have lots of influence, but it is the amicus speaking for itself.

In response to another question by Judge Bybee, Danielle Spinelli noted that the discussion draft covers the situation where two or more parties collectively control an amicus.

A judge member stated that (c)(4) by itself is unobjectionable but is less valuable than (c)(5). It is important to follow the money. Stopping with (c)(4) would not be enough. There is a need for something like (c)(5). That provides a better sense of how independent the amicus is from a party.

Judge Bybee asked what (c)(4) is designed to accomplish. Disqualify an amicus? Discourage an amicus?

Danielle Spinelli explained that the draft, like the current rule, is only about disclosure. A party can write part of the brief of an amicus so long as that is disclosed.

Because such a disclosure would lead a court to give an amicus brief less weight, it's not likely to be filed. No one submits a brief with a disclosure like that, but the rule operates to discourage it rather than forbid it.

The Reporter noted that the subcommittee had looked without success for a specific number in other bodies of law that are concerned about control. From what the subcommittee has found so far, those other bodies of law use standards rather than fixed numbers to take account of situations where one person owns (say) 40% and no one else has more than 2%.

An academic member spoke against (c)(5). There is a difference between voting control and making contributions. When a party makes contributions to an amicus, the amicus is still speaking on its own behalf, not simply providing a fee for service. The party may be funding other organizations and making contributions because the party agrees with those organizations. If there is to be a provision like (c)(5), the percentage should be something like 50%. If it's anything lower than that, so that 50% to 90% is coming from other sources, the amicus may be pleased to receive the contribution, but is not simply acting as a cat's paw.

The academic member added that the discussion draft adds "or intended as compensation for" to (c)(2), and that a lawyer's duty of candor deals with a wink-wink, nudge-nudge contribution. If the contribution is simply a regular contribution, for example, by an airline to an airline trade association, disclosure may lead to the trade association not filing; as a matter of its internal politics, the trade association may not want to tell members what other members have contributed. Given the *AFP* case, we should be mindful that the Supreme Court may not endorse (c)(5), even at the 10% level. The contribution may be made because of the views that the amicus already has, and the value of such a disclosure does not outweigh the chilling effect.

A judge member said that, with regard to parties, he wants to know if a party made a substantial contribution. He is not worried about the First Amendment here. While 10% is too low, 50% is too high. The question is to what extent is the entity independent.

Mr. Byron suggested that it might be useful to think about what kinds of connections between a party and an amicus might be useful for judges to know. He doesn't know the universe of possible connections.

Ms. Spinelli stated that the Committee rejected the idea of using a standard at the last meeting, concluding that we need a rule that is clear and easy to apply, even though it will be under-inclusive.

Judge Bybee invited suggestions for other percentages. A judge suggested 25%, noting that's substantial: I would want to know that in deciding the weight to

give the brief. The judge added that 33% would be fine, too. Judge Bybee noted that a group might have only 4 members.

Mr. Byron suggested aligning (c)(4) with (c)(5), questioning whether there is a meaningful difference between the two that would call for different percentages.

An academic member stated that he had similar concerns with (c)(4) and (c)(5). Actual voting control is quite different from substantial influence. Even with substantial influence, the brief really is coming from the organization and not the party. And others may control an organization even if a party gives lots of money. If others own 75%, they control whether a brief is filed or not. Such disclosure is more intrusive and less informative. It is harder to justify a particular number for (c)(5).

Another judge found himself extraordinarily ambivalent. In his experience, it's not common to have lots of amici in the courts of appeals. In some cases, both sides recruit as many as they can, including groups of law professors formed just for the particular appeal. He is skeptical of the value; the focus is on the Supreme Court. The focus of the proposed legislation is informing the public, not just the court. Whose voices are speaking? There is something to be said for that. An industry association can be expected to take sides. Level of ownership may not be enough. A 25% contribution is pretty significant; the executive director of the amicus may not want to tick off that contributor. It's legitimate to know that. The devil is in the details. A percentage is better than a reasonable person standard.

The question is whether it is worth it. He sees it strongly on the party side, going back to the original idea of evading page limits. There might be constitutional problems with 10%. Maybe 25%?

Judge Bybee asked if the discussion had provided enough guidance for the subcommittee. Ms. Spinelli stated that her understanding was that (c)(3) should be dropped, and the rest of (c) refined. She added that the question remains whether the game is worth the candle.

A judge member noted that the project is not for naught, and it can inform the Supreme Court.

A liaison judge raised questions about "control" in (c)(4). That's too hard to define; take it out and leave the simple "ownership." She is totally ambivalent; there isn't a problem. She assumes that amici are not independent and that there is coordination.

In response to a question, Ms. Spinelli stated that the 10% figure was drawn from the corporate disclosure rule but just as a place to begin discussion; there is no real substantive relationship between the two.

Judge Bates observed that if “control” were eliminated then the provision would not apply to organizations such as trade associations that don’t have owners.

A judge member suggested focusing on voting rights. An academic member suggested focusing on legal control. At the 50% level of control, a party can create a house amicus, not a real amicus.

After a short break, the Committee turned to 29(d) of the discussion draft.

Ms. Spinelli began by noting that 29(d) deals with disclosure of the relationship between an amicus and a nonparty. The discussion draft of 29(d)(1), like the discussion draft 29(c)(1), would extend the existing disclosure of earmarked contributions to those that are intended as compensation for an amicus brief. The existing rule reaches earmarked contributions by nonparties but excludes members of the amicus from this disclosure requirement. One question is whether this member exclusion should be retained, as the discussion draft does.

The Reporter added that one advantage of placing disclosures regarding parties in 29(c) and disclosures regarding nonparties in 29(d) is that it makes clear that the membership exclusion does not apply to parties. A party who makes earmarked contributions must disclose those contributions, even if the party is also a member of the amicus.

Ms. Spinelli posed the question: focusing solely on nonparties, should the rule require that members of the amicus who make earmarked contributions be disclosed?

A lawyer member noted the Supreme Court case where a crowd-funded amicus brief was rejected because of small dollar earmarked anonymous contributions. An exception for members of an amicus opens the opportunity of evasion by turning contributors into members.

An academic member said that the worry is about an external mouthpiece. An organization speaks for its members; they are the people that Cato represents. An organization can go to its members, or vice versa. If done in house, it really is the organization speaking to the court. The exception for members should stay in.

Ms. Spinelli posed another question: what is the interest in requiring an amicus to disclose who paid for the brief if the person was not a party? The existing rule does require such disclosure. Is there a sufficient interest in having that information that it outweighs the concerns, including constitutional concerns, with requiring disclosure? The interests and concerns are not the same for parties and nonparties.

Everything revolves around this issue of whether to meaningfully expand nonparty disclosure. Yes: the court should know who is advocating before it. No: amici

are advocating on behalf of themselves, and we don't typically require disclosure of members in light of First Amendment concerns.

A judge stated that he is not a fan of (d)(2) or (d)(3) in the discussion draft. But he would remove the exception for members from (d)(1). If there is a specific funder, he'd want to know who it is. He doesn't see a First Amendment problem where funds earmarked for a particular brief are at issue. Judges are entitled to know.

An academic member asked what do you do with an organization that hits up members for individual projects? Disclose that Joe Schmo responded to the call for contributions for this brief? If it's an outside funder, there is a need to disclose. But if there is a membership appeal to file the brief and the rule requires disclosure of all members who responded, even if it doesn't violate the First Amendment, people will be reluctant to file briefs because they won't want to have to say who they asked in this membership appeal.

Mr. Byron noted that if the concern is that non-members could evade the rule by becoming members, he is less worried about that than about the chilling effect.

A judge stated that he is not too worried about a Red Cross amicus brief. Perhaps some measurement of the amount is needed. A disclosure that 100 people each gave \$1000 is meaningless.

A different judge responded that there is a lot of power in crowdfunding, and it will be more common. Yet another judge asked what others thought about a 50% threshold for nonparty disclosure.

One judge responded that he wants to know whose voice is carrying the day; who is the specific person I'm listening to? The issue of crowdfunding is not necessarily implicated by the member issue. Ms. Spinelli agreed that crowdfunding presents a different issue.

An academic member asked how much difference in interest there is likely to be between the amicus and the funder? How much will anyone learn from a disclosure that Bob Barker funded a brief for PETA? In some instances, disclosure might be useful. But not in the mine run of cases. And disclosure may be very significant to donors. Consider a hot button issue in which FAIR is involved. The court knows what the organization is and what it is saying. The risk of being bamboozled is quite low. If disclosure isn't crucial, don't require it.

A judge responded that the concern is with someone paying for *this* brief, not supporting the organization broadly.

The academic member replied that this depends on the details of how an organization does its fundraising, project by project or more generally. Compare this to a stranger showing up with a bag of cash.

Ms. Spinelli invited other judges to speak; perhaps some threshold would be appropriate?

One judge stated that while he understood the competing view, he was more inclined to the view expressed by the academic member. Disclosures would not do a lot of work for him, and he would worry about the collateral consequences.

Another judge member noted that there are two different motivating rationales involved. The first is that a membership exception allows for easy evasion: become a member. There may not be a practical solution for that. The second is that an amicus might be a mouthpiece for an undisclosed person. Based on the amicus briefs I get, I have a similar perspective as the judge who just spoke. Yet another issue, one that may be too difficult to deal with, is the concern that an individual might find multiple amicus briefs.

A judge suggested requiring disclosure if a person or entity funded more than one amicus brief (or more than x number of amicus briefs). An academic member stated that one difficulty with such an approach is that the disclosure comes from the amicus, and no one amicus may know this information.

Ms. Spinelli stated that more thought needs to be given to (d)(1) and suggested moving the discussion to (d)(2) and (d)(3). These are essentially similar to (c)(4) and (c)(5). Discussion draft (d)(2), like (c)(4), uses a 50% threshold. But (d)(2) uses a 40% threshold compared to the 10% threshold in (c)(5).

Two committee members have already said no to (d)(2) and (d)(3). These provisions go toward an issue that another committee member raised: getting a better understanding of who is behind the briefs and whether someone is single handedly creating what looks like a broad array of amicus briefs, but without earmarking contributions.

A lawyer member said that the interest goes beyond knowing. Cases where these entanglements have come to light gives the appearance of judges tolerating it and being hoodwinked. It erodes faith and trust in the judiciary.

Mr. Byron asked whether the disqualification rules require recusal based on anything that could be captured by these disclosures. Are there unidentified conflicts of interest? Ms. Spinelli stated that the subcommittee had not thought about that take on the issue.

An academic member stated that it's not clear what the disqualification rules require. If a judge owns stock in a company and that company submits an amicus brief does that require disqualification? If the company took out an ad in the New York Times it wouldn't require disqualification. There is some interest in informing the court, but submitting a brief is not a proper occasion for the public to get information it would like to know. Disclosure would not be required before an Op-Ed. How can one get at coordination without a much broader disclosure rule? Something perfectly legitimate—funding 18 animal rights cases—may look nefarious in hindsight. How can this be done without unnecessary disclosures?

Judge Bybee asked where this left us on (d)(2) and (d)(3). Ms. Spinelli stated that no one was really advocating for them. She suggested adding judges to the subcommittee.

Judge Bybee said that the discussion draft was useful so the Committee had something to shoot at. He thought the suggestion of adding judges was a good one and added three judges to the subcommittee. [This suggestion was reconsidered later to avoid the risk of a subcommittee that constituted a quorum of the full Committee.]

The Reporter stated that one point raised in the subcommittee report had not been discussed. One less intrusive way to deal with some of the concerns might be *caveat lector*: perhaps courts should be skeptical of amicus briefs that do not provide enough information to warrant trust.

B. Amicus Briefs and Recusal—FRAP 29 (20-AP-G)

Danielle Spinelli presented the report of the amicus subcommittee regarding a suggestion made by Dean Morrison. (Agenda book page 205). She explained that Rule 29(a)(2) permits a court to prohibit an amicus brief or strike it if the brief would result in a judge's disqualification. It is not clear what the standards for recusal based on an amicus brief are. Dean Morrison suggests that guidelines be developed. The subcommittee does not think that this is within the purview of this Committee.

Judge Bybee asked the Clerk of Court representative if she ever sees this. She replied that it happens occasionally, mostly at the en banc stage.

A liaison member stated that the test of recusal regarding an amicus is multifactored. The Code of Conduct Committee struggles with it. There are no bright lines. It is wise for this Committee to avoid.

A judge member noted that there was also a separate proposal submitted about this issue. The Reporter described that proposal, which was submitted after the agenda book had been prepared. The Reporters Committee for Freedom of the Press suggests that when a court prohibits or strikes an amicus brief under Rule 29(a)(2) that the court identify the amicus or counsel that would cause disqualification.

Judge Bybee noted that such identification might make it possible to reverse engineer to determine the judge who would be disqualified. A liaison member stated that this was for the Code of Conduct Committee; there is no requirement that judges give reasons when recusing. A judge member stated that the proposal doesn't call on anyone to state the reason for the recusal. It doesn't call for the identification of the judge, just the reason for the rejection. Someone invests time and resources into an amicus brief, and the court strikes the brief because of 1 of 500 lawyers at a firm. This proposal doesn't step on the Code of Conduct Committee. The liaison member replied that it is a backdoor way to get reasons for recusal articulated.

Mr. Byron asked if a judge's recusal list is public. Ms. Dwyer said no. The Code of Conduct Committee is considering more transparent ways, but that may take years. The annual financial statement will be more available. Mr. Byron said that will go a long way to deal with this issue. Presumably counsel know about family relationships.

Judge Bybee referred this new proposal to the amicus subcommittee, noting that a suggestion had been made to add judges to that subcommittee.

Judge Bates cautioned that before the subcommittee meets, its size should be considered. [As noted earlier, for this reason, Judge Bybee reconsidered the expansion of the subcommittee.]

C. Costs on Appeal—Rule 39 (21-AP-D)

Judge Nichols presented the report of the subcommittee on costs on appeal. (Agenda book page 213). He began by noting the basic operation of Rule 39(a), which provides the default rule for allocating costs on appeal. Rule 39(d) deals with costs that are taxed in the court of appeals; Rule 39(e) deals with costs taxed in the district court. Rule 39(e)(3) provides that the premium paid for a bond to preserve rights pending appeal is taxable in the district court because it arises out of activity in the district court. The bond is approved in the district court in order to get a stay of the district court judgment pending appeal.

In *Hotels.com*, discussed at page 215 of the agenda book, the Supreme Court held that a district court cannot reallocate the costs under Rule 39. The Court relied on both the text of the Rule and the idea that the court of appeals should decide who really prevailed on appeal. The Court also noted that the current rules could be clearer.

The subcommittee investigated how big a deal this is. After polling the circuit clerks, it seems that disputes about costs on appeal do not arise often. But the costs for a bond can be quite high. If a plaintiff obtains a \$100 million judgment, and a defendant pays \$1 million for a bond to stay enforcement of that judgment and prevails on appeal, the plaintiff doesn't want to pay that million dollars.

Three points of background. First, the mandate of the court of appeals is not delayed for the taxation of costs. Second, the bill of costs for costs taxable in the district court is filed in the district court. Third, by the time a bill of costs is filed in the district court, the time to seek rehearing in the court of appeals is long gone.

A judge noted that a plaintiff can see this coming and do something about it.

Judge Nichols agreed but noted that the Supreme Court said that the mechanism to do so can be clearer. And the worry is that a prevailing plaintiff in the district court may not know how much the premium was; nothing requires disclosure. For that reason, the subcommittee recommends a joint amendment.

First the Appellate Rules would make clearer that a party can file a motion seeking reallocation of the costs. But what if the party doesn't really know what the costs were? It's anomalous to ask the court of appeals to reallocate the costs without knowing what the costs are.

For that reason, the second step would be an amendment to Civil Rule 62. That Rule currently requires the district court to approve the bond and could be amended to also require disclosure of the costs of the bond. That way, when the district court approves the bond, everyone knows the premium that the prevailing party in the district court might eat if the judgment is reversed—so the loser in the court of appeals can seek reallocation of costs.

The subcommittee considered providing for a motion in the court of appeals to reallocate costs after the bill of costs is filed in the district court. But at that point the mandate has already issued.

The subcommittee's approach makes clear what is already true, but in a context where parties know. This requires only a modest edit to Appellate Rule 39(a) to make express what is currently true. Its proposal is contingent on an amendment to Civil Rule 62 that increases transparency.

The Reporter added that the plan would be to hold the Appellate Rule amendment until we see what the Civil Rules Committee thinks.

A judge member asked if the court of appeals could allocate the cost of the premium in some way other than 50/50. Judge Nichols responded that a court of appeals could allocate the cost between the parties anywhere from 0 to 100 percent. Or it could direct the district court to deal with the allocation issue.

A judge member asked why there was a need to coordinate with Civil. Judge Nichols responded that while we could amend Appellate Rule 39(a) without any change to the Civil Rules, there is no immediate problem, no need to rush, so no harm with dealing with both together. Mr. Byron added that sophisticated litigants

negotiate when the district court is considering approval of the bond, but some plaintiffs may not recognize the risk. A coordinated effort is a good goal that can avoid surprising outcomes.

A judge member stated that Judge Nichols had done a great job and seconded his views. It should be usual for counsel to talk to each other. The issue doesn't arise often, but there is some case law that sends the issue back to the district court. This is a simple practical fix that depends on a fix to the Civil Rules. Two or three motions a year isn't much, but it can be a lot of dough. There is no urgency.

An academic member stated that the subcommittee had done a terrific job. It's a good idea even if Civil doesn't act. Judge Nichols said that he didn't disagree.

Judge Nichols then turned to the last part of the subcommittee memo. (Agenda book page 219). The proposal we have been discussing assumes that it is lawful to tax the premium for a bond as a cost at all. The Solicitor General sent an email last night suggesting that this is a difficult question; the Solicitor General appears to take a different view than that of the Seventh Circuit and Wright & Miller. A footnote in *Hotels.com* notes but does not consider the argument that a Rule cannot shift costs other than those authorized by 28 U.S.C. § 1920. This is a very difficult substantive question; we can do these amendments without taking a position on the underlying question. The Solicitor General is not suggesting that we take up this issue right now. It is not crystal clear that the Seventh Circuit is right. If the Committee decided to eliminate (e)(3), the issue is irrelevant. Or we can stay with the current plan and do nothing more regarding the question of authorization.

Professor Struve raised a question about timing. Perhaps a party should be able to seek this relief until the mandate has issued. Judge Nichols responded that the subcommittee set the same 14-day deadline for a motion to reallocate costs as the existing rule uses for a party to file a bill of costs in the court of appeals.

An academic member asked about the relationship between these two 14-day rules. Judge Nichols stated that (d)(1) addresses costs that are taxed in the court of appeals; that bill of costs has to be filed within 14 days after entry of judgment in the court of appeals. Here, we are talking about costs that are taxable in the district court under (e). The academic member suggested that perhaps the new provision belonged in (e). Judge Nichols stated that not a lot of thought had been given to the placement question.

The Reporter stated that Rule 39(a) governs the allocation of all costs, both those taxed in the district court and in the court of appeals. Judge Nichols observed that the court of appeals could set a different allocation for different costs, particularly a different allocation for the premium for a bond than for other costs.

A judge member suggested a separate provision.

The Reporter stated that Rule 39(a) deals with allocation, while (d) and (e) deal with calculation. Mr. Byron suggested framing the provision more broadly because, as the issue is more in the public eye, more might come to light, so we shouldn't say that they are off the table.

The academic member thought that the explanation of the distinction between allocation and calculation made sense. He suggested that the deadline for a motion for reallocation be filed either 28 days after judgment or 14 days after the bill of costs is filed under (d)(1), whichever is later. That way, a party knows whatever is on the table.

Judge Nichols asked whether the Committee agreed that we should not take up the underlying question of the authority to tax the costs of a bond at all. A judge member agreed, and no one disagreed.

Judge Nichols said that the subcommittee would resume its work, including dealing with the issue of placement of the new provision.

The Committee then took a break for lunch.

D. IFP Standards—Form 4 (19-AP-C; 20-AP-D)

After Judge Bybee thanked the Rules staff for putting together a lovely lunch, Lisa Wright provided the report of the IFP subcommittee. (Agenda book page 223). She explained that the subcommittee has been looking into IFP status and Form 4, particularly ways to make Form 4 less intrusive.

The underlying statute, 28 U.S.C. § 1915, had been interpreted to permit a barebones affidavit, but subsequent forms called for more detail. As amended by the Prison Litigation Reform Act, the statute now authorizes IFP status for a “person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor,” switching midsentence from “person,” to “such prisoner,” and back to “person.”

This is not just an issue for the Appellate Rules; the Supreme Court Rules incorporate Form 4 of the Appellate Rules. The district courts, on the other hand, use AO Forms. The CJA-23 used in criminal cases is simpler than Form 4.

Sai made suggestions to multiple committees regarding the standards for IFP status and the forms used. Civil decided not to pursue uniform standards. Criminal expressed some interest, particularly regarding habeas cases. This Committee has been most active because Form 4 is promulgated under the Rules Enabling Act. It is not clear that the Rules Enabling Act can be used to establish standards for IFP status. The subcommittee has focused on Form 4.

The existing Form 4 is extremely detailed, asking for items such as laundry and dry-cleaning expenses. Lisa Fitzgerald from the Ninth Circuit Clerk's Office sent around a request for information to counterparts in other circuits and got a great response. It appears that IFP status is rarely denied by courts of appeals because of insufficient indigency. It is denied far more often for frivolity. That's a reason to make the required statement of reasons more prominent on the form. Most cases aren't close; the forms have lots of zeros. There is no uniform standard. The forms are more detailed than needed. Perhaps something like CJA-23, or something in between the existing Form 4 and CJA-23. One circuit noted that it sometimes looks at whether particular expenses, such as entertainment, are excessive.

The subcommittee considered some threshold questions that if the applicant answered yes, the rest of the form would not need to be completed. But by making the rest of the form simple enough, there was no need for this. The draft form (Agenda book page 226) asks questions about means-tested programs (keyed to federal poverty guidelines) and does not seek spousal information. Sai's points are generally well taken.

There is a question whether asking, as the draft form does, "What are your total assets?" is sufficient to comply with the statute. Perhaps some big-ticket items should be broken out.

In response to a question from Judge Bybee, Ms. Wright stated that the subcommittee tried to come up with a form that provided the information that courts actually use without being so intrusive.

An academic member stated that this was great, and he was glad to see less detail. He wondered why information about the household was not sought. He also suggested a more aggressive view of rulemaking authority under 2072 to formalize standards that are informally applied so people know what they are.

Ms. Wright responded that the idea was to focus on the individual applicant and not assume that other money in the household is available. Sai is particularly concerned about questions about a spouse and the idea that one spouse has to fund litigation by the other. The public assistance questions get at the notice issue.

In response to a question by Judge Bybee, Ms. Dwyer stated that she has never seen a close case; it's rare for the form to show anything. Staff attorneys provide recommendations to panels; judges get the underlying forms only if they ask.

Mr. Byron asked if there are forms better than Form 4 that are currently used. Ms. Wright stated that lots of courts do use Form 4. Ms. Dwyer added that the draft is like the Ninth Circuit form and would help. Form 4 is available to the public and is unnecessarily revealing.

Professor Struve said that she really liked the idea of the first three questions but noted that Medicaid is called by different names in different states.

Judge Bybee said that the plan from here was to ask the clerks again and consult with the Supreme Court. Ms. Wright stated that an old agenda book indicated that a prior Clerk of the Supreme Court, General Suter, wanted more details in the form. Perhaps the pendulum has swung.

Judge Bybee asked if there was any effect on the Civil Rules. Professor Struve responded that no coordination with the Civil Rules Committee was required, but Supreme Court Rule 39 incorporates Appellate Form 4.

The Reporter asked whether the Committee thought it was generally a good idea. He clarified that after circling back to the Circuit Clerks, it would be necessary to check with the Supreme Court Clerk before moving forward. Ms. Dwyer added that the senior staff attorneys would be the appropriate people to consult.

Judge Bybee confirmed that all of the subcommittee chairs have enough information from the Committee.

VII. Discussion of Matters Before Joint Subcommittees

The Reporter stated that he had nothing new to report regarding (1) the joint subcommittee considering the midnight deadline for electronic filing, and (2) the joint subcommittee considering the final judgment rule in consolidated actions. (Agenda book page 230).

The Reporter did have an update on the project regarding electronic filing by pro se litigants that is currently being addressed by the reporters acting jointly. The Federal Judicial Center provided the reporters with a draft report that is not yet ready for publication but will eventually be published. The draft report makes several important distinctions:

- 1) case initiation compared to subsequent filings;
- 2) filing via ECF compared to other kinds of electronic submission;
- 3) submissions by prisoners compared to others;
- 4) distinctions among appeals, civil cases, criminal cases, and bankruptcy cases.

The FJC survey reveals that some courts of appeals generally permit pro se litigants to use ECF, and all do at least sometimes. In general, courts that have allowed ECF filing find that the reality is better than their fears.

There is a question whether the matter of electronic submission is best handled by rules or something else, such as CACM, shared templates, and shared software.

Another issue is the requirement of service on those who are using ECF. Since the submissions by a non-ECF filer are placed on ECF by the clerk's office, an ECF user gets served via ECF. Is there a need for other service?

In response to a question about the distinction between case initiation and subsequent filings, the Reporter noted a concern with making it too easy to file new cases. Professor Struve noted that even with lawyers there are problems with electronic case initiation and if the process is begun but not completed, there can be a docket number with no case, making it look like a sealed case is in the system.

Professor Struve alerted the Committee to an issue that may require coordination with the Bankruptcy Rules Committee. In some cases, appeals can go directly from a bankruptcy court to a court of appeals. The Bankruptcy Rules Committee is looking to make clear that when such an appeal is certified as permitted under 28 U.S.C. § 158(d)(2) any party may ask the court of appeals to authorize the appeal. That approach does not fit neatly with Appellate Rule 5. A lawyer member said that she does lots of bankruptcy appeals and that while the idea sounds weird at first blush, it is not a terrible idea.

VIII. Discussion of Recent Suggestions

The Reporter noted that three comments have been received regarding amicus disclosures. (21-AP-G; 21-AP-H; 22-AP-A). Because there has not yet been a proposal published for public comment, these comments have been docketed as new suggestions. The amicus subcommittee treated these comments as intended, and they were referred to that subcommittee.

In addition, another new suggestion was received after the publication of the agenda book. (22-AP-B). This new suggestion came up earlier in the meeting in connection with the discussion of amicus briefs and disqualification; the suggestion is that when an amicus brief is not allowed to be filed or is struck under Rule 29, the court identify each amicus or counsel that would cause the disqualification.

IX. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter stated that Judge Chagares had added this as a regular item on the agenda. For this meeting, the agenda book contains a table of amendments to the Appellate Rules that have taken effect since 2018. (Agenda book page 236). The Committee did not raise any particular concerns.

X. New Business

The Reporter stated that Professor Sachs had suggested that the Committee be alerted to the recent Supreme Court decision, *Cameron v. EMW Women's Surgical Center*. In that opinion, the Supreme Court observed that there is no Appellate Rule dealing with intervention on appeal. Professor Struve noted that the Committee had looked into this issue in 2020 but did not move forward; it may be time to think about it again. Other members agreed. Judge Bybee asked Professor Struve to circulate the material from that prior consideration.

XI. Adjournment

Judge Bybee thanked the participants, both in person and on camera, and acknowledged how valuable everyone's time is. But gaps and ambiguities in the Rules can impose litigation costs on parties. If we can save these costs on the American people, we've done our job.

The next meeting will be held on October 13, 2022, in Washington D.C. Judge Bybee hopes to see everyone there.

The Committee adjourned at approximately 2:10 p.m.

TAB 4

TAB 4A

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

ROBERT M. DOW, JR.
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Dennis R. Dow, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 10, 2022

I. Introduction

The Advisory Committee on Bankruptcy Rules met by videoconference on March 31, 2022. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee gave its final approval to rule and form amendments that were published for comment last August. They consist of (1) new Rule 9038 (Bankruptcy Rules Emergency); (2) amendments to Parts III, IV, V, and VI of the Bankruptcy Rules that are proposed as part of the rules restyling project; (3) amendments to Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases); (4) amendments to Rule 8003 (Appeal as of Right – How Taken; Docketing the Appeal); (5) amendments to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy); (6) amendments to Official Forms 309E1 and

309E2 (Notice of Chapter 11 Bankruptcy Case); and (7) amendments to Official Form 417A (Notice of Appeal and Statement of Election). The Advisory Committee also voted to seek publication for comment of (1) amendments to Parts VII, VIII, and IX of the Bankruptcy Rules—the final installment of the restyling project; (2) amendments to Rule 1007(b)(7) (Schedules, Statements, and Other Documents Required) and conforming amendments to six other rules; (3) a new Rule 8023.1 (Substitution of Parties); and (4) amendments to Official Form 410A (Mortgage Proof of Claim Attachment).

Part II of this report presents those action items, other than Rule 9038. A discussion of Rule 9038, which is proposed for final approval, is included elsewhere in the agenda book, along with the other emergency rules and a memorandum from Professors Capra and Struve. Part II also includes a request for final approval without publication of an amendment to Rule 9006(a)(6)(A) to add Juneteenth as a legal holiday. The Advisory Committee approved that amendment at its fall 2021 meeting.

Part II is organized as follows:

A. Items for Final Approval

(1) Rules and forms published for comment in August 2021—

- Restyled Parts III, IV, V, and VI;
- Rule 3011;
- Rule 8003;
- Official Form 101;
- Official Forms 309E1 and 309E2; and
- Official Form 417A.

(2) An amendment to Rule 9006(a)(6)(A) approved by the Advisory Committee without publication.

B. Items for Publication

- Restyled Parts VII, VIII, and IX;
- Rule 1007(b)(7) and conforming amendments to Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2);
- Rule 8023.1; and
- Official Form 410A.

Part III of this report presents as a possible additional action item amendments that the Advisory Committee approved to Official Forms 101 and 201 after its spring meeting pursuant to its delegated authority to make conforming changes to official forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. These amendments would be necessitated by changes made to the Bankruptcy Code by the Bankruptcy Threshold Adjustment and Technical Correction Act (the “BTATC Act”), if enacted. The bill passed the Senate by

unanimous consent on April 7, 2022, and it is expected to soon pass the House. If Congress passes the BTATC Act before the Standing Committee's June 7 meeting, the Advisory Committee will seek the Standing Committee's final approval of these amendments.

Part IV of the report presents three information items. The first concerns the Advisory Committee's decision to take no action on suggestion 20-BK-E from the Committee on Court Administration and Case Management ("CACM") for a rule amendment to establish minimum procedures for electronic signatures of debtors and others who are not registered users of CM/ECF. The second information item discusses the Advisory Committee's consideration of possible amendments to address the timing of post-judgment motions in bankruptcy proceedings initially heard in the district court and a proposed referral to the Appellate Rules Committee. The final information item reports on the work of the Consumer Subcommittee regarding the proposed amendments to Rule 3002.1 and the related new official forms that were published for comment in August 2021.

II. Action Items from the Fall and Spring Meetings

A. Items for Final Approval

(1) The Advisory Committee recommends that the Standing Committee approve the proposed rule and form amendments that were published for public comment in August 2021 and are discussed below. Bankruptcy Appendix A includes the rules and form that are in this group.

Action Item 1. Restyled Parts III, IV, V, and VI. Extensive comments were submitted on the restyled rules from the National Bankruptcy Conference, and comments were also submitted by several others. After discussion with the style consultants and consideration by the Restyling Subcommittee, the Advisory Committee incorporated some of those suggested changes into the revised rules and rejected others. Comments and changes since publication are noted on the restyled rules in Appendix A.

The Advisory Committee seeks final approval of these restyled rules, but suggests that the Standing Committee not submit the rules to the Judicial Conference until all remaining parts of the Bankruptcy Rules have been restyled, published, and given final approval, so that all restyled rules can go into effect at the same time.

Action Item 2. Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases). The proposed amendment, which was suggested by the Committee on the Administration of the Bankruptcy System, redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) that requires the clerk of court to provide searchable access on the court's website to data about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). There was one comment on the proposed amendment, and the language of subdivision (b) was restyled and modified to reflect the comment.

Action Item 3. Rule 8003 (Appeal as of Right – How Taken; Docketing the Appeal). Amendments to Rule 8003 were proposed to conform to amendments recently made to FRAP 3, which clarified that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment or appealable order or decree.

Rule 8003(a)(3)(B) is amended to avoid the misconception that it is necessary or appropriate to identify each order of the bankruptcy court that the appellant may wish to challenge on appeal. It merely requires the attachment of “the judgment—or the appealable order or decree—from which the appeal is taken,” and the phrase “or part thereof” is deleted. Subdivision (a)(4) now calls attention to the merger principle without attempting to codify the principle. It states in part that the notice of appeal “encompasses all orders that, for purposes of appeal, merge into the identified judgment or appealable order or decree.” Subdivision (a)(5) is added to make clear that the notice of appeal encompasses the final judgment if the notice identifies either an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties or a post-judgment order described in Rule 8002(b)(1). Subdivision (a)(6) is added to enable deliberate limitations of the notice of appeal. Subdivision (a)(7) is added to provide that an appeal must not be dismissed for failure to properly identify the judgment or appealable order or decree if the notice of appeal was filed after entry of the judgment or appealable order or decree and identifies an order that merged into the judgment, order, or decree from which the appeal is taken.

No comments were submitted on the proposed amendments, and the Advisory Committee give its final approval to the rule as published.

Action Item 4. Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy). The proposed amendment to Official Form 101 eliminates the portion of line 4 that asks for any business names the debtor has used in the last 8 years. Instead the form asks for additional similar information in Question 2, which is consistent with the treatment of that information in Official Forms 105, 201, and 205. There is also new language in the margin of Official Form 101, Part 1, Question 2, directing the debtor not to insert the names of LLCs, corporations, or partnerships that are not filing for bankruptcy. There was one comment on the proposed amendment, but no changes were made after publication.¹

Action Item 5. Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)). The amendments modify the language in line 7 of Official Form 309E1 (line 8 in Official Form 309E2) to clarify the deadline for objecting to discharge, as opposed to the deadline for seeking to have a particular debt excepted from discharge. The amendments also change the line that says “the court will send you notice of that date later” to add the words “or its designee” after the words “the court” because often the court

¹ There are two versions of Official Form 101 included for this Action Item 4, labeled Version 1 and Version 2. Both versions include the change described in Action Item 4. Version 2 also includes the changes the Advisory Committee approved after its March meeting on account of the Bankruptcy Threshold Adjustment and Technical Correction Act, discussed at Action Item 12. Version 2 will be recommended only if Congress passes the BTATC Act prior to the Standing Committee’s June 7 meeting.

itself does not send this notice. There were no comments on the proposed amendments. After publication a comma was inserted in line 7 of Form 309E1 and line 8 of Form 309E2 in two places, one after the words “§ 1141(d)(3)” in the first bullet and one after “or (6)” in the second bullet.

Action Item 6. Official Form 417A (Notice of Appeal and Statement of Election). Amendments to Official Form 417A were proposed to conform to the amendments proposed for Rule 8003, which are discussed at Action Item 3. The new wording in parts 2 and 3 of the form is intended to remind appellants that appeals as of right from orders and decrees are limited to those that are “appealable”—that is, either deemed final or issued under § 1121(d). It also seeks to avoid the misconception that it is necessary or appropriate to identify each order of the bankruptcy court that the appellant may wish to challenge on appeal.

No comments were submitted on the proposed amendments to the form, and the Advisory Committee give its final approval to Official Form 417A as published, with a proposed effective date of December 1, 2023.

(2) Action Item 7. The Advisory Committee recommends that the Standing Committee approve without publication an amendment to Rule 9006(a)(6)(A), which is included in Bankruptcy Appendix A. In response to the enactment of the Juneteenth National Independence Day Act, P.L. 117-17 (2021), the Advisory Committee approved an amendment to Rule 9006(a)(6)(A) to insert the words “Juneteenth National Independence Day” immediately following the words “Memorial Day.”

B. Items for Publication

The Advisory Committee recommends that the following rule and form amendments be published for public comment in August 2022. The rules and forms in this group appear in Bankruptcy Appendix B.

Action Item 8. Restyled Parts VII, VIII, and IX. The Advisory Committee seeks publication of the restyled versions of the rules in Parts VII, VIII, and IX of the Federal Rules of Bankruptcy Procedure, which reflect many hours of work by the style consultants, the reporters, and the Restyling Subcommittee. This is the final group of restyled rules for publication.

Action Item 9. Rule 1007(b)(7) (Lists, Schedules, Statements, and Other Documents; Time Limits) and conforming amendments to Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3), and 9006(c)(2). The amendments to Rule 1007(b)(7) would eliminate the requirement that the debtor file a statement on Official Form 423 and make filing of the certificate of debtor education provided by the approved provider of the course the exclusive means of establishing satisfaction of the requirement for discharge that a debtor has taken a postpetition course in personal financial management. The amendments would also eliminate the requirement that a debtor who has been excused from taking such a course file a form so stating. The six other rules that referred to a “statement” required by Rule 1007(b)(7) would also be amended to refer to a “certificate.”

Action Item 10. Rule 8023.1 (Substitution of Parties). The Advisory Committee seeks publication of a new rule on Substitution of Parties, modeled on Fed. R. App. P. 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.

Action Item 11. Official Form 410A (Mortgage Proof of Claim Attachment). The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for “Principal & Interest”) with two lines, one for “Principal” and one for “Interest.” The amendments put the burden on the claim holder to identify the elements of its claim.

III. Post-meeting Action Item²

The Advisory Committee seeks the Standing Committee’s retroactive approval of the following form amendments, with notice of the amendments to be given to the Judicial Conference.

Action Item 12. Amendments to Official Forms 101 (Voluntary Petition for Individuals Filing for Bankruptcy) and 201 (Voluntary Petition for Non-Individuals Filing for Bankruptcy) in response to the Bankruptcy Threshold Adjustment and Technical Correction Act. The 2020 CARES Act modified the definition of “debtor” in § 1182(1) of the Bankruptcy Code for determining eligibility to proceed under subchapter V of chapter 11. The change increased the debt limit for eligibility from \$2,725,625 to \$7,500,000. This change necessitated amending the petition forms. Line 13 of Form 101 was modified to ask not only whether the individual debtor is a small business debtor, but also whether he or she is a debtor as defined in § 1182(1) and whether he or she wishes to proceed under subchapter V. Line 8 of Form 201 was modified to add a box for the debtor to check if its aggregate debts are less than \$7,500,000 and it elects subchapter V treatment. The language permitting such an election with respect to “small business debtors” was deleted. Additionally, because federal rules of procedure cannot be quickly approved under the Rules Enabling Act, an interim version of Rule 1020, with amendments conforming to the CARES Act, was posted on uscourts.gov to be adopted by courts as a local rule.

Under the CARES Act, the definition of “debtor” in § 1182(1) was to revert to its prior version one year after the effective date of the CARES Act, that is, on March 27, 2021. Congress then acted in March 2021 to extend the sunset date in the CARES Act to March 27, 2022. This year Congress took no action prior to March 27 to further extend the sunset date for the definition in § 1182(1), so the prior version of the Code provision went back into effect. Accordingly, the pre-CARES Act version of Forms 101 and 201 were reinstated and Interim Rule 1020 reverted to its former construction.

The Bankruptcy Threshold Adjustment and Technical Correction Act, if enacted, would reinstate the CARES Act definition of debtor in § 1182(1)—with its \$7,500,000 subchapter V debt limit—for two years from the date of enactment. It is retroactive to March 27, 2020. By email vote,

² Action Item 12 will go forward only if Congress has passed the BTATC Act on or before the Standing Committee’s June 7 meeting.

the Advisory Committee approved conforming amendments to Official Forms 101 and 201 pursuant to its delegated authority to make technical and conforming official forms changes subject to final approval by the Standing Committee. If the BTATC Act goes into effect, the Advisory Committee recommends final approval of both forms, and it also recommends that the Administrative Office repost the necessary conforming changes to the interim version of Rule 1020 on uscourts.gov, so it can be readopted by courts as a local rule.

IV. Information Items

Information Item 1. Electronic signatures. The Advisory Committee has been considering a suggestion by CACM (20-BK-E) regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account. At the fall 2021 meeting, the Technology Subcommittee presented a draft of amendments to Rule 5005(a)(2)(C) for discussion. That discussion raised several questions and concerns. Among the issues raised were how the proposed rule would apply to documents, such as stipulations, that are filed by one attorney but bear the signature of other attorneys; how it would apply if a CM/ECF account includes several subaccounts; and whether there is really a perception among attorneys that the retention of wet signatures presents a problem that needs solving.

Following up on questions raised at the fall meeting about what problem the Committee was being asked to solve, the reporter spoke with the bankruptcy judge whose inquiry to CACM led to CACM's suggestion to the Advisory Committee. The judge said that he is on a local court committee with members of the bar, and he raised with that group the issue about electronic signatures because he thought the courts were out of step with modern commerce by still requiring the retention of wet signatures, rather than using some kind of electronic signature product, like DocuSign. He said that there was mild concern among the lawyers about having to retain wet signatures, but a stronger interest in facilitating the electronic filing of documents such as stipulations, where the filing attorney files a document with other attorneys' signatures.

The judge indicated that the California state courts have a rule about electronic signatures that allows them in place of the retention of wet signatures under certain circumstances. The judge said that he is in the process of drafting a possible local rule for his court along the same lines.

At the spring Advisory Committee meeting, the Technology Subcommittee asked whether a problem exists under current practices that needs a national rule solution. It suggested that the answer is no. Attorneys can file documents in the bankruptcy courts electronically, and the use of their CM/ECF account provides the basis for accepting their electronic signatures as valid. If they electronically file documents that their client or another individual has signed, they generally must retain the original document with the wet signature. To date, the Advisory Committee has not received a suggestion from any bankruptcy attorney that the current procedures are causing problems.

The judge's inquiry to CACM about the use of electronic signatures seems to have been based more on the desire to bring bankruptcy courts into the modern age of e-signing rather than on concerns he heard from attorneys about having to retain wet signatures. The suggestion from

CACM does note that in 2013 it had suggested that “courts’ local rules varied in their requirements to retain original paper documents bearing ‘wet’ signatures, and that these varying practices posed problems for attorneys that file in multiple districts.” Comments in response to the Advisory Committee’s earlier electronic-signature proposal, however, did not produce comments bearing out that concern. CACM’s current suggestion is based on concern that the absence of a provision in Rule 5005 regarding the electronic signatures of individuals without CM/ECF accounts may make courts “hesitant to make such a change without clarification in the rules that use of electronic signature products is sufficient for evidentiary purposes.”

The Subcommittee concluded that current Rule 5005 does not address the issue of the use of electronic signatures by individuals who are not registered users of CM/ECF and that it therefore does not preclude local rulemaking on the subject. The Bankruptcy Court for the District of Nebraska already has such a rule (L.B.R. 9011-1), and other courts, such as Bankruptcy Court for the Central District of California, may adopt such rules in the future. The Subcommittee concluded that a period of experience under local rules allowing the use of e-signature products would help inform any later decision to promulgate a national rule. Electronic signature technology will also likely develop and improve in the interim.

The Advisory Committee agreed with the Subcommittee’s recommendation and voted not to take further action on the suggestion.

Information Item 2. Timing of Post-Judgment Motions in Bankruptcy Proceedings Initially Heard in District Court. In response to a recent First Circuit decision, Professor Cathie Struve raised with the reporters an issue that involves the overlap of the bankruptcy, civil, and appellate rules. The issue is whether, in a bankruptcy proceeding heard and decided initially by a district court, the time for filing post-judgment motions of the type that toll the period for filing a notice of appeal should be 14 days, as in the bankruptcy court, or should be 28 days because of the longer time allowed for taking an appeal from the district court.

The situation in question is the following: A district court hears a bankruptcy adversary proceeding and enters a judgment. Twenty-eight days later, the losing party files a motion for reconsideration (or new trial or judgment as a matter of law). The court denies the motion. Thirty days after denial, the losing party files a notice of appeal. The question is whether the appeal is timely.

The First Circuit held no in *In re Lac-Mégantic Train Derailment Litigation*, 999 F.3d 72, 84 (2021). The court concluded that the Bankruptcy Rules applied in the district court and that under Rule 9023, the motion for reconsideration had to be filed within 14 days of the entry of judgment. Since the motion was untimely, it did not toll the time for filing the notice of appeal. Thus the appeal taken more than 30 days after entry of judgment was untimely, and the court of appeals lacked jurisdiction to hear it.

As Prof. Struve pointed out, this result raises questions about the wording of FRAP 4(a)(4)(A). It says that the listed post-judgment motions toll the time for filing a notice of appeal if “a party files in the district court any of [those] motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules.” The Civil Rules allow 28 days

for those motions. But if the rule is applied literally, it would allow motions that are untimely according to the applicable Bankruptcy Rules to toll the time for taking an appeal.

Until 2009 the time for filing post-judgment motions under the Civil and Bankruptcy Rules was the same—within 10 days after entry of judgment. Then in 2009, the time limit for such motions was changed to 14 days in Bankruptcy Rules 7052, 9015(c), and 9023 as a result of the time computation project that changed rules deadlines of less than 30 days to multiples of 7. The deadlines in Civil Rules 50, 52, and 59, however, were changed to 28 days at that time because, as explained by the committee notes, “Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays.” The reason for not similarly extending the parallel Bankruptcy Rules was explained as follows: The new Civil Rule “deadline corresponds to the 30-day deadline for filing a notice of appeal in a civil case under Rule 4(a)(1)(A) F. R. App. P. In a bankruptcy case, the deadline for filing a notice of appeal is 14 days. Therefore, the 28-day deadline for filing a motion for amended or additional findings would effectively override the notice of appeal deadline under Rule 8002(a) but for this amendment.” 2009 Committee Note to Rules 7052, 9015, and 9023.

In choosing not to propose the 28-day deadline for post-judgment motions under the Bankruptcy Rules, the Advisory Committee focused on the deadline for filing notices of appeal under Rule 8002(a). That deadline applies to appeals from the bankruptcy court to the district court or bankruptcy appellate panel, but not to appeals from a district court’s exercise of jurisdiction under 28 U.S.C. § 1334. Appellate Rule 6(a) provides that the 30-day deadline of FRAP 4(a) applies in that situation, just as it does in appeals of civil cases from the district court to the court of appeals.

The Appeals Subcommittee considered several possible responses to the issue, including amending Bankruptcy Rules 7052, 9015(c), and 9023 to provide 28 days for the motions if the proceeding is heard by the district court; asking the Appellate Rules Committee to consider amending Rule 4(a)(4)(A) to acknowledge the different timing rules; and asking the Appellate Rules Committee to consider amending Rule 6(a) to do the same. The Subcommittee recommended doing the latter, and the Advisory Committee agreed.

An amendment to Rule 6(a) might read as follows:

Rule 6. Appeal in a Bankruptcy Case

(a) APPEAL FROM A JUDGMENT, ORDER, OR DECREE OF A DISTRICT COURT EXERCISING ORIGINAL JURISDICTION IN A BANKRUPTCY CASE. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules. The reference in Rule 4(a)(4)(A) to the time allowed by the Federal Rules of Civil Procedure must be read as a reference to the time allowed by the Federal Rules of Civil Procedure as shortened, for some types of motions, by the Federal Rules of Bankruptcy Procedure.

* * * * *

This solution has the advantage of requiring the amendment of only one rule—an appellate rule that is bankruptcy specific—and it does not introduce a new distinction in the Bankruptcy Rules between district court and bankruptcy court exercises of jurisdiction. This approach would also be consistent with the general desire for expedition in bankruptcy cases. Whether to propose an amendment to FRAP 6(a) and the wording of any such amendment would, of course, be left in the first instance to the Appellate Rules Advisory Committee.

Information Item 3. Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor’s Principal Residence) and Related Forms. Last August the Standing Committee published for comment proposed amendments to Rule 3002.1 and proposed forms to implement those amendments. Among other purposes, the amendments were designed to encourage a greater degree of compliance with the rule and to provide a new midcase assessment of the mortgage claim’s status in order to give a chapter 13 debtor an opportunity to cure any postpetition defaults that may have occurred.

Twenty-seven comments were submitted on the proposed amendments. Some of the comments were lengthy and detailed; others briefly stated an opinion in support of or opposition to the amendments. All were well thought-out and worthy of careful consideration.

The Consumer Subcommittee held several meetings to discuss the comments and to consider what recommendation to make to the Advisory Committee in response to them. Because of the short time period between the final date for submitting comments and the spring meeting, however, the Subcommittee was not able to complete its consideration of the comments. It therefore did not recommend any action on Rule 3002.1 at the spring meeting. Instead, it provided the Advisory Committee with an overview of the comments and the major points they raised, reported on the Subcommittee’s discussions and tentative decisions about changes to the published amendments that should be made, and sought the Advisory Committee’s feedback to guide the Subcommittee’s further deliberations.

The reactions to the published amendments were mixed. Broadly described, the comments fell into 3 categories: (1) comments opposing the amendments, or at least the midcase review, submitted by some chapter 13 trustees; (2) comments favoring the amendments, submitted by some consumer debtor attorneys; and (3) comments favoring the amendments but giving suggestions for improvement, submitted by trustees, debtors, judges, and an association of mortgage lenders. There were differences of opinion, however, within each category of commenters.

The comments included a letter from a group of 68 chapter 13 trustees who questioned whether there is a need for the amendments. They were particularly concerned about the midcase review because they said that it would impose an unnecessary burden on them and that the needed information about the home mortgages is already available. They and other trustees also contended that the new requirements for the end-of-case motion would not work well in a case in which the

debtor pays the mortgage directly, because the trustee lacks records about postpetition mortgage payments.

The comments from some debtors' attorneys, on the other hand, welcomed the requirement of a midcase review. They pointed out that mortgage servicers' records are often inconsistent with trustees' and debtors' records and that an earlier opportunity to reconcile them would be beneficial. Some also stated support for the adoption of a motion practice, rather than just a notice requirement, that would result in an enforceable order.

The National Conference of Bankruptcy Judges, while stating that it did not oppose the amendments, raised questions about the authority to promulgate several provisions. In particular, it questioned the requirement of annual notices of payment change for home equity lines of credit and the end-of-case procedures for obtaining an order determining the status of the mortgage. NCBJ also questioned whether the benefits of a midcase assessment and the revised end-of-case procedures were sufficient to outweigh the added burden on courts and parties imposed by the provisions.

The Subcommittee concluded that there is a need for some amendments to Rule 3002.1 and that there is authority to promulgate them. The Advisory Committee agreed. The Subcommittee is also sympathetic with the desire for simplification and the reduction of costs. It has begun to sketch out revisions to the published amendments in response to the comments, and it hopes to present a revised draft to the Advisory Committee at the fall meeting. The Forms Subcommittee will await decisions about Rule 3002.1 before considering any changes to the proposed implementing forms.

Bankruptcy Rules Restyling

3000 Series

Preface

This revision is a restyling of the Federal Rules of Bankruptcy Procedure to provide greater clarity, consistency, and conciseness without changing practice and procedure.

[The Committee Note to Rule 1001 is included here for reference for purposes of publication. It will not be included in the final rule.

Committee Note to Rule 1001

The Bankruptcy Rules are the fifth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence took effect in 2011. The restyled Bankruptcy Rules apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal, Civil and Evidence Rules.

General Guidelines. Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). See also Joseph Kimble, *Guiding Principles for Restyling the Civil Rules*, in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure*, at page x (Feb. 2005) (available at <https://www.michbar.org/file/barjournal/article/documents/pdf4article909.pdf> and <https://www.michbar.org/file/barjournal/article/documents/pdf4article921.pdf>); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 *Scribes J. Legal Writing* 25 (2008-2009).

Formatting Changes. Many of the changes in the restyled Bankruptcy Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed.

Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words. The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. The restyled rules also minimize the use of inherently ambiguous words. The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their substantive meaning. The restyled rules also remove words and concepts that are outdated or redundant.

Rule Numbers. The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

No Substantive Change. The style changes to the rules are intended to make no changes in substantive meaning. The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee also declined to modify "sacred phrases"—those that have become so familiar in practice that to alter them would be unduly disruptive to practice and expectations. An example in the Bankruptcy Rules would be “meeting of creditors.”

Legislative Rules. In those cases in which Congress enacted a rule by statute, in particular Rule 2002(n) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 357), Rule 3001(g) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 361) and Rule 7004(h) (Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106), the Committee has not restyled the rule.]

Summary of Public Comments on Restyled Rules Generally

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**
- **National Conference of Bankruptcy Judges (BK-2021-0002-0020) (NCBJ)**
- **Gold and Hammes, Attorneys (BK-2021-0002-0023) (G&H)**

Comments on the restyled rules generally and the responses to those comments follow:

1. ***No Substantive Change.*** The NBC suggested that the Restyled Rules include a “specific rule of interpretation” or be accompanied by “a declarative statement in the Supreme Court order adopting the new rules” to make clear that no substantive change was intended in the restyling process and the restyled rules must be interpreted consistently with the current rules. G&H agreed with NBC’s suggestion to “make clear that no substantive changes in the rules are intended.”

Response: The Bankruptcy Rules are the last of the five sets of federal rules to be restyled. In the prior restyling projects, the applicable Advisory Committee has emphasized that the restyling is not intended to make any substantive change in two ways. One was the Advisory Committee Note to the restyled rules. For example, in the Note to Rule 1 of the Federal Rules of Civil Procedure, the Advisory Committee stated “The style changes to the rules are intended to make no changes in substantive meaning.” In our Committee Note we expressly state the following:

“The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule.”

(This language was identical to that used in the committee note for the restyled Federal Rules of Evidence.) The Advisory Committee has expanded this note to insert a new sentence before the current one that reads exactly like that used for the civil procedure rules: “The style changes to the rules are intended to make no changes in substantive meaning.”

Second, every restyled rule has its own Committee Note stating that “the language of rule ___ has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.”

In connection with the restyling of the Federal Rules of Civil Procedure, Professor Ed Hartnett argued that these expressions of intent in the committee notes were not binding on courts, and discussed whether the restyled rules should have included “a rule of construction in the text of the rules themselves.” Edward A. Hartnett, “*Against (Mere) Restyling*,” 82 NOTRE DAME L. REV. 155 (2006). He said that the Advisory Committee on Civil Rules could have included a provision in Rule 1 that stated that “[t]hese rules must be construed to retain the same meaning after the amendments adopted on December 1, 2007 [the date of the restyling amendments], as they did before those amendments.” *Id.* at 168. However, he noted that the Advisory Committee rejected including such a rule of construction because it would “make it impossible for anyone to rely on the text of any of the restyled rules. In every instance in which someone relied on the text of the rule should be ignored in favor of its prior meaning.” *Id.* Of course, if courts rely on the committee notes, the same problem is created; the plain meaning of the restyled rules are always subject to challenge based on the meaning of the prior version of the rules. As Professor Hartnett said,

“The more the courts rely on the purpose of maintaining prior meaning, the less the restyled rules will achieve their goal of making the rules clear and easily understood. The flip side is that the more that courts rely on the plain language of the restyled rule, the more the restyled rules will achieve their goal of making the rules clear and easily understood. Ironically, then, the best hope for the successful implementation of clear, easily understood restyled rules is if lawyers and judges ignore the Advisory Committee Note repeated after each restyled rule.”

Id. at 169-70.

The Advisory Committee has chosen to follow the pattern that was developed in the prior restyled rules and include committee notes after each rule, but not include a rule of construction or any other method of providing that the rules do not change the substance of the prior version of the rules.

2. **Capitalization.** The NBC objected to the choice of the style consultants to capitalize the words “title,” “chapter,” and “subchapter.” This choice is inconsistent with how those terms are used in the Code (without capitalization).

Response: The position of the Advisory Committee has been that the choices of the style consultants should prevail on matters of pure style. This is a matter of pure style. Therefore, no change was made to the capitalization choices of the style consultants.

3. **Bullet Points.** The NBC objected to the use of bullet points in the rules rather than lettered designations. Use of bullet points makes it “difficult and cumbersome for courts and parties to try to correctly cite any given bullet point.” G&H endorsed this comment.

Response: Bullet points have been used in other restylings. See, e.g. Civil Rule 8(c)(1). The Advisory Committee is comfortable that bullet points are not used in a way that would be likely to require citation to individual bullet points (as opposed to the section in which they appear). They are usually used to list the recipients of notice or service. The style consultants feel strongly that their use is consistent with modern trends in making language comprehensible, and as a stylistic matter it rests with them. No change was made in response to this comment.

4. **Court’s Designee.** The NBC noted that rules that previously referred to “the clerk, or some other person as the court may direct” were changed to refer to “the clerk or the court’s designee”. They objected to the phrase “the court’s designee” as less clear than “some other person as the court may direct.” They also expressed the concern that the court (as a collection of judges) may not be able to specify the “designee” by local rule.

Response: The Advisory Committee does not believe the phrase is substantively different from “some other person as the court may direct.” The NBC fails to recognize that the term “court” is defined in Rule 9001(4) to mean the judicial officer before whom the case or proceeding is pending, not the collection of judges in a particular district. There was no change in response to this comment.

5. **Reference to Forms by Number.** The NBC notes that certain rules refer to a specific form by its number. They express concern that a forms change will make those references “invalid.” They highlight this issue as a “concern.” G&H endorsed this concern and also believe that specifying forms by number “may also create confusion” and “obscures the fact that the tables of permitted changes in FRBP 9009 – for some Official Forms – require only that the document used ‘substantially conforms’ with that Official Form.” They noted that this qualification is missing in Rule 3007(a)(2). The NCBJ also expressed concern about the use of Official Form numbers, and suggested “that the Rules Committee consider this concern as it proceeds further.” The NCBJ also notes that restyled Rule 4004(e) retains the reference to the “appropriate Official Form.”

Response: The Subcommittee made a very intentional decision to include form numbers when the rules require use of an official form to make the rules easier to use. The Subcommittee is aware that any change to form number will require conforming changes to any rule that refers to that form number. G&H are correct that several of the existing rules require only substantial compliance with Official Forms, and that qualification was missing in 3007(a)(2). That Rule has been amended to reinsert the qualification. As to Rule 4004(e), the Rule requires a final discharge order to conform to the appropriate Official Form because there is a different Official Form for each Chapter (and two for Chapter 13). The current formulation seemed more appropriate than listing a series of form numbers as alternatives.

6. **Service on the United States Trustee.** The NCBJ notes that the restyled rules are inconsistent in the ways they provide for papers to be sent to the United States trustee. In some rules there is a hanging paragraph requiring that a copy be sent to the United States trustee. In others there is a separate subsection requiring a copy be sent to the United States trustee. In others the requirement that a copy be sent to the United States trustee is included in the introductory language of a subsection before other recipients are listed in the bullet points. The NCBJ advocates for a uniform approach to these provisions and in particular, suggests that the hanging paragraphs be eliminated in favor of one of the other approaches.

Response: When the restyled rules include a separate subsection providing for a copy to be sent to the U.S. trustee, the original rule had a separate sentence or separate subsection so providing. See Rule 3017(a)(3) (last sentence of former Rule 3017(a)); 3020(b)(2) (penultimate sentence of former 3020(b)(1)); Rule 3020(c)(3) (former Rule 3020(c)(3)). Therefore the Advisory Committee believes a separate subsection is appropriate in these restyled rules.

Use of hanging paragraphs after bullets is part of the style consultant guidelines and they have chosen to do that in Rules 3015(h)(2), 3017.1(c)(2) and 3019(b)(2)(B). Because they are the final word on matters of style, no change was made.

There is really no way to treat these references completely consistently. They were not consistent in the existing rules.

7. **Split Verbs.** The NCBJ objects to restyled rules that state that the “court must, after notice and a hearing,” take action. They would prefer “the court, after notice and a hearing, must” or “the court must . . . , after notice and a hearing” or the like.

Response: This is a pure matter of style, and on style matters we defer to the style consultants.

8. **Internal references to Subpart of a Rule.** The NCBJ objects to the eliminate of the word “paragraph” or “subpart” or “subdivision” or the like in referred to subparts of a Rule.

Response: This is also a pure style choice. The style consultants have agreed to add the word “subdivision” in Rule 5009(b) and (d).

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PART III—CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS	PART III. CLAIMS; PLANS; DISTRIBUTIONS TO CREDITORS AND EQUITY SECURITY HOLDERS
Rule 3001. Proof of Claim	Rule 3001. Proof of Claim
(a) FORM AND CONTENT. A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.	(a) Definition and Form. A proof of claim is a written statement of a creditor's claim. It must substantially conform to Form 410.
(b) WHO MAY EXECUTE. A proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005.	(b) Who May Sign a Proof of Claim. Only a creditor or the creditor's agent may sign a proof of claim—except as provided in Rules 3004 and 3005.
(c) SUPPORTING INFORMATION. <p>(1) <i>Claim Based on a Writing.</i> Except for a claim governed by paragraph (3) of this subdivision, when a claim, or an interest in property of the debtor securing the claim, is based on a writing, a copy of the writing shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.</p> <p>(2) <i>Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply.</i> In a case in which the debtor is an individual:</p> <p>(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.</p> <p>(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the</p>	(c) Required Supporting Information. <p>(1) <i>Claim or Interest Based on a Writing.</i> If a claim or an interest in the debtor's property securing the claim is based on a writing, the creditor must file a copy with the proof of claim—except for a claim based on a consumer-credit agreement under (4). If the writing has been lost or destroyed, a statement explaining the loss or destruction must be filed with the claim.</p> <p>(2) <i>Additional Information in an Individual Debtor's Case.</i> If the debtor is an individual, the creditor must file with the proof of claim:</p> <p>(A) an itemized statement of the principal amount and any interest, fees, expenses, or other charges incurred before the petition was filed;</p> <p>(B) for any claimed security interest in the debtor's property, the amount needed to cure any default as of the date the petition was filed; and</p>

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<p>petition shall be filed with the proof of claim.</p> <p>(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.</p> <p>(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:</p> <p>(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or</p> <p>(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.</p> <p>(3) <i>Claim Based on an Open-End or Revolving Consumer Credit Agreement.</i></p> <p>(A) When a claim is based on an open-end or revolving consumer credit agreement—except one for which a security interest is claimed in the debtor's real property—a statement shall be filed with the proof of claim, including all of the following information that applies to the account:</p> <p>(i) the name of the entity from whom the creditor</p>	<p>(C) for any claimed security interest in the debtor's principal residence:</p> <p>(i) Form 410A; and</p> <p>(ii) if there is an escrow account connected with the claim, an escrow-account statement, prepared as of the date the petition was filed, that is consistent in form with applicable nonbankruptcy law.</p> <p>(3) <i>Sanctions in an Individual-Debtor Case.</i> If the debtor is an individual and a claim holder fails to provide any information required by (c)(1) and (2), the court may, after notice and a hearing, take one or both of these actions:</p> <p>(A) preclude the holder from presenting the information in any form as evidence in any contested matter or adversary proceeding in the case—unless the court determines that the failure is substantially justified or is harmless; and</p> <p>(B) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.</p> <p>(4) <i>Claim Based on an Open-End or Revolving Consumer-Credit Agreement.</i></p> <p>(A) <i>Required Statement.</i> Except when the claim is secured by an interest in the debtor's real property, a proof of claim for a claim based on an open-end or revolving consumer-credit agreement must be accompanied by a statement that</p>

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<p>purchased the account;</p> <p style="padding-left: 40px;">(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;</p> <p style="padding-left: 40px;">(iii) the date of an account holder's last transaction;</p> <p style="padding-left: 40px;">(iv) the date of the last payment on the account; and</p> <p style="padding-left: 40px;">(v) the date on which the account was charged to profit and loss.</p> <p>(B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.</p>	<p>shows the following information about the credit account:</p> <p>(i) the name of the entity from whom the creditor purchased the account;</p> <p>(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;</p> <p>(iii) the date of that last transaction;</p> <p>(iv) the date of the last payment on the account; and</p> <p>(v) the date that the account was charged to profit and loss.</p> <p>(B) <i>Copy to a Party in Interest.</i> On a party in interest's written request, the creditor must send a copy of the writing described in (c)(1) to that party in interest within 30 days after the request is sent.</p>
<p>(d) EVIDENCE OF PERFECTION OF SECURITY INTEREST. If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.</p>	<p>(d) Claim Based on a Security Interest in the Debtor's Property. If a creditor claims a security interest in the debtor's property, the proof of claim must be accompanied by evidence that the security interest has been perfected.</p>
<p>(e) TRANSFERRED CLAIM.</p> <p style="padding-left: 40px;">(1) <i>Transfer of Claim Other Than for Security Before Proof Filed.</i> If a claim has been transferred other than for security before proof of the claim has been filed, the proof of claim may be filed only by the transferee or an indenture trustee.</p> <p style="padding-left: 40px;">(2) <i>Transfer of Claim Other than for Security after Proof Filed.</i> If a claim other than one based on a publicly traded note, bond, or debenture has been transferred other than for security after</p>	<p>(e) Transferred Claim.</p> <p>(1) <i>Claim Transferred Before a Proof of Claim Is Filed.</i> Unless the transfer was made for security, if a claim was transferred before a proof of claim was filed, only the transferee or an indenture trustee may file a proof of claim.</p>

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<p>the proof of claim has been filed, evidence of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. If the alleged transferor files a timely objection and the court finds, after notice and a hearing, that the claim has been transferred other than for security, it shall enter an order substituting the transferee for the transferor. If a timely objection is not filed by the alleged transferor, the transferee shall be substituted for the transferor.</p> <p>(3) <i>Transfer of Claim for Security Before Proof Filed.</i> If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall be supported by a statement setting forth the terms of the transfer. If either the transferor or the transferee files a proof of claim, the clerk shall immediately notify the other by mail of the right to join in the filed claim. If both transferor and transferee file proofs of the same claim, the proofs shall be consolidated. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.</p> <p>(4) <i>Transfer of Claim for Security</i></p>	<p>(2) <i>Claim Transferred After a Proof of Claim Was Filed.</i></p> <p>(A) <i>Filing Evidence of the Transfer.</i> Unless the transfer was made for security, the transferee of a claim that was transferred after a proof of claim was filed must file evidence of the transfer—except for a claim based on a publicly traded note, bond, or debenture.</p> <p>(B) <i>Notice of the Filing and the Time for Objecting.</i> The clerk must immediately notify the alleged transferor, by mail, that evidence of the transfer has been filed and that the alleged transferor has 21 days after the notice is mailed to file an objection. The court may extend the time to file it.</p> <p>(C) <i>Hearing on an Objection; Substituting the Transferee.</i> If, on timely objection by the alleged transferor and after notice and a hearing, the court finds that the claim was transferred other than for security, the court must substitute the transferee for the transferor. If the alleged transferor does not file a timely objection, the transferee must be substituted for the transferor.</p> <p>(3) <i>Claim Transferred for Security Before a Proof of Claim is Filed.</i></p> <p>(A) <i>Right to File a Proof of Claim.</i> If a claim (except one based on a publicly traded note, bond, or debenture) was transferred for security before the proof of claim was filed, either the transferor or transferee (or both) may file a proof of claim for the full amount. The proof of claim must include a</p>

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<p><i>after Proof Filed.</i> If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. If a timely objection is filed by the alleged transferor, the court, after notice and a hearing, shall determine whether the claim has been transferred for security. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.</p> <p>(5) <i>Service of Objection or Motion; Notice of Hearing.</i> A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall be mailed or otherwise delivered to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing.</p>	<p>statement setting forth the terms of the transfer.</p> <p>(B) <i>Notice of a Right to Join in a Proof of Claim; Consolidating Proofs.</i> If either the transferor or transferee files a proof of claim, the clerk must, by mail, immediately notify the other of the right to join in the claim. If both file proofs of the same claim, the claims must be consolidated.</p> <p>(C) <i>Failure to File an Agreement About the Rights of the Transferor and Transferee.</i> On a party in interest's motion and after notice and a hearing, the court must issue appropriate orders regarding the rights of the transferor and transferee if either one fails to file an agreement on voting the claim, receiving dividends on it, or participating in the estate's administration.</p> <p>(4) <i>Claim Transferred for Security After a Proof of Claim Has Been Filed.</i></p> <p>(A) <i>Filing Evidence of the Transfer.</i> If a claim (except one based on a publicly traded note, bond, or debenture) was transferred for security after a proof of claim was filed, the transferee must file a statement setting forth the terms of the transfer.</p> <p>(B) <i>Notice of the Filing and the Time for Objecting.</i> The clerk must immediately notify the alleged transferor, by mail, that evidence of the transfer has been filed and that the alleged transferor has 21 days after the notice is mailed to file an objection. The court may extend the time to file it.</p> <p>(C) <i>Hearing on an Objection.</i> If the alleged transferor files a timely objection,</p>

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	<p>the court must, after notice and a hearing, determine whether the transfer was for security.</p> <p>(D) <i>Failure to File an Agreement About the Rights of the Transferor and Transferee.</i> On a party in interest's motion and after notice and a hearing, the court must issue appropriate orders regarding the rights of the transferor and transferee if either one fails to file an agreement on voting the claim, receiving dividends on it, or participating in the estate's administration.</p> <p>(5) <i>Serving an Objection or Motion; Notice of a Hearing.</i> At least 30 days before a hearing, a copy of any objection filed under (2) or (4) or any motion filed under (3) or (4) must be mailed or delivered to either the transferor or transferee as appropriate, together with notice of the hearing.</p>
<p>(f) EVIDENTIARY EFFECT. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.</p>	<p>(f) Proof of Claim as Prima Facie Evidence of a Claim and Its Amount. A proof of claim signed and filed in accordance with these rules is prima facie evidence of the validity and amount of the claim.</p>
<p>(g) To the extent not inconsistent with the United States Warehouse Act or applicable State law, a warehouse receipt, scale ticket, or similar document of the type routinely issued as evidence of title by a grain storage facility, as defined in section 557 of title 11, shall constitute prima facie evidence of the validity and amount of a claim of ownership of a quantity of grain.</p>	<p>(g) Proving the Ownership and Quantity of Grain. To the extent not inconsistent with the United States Warehouse Act or applicable State law, a warehouse receipt, scale ticket, or similar document of the type routinely issued as evidence of title by a grain storage facility, as defined in section 557 of title 11, shall constitute prima facie evidence of the validity and amount of a claim of ownership of a quantity of grain.</p>

Committee Note

The language of most provisions in Rule 3001 have been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 3001(g) has not been restyled (except to add a title) because it was enacted by Congress, P.L. 98-353, 98 Stat. 361, Sec. 354 (1984). The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, provides no authority to modify statutory language.

Changes Made After Publication and Comment

- In 3001(c)(3) the language has been changed from “In a case with an individual debtor” to “If the debtor is an individual.”
- In 3001(c)(4)(B) the word “document” has been changed to “writing.”
- In 3001(e)(2)(C) the words “the court must substitute the transferee for the transferor” were replaced with “the transferee must be substituted for the transferor.”
- In 3001(e)(4)(A), the words “that sets forth” were replaced with “setting forth.”

Summary of Public Comment

• National Bankruptcy Conference (BK-2021-0002-0001) (NBC)

The NBC suggested that the stylistic change to 3001(b) “arguably has changed the purpose of the rule” from one specifying who could file a proof of claim to one about who can sign a proof of claim. They are also concerned that it could validate an unsigned proof of claim because of the use of the word “may.” They also suggest that the title be changed to “Who Must Sign a Proof of Claim.”

Response: The rule has always been about who may sign a proof of claim, not who may file one. The name of the existing rule is “Who May Execute,” not “Who May File.” There is nothing inconsistent with the official form, which requires that a proof of claim be signed, and a rule specifying that only a creditor or creditor’s agent may affix that signature. No change was made in response to this suggestion.

The NBC’s next suggestion on Rule 3001 advocates changing “a case with an individual debtor” to “a case regarding an individual debtor” in (c)(3). They believe “a case with an individual debtor” could be read to include a case in which an individual debtor is involved in some way other than as the debtor.

Response: The language of (c)(3) has been changed to begin “If the debtor is an individual”

The NBC next suggests changing “immediately” to “promptly” in 3001(e)(2)(B), although the existing rule uses “immediately.”

Response: This would be a substantive change.

In the last phrase of 3001(e)(2)(C), the NBC suggests using the passive voice (“the transferee will be substituted for the transferor”) rather than stating that “the court must substitute the transferee for the transferor.” The NBC believes that the passive voice “allow[s] local practice to control here” and avoids the implication that the court must enter an order.

Response: The last sentence of Rule 3001(e)(2)(C) is describing what happens when an alleged transferor has been notified of an alleged transfer and does not file a timely objection. We agree that we should not impose a new duty on the court or the clerk that was not in the original; comment accepted.

In 3001(e)(4)(A), the NBC suggests replacing “that sets forth” with “setting forth”.

Response: Suggestion accepted.

In 3001(e)(4)(B), the NBC again suggests changing “immediately” to “promptly” although the existing rule uses “immediately.”

Response: This would be a substantive change.

Also in 3001(e)(4)(B), the NBC suggests that the last sentence (“the court may extend the time to file it”) is unclear as to what “it” is. They suggest replacing “it” with “an objection.”

Response: The only thing being filed in (e)(4)(B) is “an objection.” (The filing of the evidence of the transfer is covered by (e)(4)(A).) The words “an objection” are also the last words in the sentence preceding the last sentence. There is no ambiguity about what “it” is.

- **National Conference of Bankruptcy Judges (BK-2021-0002-0020) (NCBJ)**

The NCBJ suggested changing the language at the beginning of 3001(c)(3) to “if the debtor is an individual” to conform to (c)(2).

Response: We have accepted the NCBJ suggestion.

In 3001(c)(4)(B) the NCBJ suggested changing the word “document” to “writing” which is the term used in (c)(1) to which (c)(4) refers.

Response: Comment accepted

- **Gold and Hammes, Attorneys (BK-2021-0002-0023) (G&H)**

G&H asserted that changing the language of 3001(b)(1) from “execute” to “sign” is a substantive change, and that “execution” requires many additional steps other than simply affixing one’s signature. G&H stated that the amendment would allow a creditor to “‘sign’ a letter to the court simply asserting that the debtor owes them money.”

Response: A proof of claim is defined in Rule 3001(a) and must substantially conform to Form 410. There is nothing in Rule 3001(b) that modifies the requirements for a proof of claim. A creditor could not simply sign a piece of paper and submit it. Nor is there any basis for the assertion that “execute” means something different from “sign.” The Federal Rules of Civil Procedure consistently use the term “sign” (*see, e.g.*, Fed. R. Civ. P. 11 (Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions)). No change was made based on this comment.

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Rule 3002. Filing Proof of Claim or Interest	Rule 3002. Filing a Proof of Claim or Interest
(a) NECESSITY FOR FILING. A secured creditor, unsecured creditor, or equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005. A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim.	(a) Need to File. Unless Rule 1019(c), 3003, 3004, or 3005 provides otherwise, every creditor or equity security holder must file a proof of claim or interest for the claim or interest to be allowed. A lien that secures a claim is not void solely because an entity failed to file a proof of claim.
(b) PLACE OF FILING. A proof of claim or interest shall be filed in accordance with Rule 5005.	(b) Where to File. The proof of claim or interest must be filed in the district where the case is pending and in accordance with Rule 5005.
(c) TIME FOR FILING. In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, a proof of claim is timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13. In an involuntary chapter 7 case, a proof of claim is timely filed if it is filed not later than 90 days after the order for relief under that chapter is entered. But in all these cases, the following exceptions apply: <p style="padding-left: 40px;">(1) A proof of claim filed by a governmental unit, other than for a claim resulting from a tax return filed under § 1308, is timely filed if it is filed not later than 180 days after the date of the order for relief. A proof of claim filed by a governmental unit for a claim resulting from a tax return filed under § 1308 is timely filed if it is filed no later than 180 days after the date of the order for relief or 60 days after the date of the filing of the tax return. The court may, for cause, enlarge the time for a governmental unit to file a proof of</p>	(c) Time to File. In a voluntary Chapter 7 case or in a Chapter 12 or 13 case, the proof of claim is timely if it is filed within 70 days after the order for relief or entry of an order converting the case to Chapter 12 or 13. In an involuntary Chapter 7 case, a proof of claim is timely filed if it is filed within 90 days after the order for relief is entered. These exceptions apply in all cases: <p>(1) Governmental Unit. A governmental unit’s proof of claim is timely if it is filed within 180 days after the order for relief. But a proof of claim resulting from a tax return filed under § 1308 is timely if it is filed within 180 days after the order for relief or within 60 days after the tax return is filed. On motion filed by a governmental unit before the time expires and for cause, the court may extend the time to file a proof of claim.</p> <p>(2) Infant or Incompetent Person. In the interests of justice, the court may extend the time for an infant or incompetent person—or a representative of either—to file a</p>

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<p>claim only upon motion of the governmental unit made before expiration of the period for filing a timely proof of claim.</p> <p>(2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.</p> <p>(3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.</p> <p>(4) A claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct.</p> <p>(5) If notice of insufficient assets to pay a dividend was given to creditors under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall give at least 90 days' notice by mail to creditors of that fact and of the date by which proofs of claim must be filed.</p> <p>(6) On motion filed by a creditor before or after the expiration of the time to file a proof of claim, the court may extend the time by not more than 60 days from the date of the order granting the motion. The motion may be granted</p>	<p>proof of claim, but only if the extension will not unduly delay case administration.</p> <p>(3) <i>Unsecured Claim That Arises from a Judgment.</i> An unsecured claim that arises in favor of an entity or becomes allowable because of a judgment may be filed within 30 days after the judgment becomes final if it is to recover money or property from that entity or denies or avoids the entity's interest in property. The claim must not be allowed if the judgment imposes a liability that is not satisfied—or a duty that is not performed—within the 30 days or any additional time set by the court.</p> <p>(4) <i>Claim Arising from a Rejected Executory Contract or Unexpired Lease.</i> A proof of claim for a claim that arises from a rejected executory contract or an unexpired lease may be filed within the time set by the court.</p> <p>(5) <i>Notice That Assets May Be Available to Pay a Dividend.</i> The clerk must, by mail, give at least 90 days' notice to creditors that a dividend payment appears possible and that proofs of claim must be filed by the date set forth in the notice if:</p> <p>(A) a notice of insufficient assets to pay a dividend had been given under Rule 2002(e); and</p> <p>(B) the trustee later notifies the court that a dividend appears possible.</p> <p>(6) <i>Claim Secured by a Security Interest in the Debtor's Principal Residence.</i> A proof of a claim secured by a security interest in the debtor's principal residence is timely filed if:</p> <p>(A) the proof of claim and attachments required by Rule 3001(c)(2)(C) are</p>

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<p>if the court finds that:</p> <p>(A) the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a); or</p> <p>(B) the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim, and the notice was mailed to the creditor at a foreign address.</p> <p>(7) A proof of claim filed by the holder of a claim that is secured by a security interest in the debtor's principal residence is timely filed if:</p> <p>(A) the proof of claim, together with the attachments required by Rule 3001(c)(2)(C), is filed not later than 70 days after the order for relief is entered; and</p> <p>(B) any attachments required by Rule 3001(c)(1) and (d) are filed as a supplement to the holder's claim not later than 120 days after the order for relief is entered.</p>	<p>filed within 70 days after the order for relief; and</p> <p>(B) the attachments required by Rule 3001(c)(1) and (d) are filed as a supplement to the holder's claim within 120 days after the order for relief.</p> <p>(7) <i>Extending the Time to File.</i> On a creditor's motion filed before or after the time to file a proof of claim has expired, the court may extend the time to file by no more than 60 days from the date of its order. The motion may be granted if the court finds that:</p> <p>(A) the notice was insufficient under the circumstances to give the creditor a reasonable time to file because the debtor failed to timely file the list of creditors and their names and addresses as required by Rule 1007(a); or</p> <p>(B) the notice was mailed to the creditor at a foreign address and was insufficient to give the creditor a reasonable time to file.</p>

Committee Note

The language of Rule 3002 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC first objected to the insertion of the phrase “in the district where the case is pending and” in 3002(b). They believe it is “redundant” because Rule 5005 already says that.

Response: The style consultants attempted to avoid naked cross-references to other rules without some indication of the subject of the rule to which the cross-reference is made. It is helpful to the reader, albeit not necessary as a substantive matter. No change was made in response to this comment.

The NBC objects to the transposition of (c)(6) and (c)(7) from the original rule. They believe it makes researching difficult.

Response: The Advisory Committee was cautious about renumbering paragraphs, but (c)(7) was added only in 2017, and the provisions of (c)(6) allowing extensions of the time to file are applicable to the situation described in (c)(6) as well as other proofs of claim. Therefore logically (c)(7) should follow (c)(6). No change was made in response to this comment.

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<p>Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor’s Principal Residence</p>	<p>Rule 3002.1. Notice Relating to Claims Secured by a Security Interest in the Debtor’s Principal Residence in a Chapter 13 Case</p>
<p>(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor’s principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.</p>	<p>(a) In General. This rule applies in a Chapter 13 case to a claim that is secured by a security interest in the debtor’s principal residence and for which the plan provides for the trustee or debtor to make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease when an order terminating or annulling the automatic stay related to that residence becomes effective.</p>
<p>(b) NOTICE OF PAYMENT CHANGES; OBJECTION.</p> <p>(1) <i>Notice.</i> The holder of the claim shall file and serve on the debtor, debtor’s counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order.</p> <p>(2) <i>Objection.</i> A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.</p>	<p>(b) Notice of a Payment Change.</p> <p>(1) <i>Notice by the Claim Holder.</i> The claim holder must file a notice of any change in the amount of an installment payment—including any change resulting from an interest-rate or escrow-account adjustment. At least 21 days before the new payment is due, the notice must be filed and served on:</p> <ul style="list-style-type: none"> • the debtor; • the debtor’s attorney; and • the trustee. <p>If the claim arises from a home-equity line of credit, the court may modify this requirement.</p> <p>(2) <i>Party in Interest’s Objection.</i> A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments under § 1322(b)(5). Unless the court orders otherwise, if no motion is filed by the</p>

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	day before the new payment is due, the change goes into effect.
<p>(c) NOTICE OF FEES, EXPENSES, AND CHARGES. The holder of the claim shall file and serve on the debtor, debtor’s counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor’s principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.</p>	<p>(c) Fees, Expenses, and Charges Incurred After the Case Was Filed; Notice by the Claim Holder. The claim holder must file a notice itemizing all fees, expenses, and charges incurred after the case was filed that the holder asserts are recoverable against the debtor or the debtor’s principal residence. Within 180 days after the fees, expenses, or charges were incurred, the notice must be served on:</p> <ul style="list-style-type: none"> • the debtor; • the debtor’s attorney; and • the trustee.
<p>(d) FORM AND CONTENT. A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder’s proof of claim. The notice is not subject to Rule 3001(f).</p>	<p>(d) Filing Notice as a Supplement to a Proof of Claim. A notice under (b) or (c) must be filed as a supplement to the proof of claim using Form 410S-1 or 410S-2, respectively. The notice is not subject to Rule 3001(f).</p>
<p>(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of a party in interest filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.</p>	<p>(e) Determining Fees, Expenses, or Charges. On a party in interest’s motion filed within one year after the notice in (c) was served, the court must, after notice and a hearing, determine whether paying any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments under § 1322(b)(5).</p>
<p>(f) NOTICE OF FINAL CURE PAYMENT. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on</p>	<p>(f) Notice of the Final Cure Payment.</p> <p>(1) Contents of a Notice. Within 30 days after the debtor completes all</p>

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<p>the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.</p>	<p>payments under a Chapter 13 plan, the trustee must file a notice:</p> <p>(A) stating that the debtor has paid in full the amount required to cure any default on the claim; and</p> <p>(B) informing the claim holder of its obligation to file and serve a response under (g).</p> <p>(2) <i>Serving the Notice.</i> The notice must be served on:</p> <ul style="list-style-type: none"> • the claim holder; • the debtor; and • the debtor's attorney. <p>(3) <i>The Debtor's Right to File.</i> The debtor may file and serve the notice if:</p> <p>(A) the trustee fails to do so; and</p> <p>(B) the debtor contends that the final cure payment has been made and all plan payments have been completed.</p>
<p>(g) RESPONSE TO NOTICE OF FINAL CURE PAYMENT. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of</p>	<p>(g) Response to a Notice of the Final Cure Payment.</p> <p>(1) <i>Required Statement.</i> Within 21 days after the notice under (f) is served, the claim holder must file and serve a statement that:</p> <p>(A) indicates whether:</p> <p>(i) the claim holder agrees that the debtor has paid in full the amount required to cure any default on the claim; and</p> <p>(ii) the debtor is otherwise current on all payments under § 1322(b)(5); and</p> <p>(B) itemizes the required cure or postpetition amounts, if any, that</p>

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claim and is not subject to Rule 3001(f).	<p style="text-align: center;">the claim holder contends remain unpaid as of the statement's date.</p> <p>(2) <i>Persons to be Served.</i> The holder must serve the statement on:</p> <ul style="list-style-type: none"> • the debtor; • the debtor's attorney; and • the trustee. <p>(3) <i>Statement to be a Supplement</i> The statement must be filed as a supplement to the proof of claim and is not subject to Rule 3001(f).</p>
(h) DETERMINATION OF FINAL CURE AND PAYMENT. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.	(h) Determining the Final Cure Payment. On the debtor's or trustee's motion filed within 21 days after the statement under (g) is served, the court must, after notice and a hearing, determine whether the debtor has cured the default and made all required postpetition payments.
(i) FAILURE TO NOTIFY. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:	(i) Failure to Give Notice. If the claim holder fails to provide any information as required by (b), (c), or (g), the court may, after notice and a hearing, take one or both of these actions:
<p style="padding-left: 40px;">(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or</p> <p style="padding-left: 40px;">(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.</p>	<p style="padding-left: 40px;">(1) preclude the holder from presenting the omitted information in any form as evidence in a contested matter or adversary proceeding in the case— unless the failure was substantially justified or is harmless; and</p> <p style="padding-left: 40px;">(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.</p>

Committee Note

The language of Rule 3002.1 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 3002.1(a), the word “requires” was changed to “provides for.”
- In 3002.1(i) the word “as” was reinserted before the word “required.”

Summary of Public Comment

- **National Assoc. of Consumer Bankruptcy Attorneys (BK-2021-0002-0032) (NACBA)**

The NACBA suggested that the change in proposed Rule 3002.1(a) from “the plan *provides that either* the trustee or the debtor *will* make contractual installment payments” to “the plan *requires* the trustee or the debtor to make contractual payments” clarifies that the non-treatment of a claim is permissible, but that in such a plan Rule 3002.1 does not then apply. They suggested that the comments should make explicit that Rule 3002.1 does not apply to a plan that does not provide for a secured claim.

Response:

The words “requires that” in 3002.1(a) have been changed to “provides for” to be consistent with the statutory language of § 1322(a)(2) and § 1325a(5).

James Davis (BK-2021-0002-0031)

Mr. Davis suggested retaining the word “as” before “required” in 3002.1(i) to make clear that courts have authority to grant relief for *any* non-compliance with the rule (including, for example, an untimely provision of information), not just for a failure to provide information.

***Response:* Suggestion accepted.**

ORIGINAL	REVISION
<p>Rule 3003. Filing Proof of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases</p>	<p>Rule 3003. Chapter 9 or 11— Filing a Proof of Claim or Equity Interest</p>
<p>(a) APPLICABILITY OF RULE. This rule applies in chapter 9 and 11 cases.</p>	<p>(a) Scope. This rule applies only in a Chapter 9 or 11 case.</p>
<p>(b) SCHEDULE OF LIABILITIES AND LIST OF EQUITY SECURITY HOLDERS.</p> <p>(1) <i>Schedule of Liabilities.</i> The schedule of liabilities filed pursuant to § 521(l) of the Code shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent, or unliquidated. It shall not be necessary for a creditor or equity security holder to file a proof of claim or interest except as provided in subdivision (c)(2) of this rule.</p> <p>(2) <i>List of Equity Security Holders.</i> The list of equity security holders filed pursuant to Rule 1007(a)(3) shall constitute prima facie evidence of the validity and amount of the equity security interests and it shall not be necessary for the holders of such interests to file a proof of interest.</p>	<p>(b) Scheduled Liabilities and Listed Equity Security Holders as Prima Facie Evidence of Validity and Amount.</p> <p>(1) <i>Creditor’s Claim.</i> An entry on the schedule of liabilities filed under § 521(a)(1)(B)(i) is prima facie evidence of the validity and the amount of a creditor’s claim—except for a claim scheduled as disputed, contingent, or unliquidated. Filing a proof of claim is unnecessary except as provided in (c)(2).</p> <p>(2) <i>Interest of an Equity Security Holder.</i> An entry on the list of equity security holders filed under Rule 1007(a)(3) is prima facie evidence of the validity and the amount of the equity interest. Filing a proof of the interest is unnecessary except as provided in (c)(2).</p>
<p>(c) FILING PROOF OF CLAIM.</p> <p>(1) Who May File. Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.</p> <p>(2) Who Must File. Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be</p>	<p>(c) Filing a Proof of Claim.</p> <p>(1) <i>Who May File a Proof of Claim.</i> A creditor or indenture trustee may file a proof of claim.</p> <p>(2) <i>Who Must File a Proof of Claim or Interest.</i> A creditor or equity security holder whose claim or interest is not scheduled—or is scheduled as disputed, contingent, or unliquidated—must file a proof of claim or interest. A creditor who fails to do so will not be treated as a creditor for that claim for voting and distribution.</p>

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<p>treated as a creditor with respect to such claim for the purposes of voting and distribution.</p> <p>(3) Time for Filing. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6).</p> <p>(4) Effect of Filing Claim or Interest. A proof of claim or interest executed and filed in accordance with this subdivision shall supersede any scheduling of that claim or interest pursuant to § 521(a)(1) of the Code.</p> <p>(5) Filing by Indenture Trustee. An indenture trustee may file a claim on behalf of all known or unknown holders of securities issued pursuant to the trust instrument under which it is trustee.</p>	<p>(3) <i>Time to File.</i> The court must set the time to file a proof of claim or interest and may, for cause, extend the time. If the time has expired, the proof of claim or interest may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (3), (4), and (7).</p> <p>(4) <i>Proof of Claim by an Indenture Trustee.</i> An indenture trustee may file a proof of claim on behalf of all known or unknown holders of securities issued under the trust instrument under which it is trustee.</p> <p>(5) <i>Effect of Filing a Proof of Claim or Interest.</i> A proof of claim or interest signed and filed under (c) supersedes any scheduling under § 521(a)(1) of the claim or interest.</p>
<p>(d) PROOF OF RIGHT TO RECORD STATUS. For the purposes of Rules 3017, 3018 and 3021 and for receiving notices, an entity who is not the record holder of a security may file a statement setting forth facts which entitle that entity to be treated as the record holder. An objection to the statement may be filed by any party in interest.</p>	<p>(d) <i>Treating a Nonrecord Holder of a Security as the Record Holder.</i> For the purpose of Rules 3017, 3018, and 3021 and receiving notices, an entity that is not a record holder of a security may file a statement setting forth facts that entitle the entity to be treated as the record holder. A party in interest may file an objection to the statement.</p>

Committee Note

The language of Rule 3003 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 3001(b)(1) and (c)(2) the word “shown” was changed to “scheduled.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC questioned in (b)(1) and (c)(2) whether the change of the word “scheduled” to “shown” alters familiar terminology in a way that would be “unduly disruptive.”

Response: Suggestion accepted.

The NBC also questioned the transposition of (c)(4) and (c)(5) from the original rule, and suggested not reordering to avoid researching issues.

Response: The reason for the transposition is that filings by the indenture trustee, covered in existing (c)(5), are also subject to the provisions of existing (c)(4). Logically, therefore, existing (c)(4) should follow existing (c)(5). The Advisory Committee doubts this will pose difficulties in researching.

ORIGINAL	REVISION
Rule 3004. Filing of Claims by Debtor or Trustee	Rule 3004. Proof of Claim Filed by the Debtor or Trustee for a Creditor
<p>If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith give notice of the filing to the creditor, the debtor and the trustee.</p>	<p>(a) Filing by the Debtor or Trustee. If a creditor does not file a proof of claim within the time prescribed by Rule 3002(c) or Rule 3003(c), the debtor or trustee may do so within 30 days after the creditor's time to file expires.</p> <p>(b) Notice by the Clerk. The clerk must promptly give notice of the filing to:</p> <ul style="list-style-type: none"> • the creditor; • the debtor; and • the trustee.

Committee Note

The language of Rule 3004 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
Rule 3005. Filing of Claim, Acceptance, or Rejection by Guarantor, Surety, Indorser, or Other Codebtor	Rule 3005. Filing a Proof of Claim or Accepting or Rejecting a Plan by a Surety, Endorser, Guarantor, or Other Codebtor
(a) FILING OF CLAIM. If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), any entity that is or may be liable with the debtor to that creditor, or who has secured that creditor, may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or Rule 3003(c) whichever is applicable. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution.	(a) In General. If a creditor fails to file a proof of claim within the time prescribed by Rule 3002(c) or Rule 3003(c), it may be filed by an entity that, along with the debtor, is or may be liable to the creditor or has given security for the creditor's debt. The entity must do so within 30 days after the creditor's time to file expires. A distribution on such a claim may be made only on satisfactory proof that the original debt will be diminished by the distribution.
(b) FILING OF ACCEPTANCE OR REJECTION; SUBSTITUTION OF CREDITOR. An entity which has filed a claim pursuant to the first sentence of subdivision (a) of this rule may file an acceptance or rejection of a plan in the name of the creditor, if known, or if unknown, in the entity's own name but if the creditor files a proof of claim within the time permitted by Rule 3003(c) or files a notice prior to confirmation of a plan of the creditor's intention to act in the creditor's own behalf, the creditor shall be substituted for the obligor with respect to that claim.	(b) Accepting or Rejecting a Plan in a Creditor's Name. An entity that has filed a proof of claim on behalf of a creditor under (a) may accept or reject a plan in the creditor's name. If the creditor's name is unknown, the entity may do so in its own name. But the creditor must be substituted for the entity on that claim if the creditor: <ol style="list-style-type: none"> (1) files a proof of claim within the time permitted by Rule 3003(c); or (2) files notice, before the plan is confirmed, of an intent to act in the creditor's own behalf.

Committee Note

The language of Rule 3005 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
<p>Rule 3006. Withdrawal of Claim; Effect on Acceptance or Rejection of Plan</p>	<p>Rule 3006. Withdrawing a Proof of Claim; Effect on a Plan</p>
<p>A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If after a creditor has filed a proof of claim an objection is filed thereto or a complaint is filed against that creditor in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors' committee elected pursuant to § 705(a) or appointed pursuant to § 1102 of the Code. The order of the court shall contain such terms and conditions as the court deems proper. Unless the court orders otherwise, an authorized withdrawal of a claim shall constitute withdrawal of any related acceptance or rejection of a plan.</p>	<p>(a) Notice of Withdrawal; Limitations. A creditor may withdraw a proof of claim by filing a notice of withdrawal. But unless the court orders otherwise after notice and a hearing, a creditor may not withdraw a proof of claim if:</p> <ol style="list-style-type: none"> (1) an objection to it has been filed; (2) a complaint has been filed against the creditor in an adversary proceeding; or (3) the creditor has accepted or rejected the plan or has participated significantly in the case. <p>(b) Notice of the Hearing; Order Permitting Withdrawal. Notice of the hearing must be served on:</p> <ul style="list-style-type: none"> • the trustee or debtor in possession; and • any creditors' committee elected under § 705(a) or appointed under § 1102. <p>The court's order permitting a creditor to withdraw a proof of claim may contain any terms and conditions the court considers proper.</p> <p>(c) Effect of Withdrawing a Proof of Claim. Unless the court orders otherwise, an authorized withdrawal constitutes withdrawal of any related acceptance or rejection of a plan.</p>

Committee Note

The language of Rule 3006 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In the hanging paragraph at the end of 3006(b), the word “must” was changed to “may” and the word “deems” was changed to “considers.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC suggested changing “must” to “may” in the hanging paragraph at the end of 3006(b).

Response: Suggestion accepted.

ORIGINAL	REVISION
Rule 3007. Objections to Claims	Rule 3007. Objecting to a Claim
<p>(a) TIME AND MANNER OF SERVICE.</p> <p>(1) <i>Time of Service.</i> An objection to the allowance of a claim and a notice of objection that substantially conforms to the appropriate Official Form shall be filed and served at least 30 days before any scheduled hearing on the objection or any deadline for the claimant to request a hearing.</p> <p>(2) <i>Manner of Service.</i></p> <p>(A) The objection and notice shall be served on a claimant by first-class mail to the person most recently designated on the claimant’s original or amended proof of claim as the person to receive notices, at the address so indicated; and</p> <p>(i) if the objection is to a claim of the United States, or any of its officers or agencies, in the manner provided for service of a summons and complaint by Rule 7004(b)(4) or (5); or</p> <p>(ii) if the objection is to a claim of an insured depository institution, in the manner provided by Rule 7004(h).</p> <p>(B) Service of the objection and notice shall also be made by first-class mail or other permitted means on the debtor or debtor in possession, the trustee, and, if applicable, the entity filing the proof of claim under Rule 3005.</p>	<p>(a) Time and Manner of Serving the Objection.</p> <p>(1) <i>Time to Serve.</i> An objection to a claim and a notice of the objection must be filed and served at least 30 days before a scheduled hearing on the objection or any deadline for the claim holder to request a hearing.</p> <p>(2) <i>Whom to Serve; Manner of Service.</i></p> <p>(A) <i>Serving the Claim Holder.</i> The notice—substantially conforming to Form 420B—and objection must be served by mail on the person the claim holder most recently designated to receive notices on the claim holder’s original or latest amended proof of claim, at the address so indicated. If the objection is to a claim of:</p> <p>(i) the United States or one of its officers or agencies, service must be made as if it were a summons and complaint under Rule 7004(b)(4) or (5); or</p> <p>(ii) an insured depository institution, service must be made under Rule 7004(h).</p> <p>(B) <i>Serving Others.</i> The notice and objection must also be served, by mail (or other permitted means), on:</p> <ul style="list-style-type: none"> • the debtor or debtor in possession; • the trustee; and • if applicable, the entity that filed the proof of claim under Rule 3005.

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<p>(b) DEMAND FOR RELIEF REQUIRING AN ADVERSARY PROCEEDING. A party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, but may include the objection in an adversary proceeding.</p>	<p>(b) Demanding Relief That Requires an Adversary Proceeding Not Permitted. In objecting to a claim, a party in interest must not include a demand for a type of relief specified in Rule 7001 but may include the objection in an adversary proceeding.</p>
<p>(c) LIMITATION ON JOINDER OF CLAIMS OBJECTIONS. Unless otherwise ordered by the court or permitted by subdivision (d), objections to more than one claim shall not be joined in a single objection.</p>	<p>(c) Limit on Omnibus Objections. Unless the court orders otherwise or (d) permits, objections to more than one claim may not be joined in a single objection.</p>
<p>(d) OMNIBUS OBJECTION. Subject to subdivision (e), objections to more than one claim may be joined in an omnibus objection if all the claims were filed by the same entity, or the objections are based solely on the grounds that the claims should be disallowed, in whole or in part, because:</p> <ol style="list-style-type: none"> (1) they duplicate other claims; (2) they have been filed in the wrong case; (3) they have been amended by subsequently filed proofs of claim; (4) they were not timely filed; (5) they have been satisfied or released during the case in accordance with the Code, applicable rules, or a court order; (6) they were presented in a form that does not comply with applicable rules, and the objection states that the objector is unable to determine the validity of the claim because of the noncompliance; (7) they are interests, rather than claims; or 	<p>(d) Omnibus Objection. Subject to (e), objections to more than one claim may be joined in a single objection if:</p> <ol style="list-style-type: none"> (1) all the claims were filed by the same entity; or (2) the objections are based solely on grounds that the claims should be disallowed, in whole or in part, because they: <ol style="list-style-type: none"> (A) duplicate other claims; (B) were filed in the wrong case; (C) have been amended by later proofs of claim; (D) were not timely filed; (E) have been satisfied or released during the case in accordance with the Code, applicable rules, or a court order; (F) were presented in a form that does not comply with applicable rules and the objection states that because of the noncompliance the objector is unable to determine a claim's validity; (G) are interests, not claims; or

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<p>(8) they assert priority in an amount that exceeds the maximum amount under § 507 of the Code.</p>	<p>(H) assert a priority in an amount that exceeds the maximum amount allowable under § 507.</p>
<p>(e) REQUIREMENTS FOR OMNIBUS OBJECTION. An omnibus objection shall:</p> <p>(1) state in a conspicuous place that claimants receiving the objection should locate their names and claims in the objection;</p> <p>(2) list claimants alphabetically, provide a cross-reference to claim numbers, and, if appropriate, list claimants by category of claims;</p> <p>(3) state the grounds of the objection to each claim and provide a cross-reference to the pages in the omnibus objection pertinent to the stated grounds;</p> <p>(4) state in the title the identity of the objector and the grounds for the objections;</p> <p>(5) be numbered consecutively with other omnibus objections filed by the same objector; and</p> <p>(6) contain objections to no more than 100 claims.</p>	<p>(e) Required Content of an Omnibus Objection. An omnibus objection must:</p> <p>(1) state in a conspicuous place that claim holders can find their names and claims in the objection;</p> <p>(2) list the claim holders alphabetically, provide a cross-reference to claim numbers, and, if appropriate, list claim holders by category of claims;</p> <p>(3) state for each claim the grounds for the objection and provide a cross-reference to the pages where pertinent information about the grounds appears;</p> <p>(4) state in the title the objector's identity and the grounds for the objections;</p> <p>(5) be numbered consecutively with other omnibus objections filed by the same objector; and</p> <p>(6) contain objections to no more than 100 claims.</p>
<p>(f) FINALITY OF OBJECTION. The finality of any order regarding a claim objection included in an omnibus objection shall be determined as though the claim had been subject to an individual objection.</p>	<p>(f) Finality of an Order When Objections Are Joined. When objections are joined, the finality of an order regarding any claim must be determined as though the claim had been subject to an individual objection.</p>

Committee Note

The language of Rule 3007 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 3007(a)(2)(A), the phrase “using Form 420B” was changed to “substantially conforming to Form 420B.”
- The heading of 3007(b) was changed from Demanding Relief Under Rule 7001 Not Permitted” to “Demanding Relief That Requires an Adversary Proceeding Not Permitted.”
- In 3007(f) the word “it” has been replaced with “the claim.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

In 3007(a)(2)(A) the NBC suggested that the reference to first-class mail be restored to avoid the implication that other forms of mail are required.

Response: Rule 9001(8) defines “mail” as “first class, postage prepaid.” No change is needed.

The NBC also suggested modifying the new heading in 3007(b) to “Demanding Relief Requiring an Adversary Proceeding.”

Response: The heading has been modified.

The NBC objected to the word “it” in (f) and suggests replacing it with “that claim.”

Response: The word “it” has been replaced with “the claim.”

- **Gold and Hammes, Attorneys (BK-2021-0002-0023) (G&H)**

As previously discussed, G&H pointed out that the reference to Official Form 420(b) in 3007(a)(2)(A) should be qualified by the “substantially conforms” standard in the existing rule.

Response: Suggestion accepted.

ORIGINAL	REVISION
Rule 3008. Reconsideration of Claims	Rule 3008. Reconsidering an Order Allowing or Disallowing a Claim
A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.	A party in interest may move to reconsider an order allowing or disallowing a claim. After notice and a hearing, the court must issue an appropriate order.

Committee Note

The language of Rule 3008 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
Rule 3009. Declaration and Payment of Dividends in a Chapter 7 Liquidation Case	Rule 3009. Chapter 7—Paying Dividends
In a chapter 7 case, dividends to creditors shall be paid as promptly as practicable. Dividend checks shall be made payable to and mailed to each creditor whose claim has been allowed, unless a power of attorney authorizing another entity to receive dividends has been executed and filed in accordance with Rule 9010. In that event, dividend checks shall be made payable to the creditor and to the other entity and shall be mailed to the other entity.	In a Chapter 7 case, dividends to creditors on claims that have been allowed must be paid as soon as practicable. A dividend check must be made payable to and mailed to the creditor. But if a power of attorney authorizing another entity to receive payment has been filed under Rule 9010, the check must be: <ul style="list-style-type: none"> (a) made payable to both the creditor and the other entity; and (b) mailed to the other entity.

Committee Note

The language of Rule 3009 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
Rule 3010. Small Dividends and Payments in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases	Rule 3010. Chapter 7, 12, or 13—Limits on Small Dividends and Payments
(a) CHAPTER 7 CASES. In a chapter 7 case no dividend in an amount less than \$5 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Any dividend not distributed to a creditor shall be treated in the same manner as unclaimed funds as provided in § 347 of the Code.	(a) Chapter 7. In a Chapter 7 case, the trustee must not distribute to a creditor any dividend less than \$5 unless authorized to do so by local rule or court order. A dividend not distributed must be treated in the same manner as unclaimed funds under § 347.
(b) CHAPTER 12 AND CHAPTER 13 CASES. In a chapter 12 or chapter 13 case no payment in an amount less than \$15 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Funds not distributed because of this subdivision shall accumulate and shall be paid whenever the accumulation aggregates \$15. Any funds remaining shall be distributed with the final payment.	(b) Chapter 12 or 13. In a Chapter 12 or 13 case, the trustee must not distribute to a creditor any payment less than \$15 unless authorized to do so by local rule or court order. Distribution must be made when accumulated funds total \$15 or more. Any remaining funds must be distributed with the final payment.

Committee Note

The language of Rule 3010 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
Rule 3011. Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer’s Debt Adjustment, and Chapter 13 Individual’s Debt Adjustment Cases	Rule 3011. Chapter 7, 12, or 13— Listing Unclaimed Funds
The trustee shall file a list of all known names and addresses of the entities and the amounts which they are entitled to be paid from remaining property of the estate that is paid into court pursuant to § 347(a) of the Code.	The trustee must: <ul style="list-style-type: none"> (a) file a list of the known names and addresses of entities entitled to payment from any remaining property of the estate that is paid into court under § 347(a); and (b) include the amount due each entity.

Committee Note

The language of Rule 3011 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
<p>Rule 3012. Determining the Amount of Secured and Priority Claims</p>	<p>Rule 3012. Determining the Amount of a Secured or Priority Claim</p>
<p>(a) DETERMINATION OF AMOUNT OF CLAIM. On request by a party in interest and after notice—to the holder of the claim and any other entity the court designates—and a hearing, the court may determine:</p> <p>(1) the amount of a secured claim under § 506(a) of the Code; or</p> <p>(2) the amount of a claim entitled to priority under § 507 of the Code.</p>	<p>(a) In General. On a party in interest’s request, after notice and a hearing, the court may determine the amount of a secured claim under § 506(a) or the amount of a priority claim under § 507. The notice must be served on:</p> <ul style="list-style-type: none"> • the claim holder; and • any other entity the court designates.
<p>(b) REQUEST FOR DETERMINATION; HOW MADE. Except as provided in subdivision (c), a request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a plan filed in a chapter 12 or chapter 13 case. When the request is made in a chapter 12 or chapter 13 plan, the plan shall be served on the holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by Rule 7004. A request to determine the amount of a claim entitled to priority may be made only by motion after a claim is filed or in a claim objection.</p>	<p>(b) Determining the Amount of a Claim.</p> <p>(1) Secured Claim. Except as provided in (c), a request to determine the amount of a secured claim may be made by motion, in an objection to a claim, or in a plan filed in a Chapter 12 or 13 case. If the request is included in a plan, a copy of the plan must be served on the claim holder and any other entity the court designates as if it were a summons and complaint under Rule 7004.</p> <p>(2) Priority Claim. A request to determine the amount of a priority claim may be made only by motion after the claim is filed or in an objection to the claim.</p>
<p>(c) CLAIMS OF GOVERNMENTAL UNITS. A request to determine the amount of a secured claim of a governmental unit may be made only by motion or in a claim objection after the governmental unit files a proof of claim or after the time for filing one under Rule 3002(c)(1) has expired.</p>	<p>(c) Governmental Unit’s Secured Claim. A request to determine the amount of a governmental unit’s secured claim may be made only by motion—or in an objection to a claim—filed after:</p> <ol style="list-style-type: none"> (1) the governmental unit has filed the proof of claim; or (2) the time to file it under Rule 3002(c)(1) has expired.

Committee Note

The language of Rule 3012 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC found the use of “it” in (c)(B) to be ambiguous and suggested using “the proof of claim.”

Response: Rule 3002(c)(1) deals with the time to file a proof of claim. There is nothing else “it” could be. In addition, the proof of claim is specifically referenced in (c)(A). This is a matter of style and no change was made in response to this suggestion.

ORIGINAL	REVISION
Rule 3013. Classification of Claims and Interests	Rule 3013. Determining Classes of Creditors and Equity Security Holders
For the purposes of the plan and its acceptance, the court may, on motion after hearing on notice as the court may direct, determine classes of creditors and equity security holders pursuant to §§ 1122, 1222(b)(1), and 1322(b)(1) of the Code.	For purposes of a plan and its acceptance, the court may—on motion after hearing on notice as the court directs—determine classes of creditors and equity security holders under §§ 1122, 1222(b)(1), and 1322(b)(1).

Committee Note

The language of Rule 3013 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- The language “on motion after notice and a hearing” was changed to “on motion after hearing on notice as the court directs” and the last sentence was deleted.

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC expressed concern that changing “on motion after hearing on notice as the court may direct” in the existing rule to “after notice and hearing” (with the additional phrase “The notice must be served as the court directs” at the end) is a substantive change, given that Section 102(1) of the Code defines “after notice and a hearing” and that phrase was not used in the existing rule.

Response: The language was returned to that included in the existing rule to avoid any argument that a substantive change was inadvertently made.

ORIGINAL	REVISION
<p>Rule 3014. Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case</p>	<p>Rule 3014. Chapter 9 or 11—Secured Creditors’ Election to Apply § 1111(b)</p>
<p>An election of application of § 1111(b)(2) of the Code by a class of secured creditors in a chapter 9 or 11 case may be made at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix. If the disclosure statement is conditionally approved pursuant to Rule 3017.1, and a final hearing on the disclosure statement is not held, the election of application of § 1111(b)(2) may be made not later than the date fixed pursuant to Rule 3017.1(a)(2) or another date the court may fix. The election shall be in writing and signed unless made at the hearing on the disclosure statement. The election, if made by the majorities required by § 1111(b)(1)(A)(i), shall be binding on all members of the class with respect to the plan.</p>	<p>(a) Time for an Election. In a Chapter 9 or 11 case, before a hearing on the disclosure statement concludes, a class of secured creditors may elect to apply § 1111(b)(2). If the disclosure statement is conditionally approved under Rule 3017.1 and a final hearing on it is not held, the election must be made within the time provided in Rule 3017.1(a)(2). In either situation, the court may set another time for the election.</p> <p>(b) Signed Writing; Binding Effect. The election must be made in writing and signed unless made at the hearing on the disclosure statement. An election made by the majorities required by § 1111(b)(1)(A)(i) is binding on all members of the class.</p>

Committee Note

The language of Rule 3014 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
<p>Rule 3015. Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 or a Chapter 13 Case</p>	<p>Rule 3015. Chapter 12 or 13—Time to File a Plan; Nonstandard Provisions; Objection to Confirmation; Effect of Confirmation; Modifying a Plan</p>
<p>(a) FILING A CHAPTER 12 PLAN. The debtor may file a chapter 12 plan with the petition. If a plan is not filed with the petition, it shall be filed within the time prescribed by § 1221 of the Code.</p>	<p>(a) Time to File a Chapter 12 Plan. The debtor must file a Chapter 12 plan:</p> <ol style="list-style-type: none"> (1) with the petition; or (2) within the time prescribed by § 1221.
<p>(b) FILING A CHAPTER 13 PLAN. The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct. If a case is converted to chapter 13, a plan shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct.</p>	<p>(b) Time to File a Chapter 13 Plan.</p> <ol style="list-style-type: none"> (1) <i>In General.</i> The debtor must file a Chapter 13 plan with the petition or within 14 days after the petition is filed. The time to file may not be extended except for cause and on notice as the court directs. (2) <i>Case Converted to Chapter 13.</i> If a case is converted to Chapter 13, the plan must be filed within 14 days after conversion. The time may not be extended except for cause and on notice as the court directs.
<p>(c) FORM OF CHAPTER 13 PLAN. If there is an Official Form for a plan filed in a chapter 13 case, that form must be used unless a Local Form has been adopted in compliance with Rule 3015.1. With either the Official Form or a Local Form, a nonstandard provision is effective only if it is included in a section of the form designated for nonstandard provisions and is also identified in accordance with any other requirements of the form. As used in this rule and the Official Form or a Local Form, “nonstandard provision” means a provision not otherwise included in the Official or Local Form or deviating from it.</p>	<p>(c) Form of a Chapter 13 Plan.</p> <ol style="list-style-type: none"> (1) <i>In General.</i> In filing a Chapter 13 plan, the debtor must use Form 113, unless the court has adopted a local form under Rule 3015.1. (2) <i>Nonstandard Provision.</i> With either form, a nonstandard provision is effective only if it is included in the section of the form that is designated for nonstandard provisions and is identified in accordance with any other requirements of the form. A nonstandard provision is one that is not included in the form or deviates from it.

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(d) NOTICE. If the plan is not included with the notice of the hearing on confirmation mailed under Rule 2002, the debtor shall serve the plan on the trustee and all creditors when it is filed with the court.	(d) Serving a Copy of the Plan. If the plan was not included with the notice of a confirmation hearing mailed under Rule 2002, the debtor must serve the plan on the trustee and creditors when it is filed.
(e) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of the plan and any modification thereof filed under subdivision (a) or (b) of this rule.	(e) Copy to the United States Trustee. The clerk must promptly send to the United States trustee a copy of any plan filed under (a) or (b) or any modification of it.
(f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD FAITH IN THE ABSENCE OF AN OBJECTION. An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, at least seven days before the date set for the hearing on confirmation, unless the court orders otherwise. An objection to confirmation is governed by Rule 9014. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.	(f) Objection to Confirmation; Determining Good Faith When No Objection is Filed. (1) <i>Serving an Objection.</i> An entity that objects to confirmation of a plan must file and serve the objection on the debtor, trustee, and any other entity the court designates, and must send a copy to the United States trustee. Unless the court orders otherwise, the objection must be filed, served, and sent at least seven days before the date set for the confirmation hearing. The objection is governed by Rule 9014. (2) <i>When No Objection Is Filed.</i> If no objection is timely filed, the court may, without receiving evidence, determine that the plan has been proposed in good faith and not by any means forbidden by law.
(g) EFFECT OF CONFIRMATION. Upon the confirmation of a chapter 12 or chapter 13 plan: (1) any determination in the plan made under Rule 3012 about the amount of a secured claim is binding on the holder of the claim, even if the holder files a contrary proof of claim or the debtor schedules that claim, and	(g) Effect of Confirmation of a Chapter 12 or 13 Plan on the Amount of a Secured Claim; Terminating the Stay. (1) <i>Secured Claim.</i> When a plan is confirmed, the amount of a secured claim—determined in the plan under Rule 3012—becomes binding on the holder of the claim. That is the effect even if the holder files a contrary proof

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<p>regardless of whether an objection to the claim has been filed; and</p> <p>(2) any request in the plan to terminate the stay imposed by § 362(a), § 1201(a), or § 1301(a) is granted.</p>	<p>of claim, the debtor schedules that claim, or an objection to the claim is filed.</p> <p>(2) <i>Terminating the Stay.</i> When a plan is confirmed, a request in the plan to terminate the stay imposed under § 362(a), § 1201(a), or § 1301(a) is granted.</p>
<p>(h) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan under § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.</p>	<p>(h) Modifying a Plan After It Is Confirmed.</p> <p>(1) <i>Request to Modify a Plan After It Is Confirmed.</i> A request to modify a confirmed plan under § 1229 or § 1329 must identify the proponent and include the proposed modification. Unless the court orders otherwise for creditors not affected by the modification, the clerk or the court's designee must:</p> <p>(A) give the debtor, trustee, and creditors at least 21 days' notice, by mail, of the time to file objections and the date of any hearing;</p> <p>(B) send a copy of the notice to the United States trustee; and</p> <p>(C) include a copy or summary of the modification.</p> <p>(2) <i>Objecting to a Modification.</i> Rule 9014 governs an objection to a proposed modification. An objection must be filed and served on:</p> <ul style="list-style-type: none"> • the debtor; • the trustee; and • any other entity the court designates. <p>A copy must also be sent to the United States trustee.</p>

Committee Note

The language of Rule 3015 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 3015(a) and 3015(b)(1) the word “may” was changed to “must.”
- In 3015(b)(1) the word “may was changed to “must” and the word “it” was changed to “the petition.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

In 3015(b)(1), the NBC noted that the period specified in § 1221 is mandatory, not permissive, and suggested changing “may” to “must.”

Response: Suggestion accepted.

Also in 3012(b)(1), the NBC expressed the view that the use of “it” is ambiguous and suggested replacing the word with “the petition.”

Response: Suggestion accepted.

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<p>Rule 3015.1. Requirements for a Local Form for Plans Filed in a Chapter 13 Case</p>	<p>Rule 3015.1 Requirements for a Local Form for a Chapter 13 Plan</p>
<p>Notwithstanding Rule 9029(a)(1), a district may require that a Local Form for a plan filed in a chapter 13 case be used instead of an Official Form adopted for that purpose if the following conditions are satisfied:</p> <p>(a) a single Local Form is adopted for the district after public notice and an opportunity for public comment;</p> <p>(b) each paragraph is numbered and labeled in boldface type with a heading stating the general subject matter of the paragraph;</p> <p>(c) the Local Form includes an initial paragraph for the debtor to indicate that the plan does or does not:</p> <p>(1) contain any nonstandard provision;</p> <p>(2) limit the amount of a secured claim based on a valuation of the collateral for the claim; or</p> <p>(3) avoid a security interest or lien;</p> <p>(d) the Local Form contains separate paragraphs for:</p> <p>(1) curing any default and maintaining payments on a claim secured by the debtor’s principal residence;</p> <p>(2) paying a domestic-support obligation;</p> <p>(3) paying a claim described in the final paragraph of § 1325(a) of the Bankruptcy Code; and</p> <p>(4) surrendering property that secures a claim with a request that</p>	<p>As an exception to Rule 9029(a)(1), a district may require that a single local form be used for a chapter 13 plan instead of Official Form 113 if it:</p> <p>(a) is adopted for the district after public notice and an opportunity for comment;</p> <p>(b) numbers and labels each paragraph in boldface type with a heading that states its general subject matter;</p> <p>(c) includes an opening paragraph for the debtor to indicate that the plan does or does not:</p> <p>(1) contain a nonstandard provision;</p> <p>(2) limit the amount of a secured claim based on a valuation of the collateral; or</p> <p>(3) avoid a security interest or lien;</p> <p>(d) contains separate paragraphs relating to:</p> <p>(1) curing any default and maintaining payments on a claim secured by the debtor’s principal residence;</p> <p>(2) paying a domestic support obligation;</p> <p>(3) paying a claim described in the final paragraph of § 1325(a); and</p> <p>(4) surrendering property that secures a claim and requesting that the stay under § 362(a) or 1301(a) related to the property be terminated; and</p> <p>(e) contains a final paragraph providing a place for:</p> <p>(1) nonstandard provisions as defined in Rule 3015(c), with a warning</p>

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<p>the stay under §§ 362(a) and 1301(a) be terminated as to the surrendered collateral; and</p> <p>(e) the Local Form contains a final paragraph for:</p> <p>(1) the placement of nonstandard provisions, as defined in Rule 3015(c), along with a statement that any nonstandard provision placed elsewhere in the plan is void; and</p> <p>(2) certification by the debtor’s attorney or by an unrepresented debtor that the plan contains no nonstandard provision other than those set out in the final paragraph.</p>	<p>that any nonstandard provision placed elsewhere in the plan is void; and</p> <p>(2) a certification by the debtor’s attorney, or by an unrepresented debtor, that the plan does not contain any nonstandard provision except as set out in the final paragraph.</p>

Committee Note

The language of Rule 3015.1 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In the introductory paragraph to 3015.1, the word “court” was changed to “district” and the words “in its district” were deleted.
- In 3015(a) the words “for the district” were inserted after “is adopted.”

Summary of Public Comment

• Gold and Hammes, Attorneys (BK-2021-0002-0023) (G&H)

G&H pointed out that existing Rule 3015.1 allows a “district” to require a local form in lieu of Official Form 113 if it is adopted for the district. The restyled rule seems to make this a decision for the “court” which is defined in Rule 9004(1) as the presiding judge. This is a substantive change.

Response: This is a valid comment, and restyled Rule 3015.1 has been amended accordingly.

ORIGINAL	REVISION
Rule 3016. Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case	Rule 3016. Chapter 9 or 11—Plan and Disclosure Statement
(a) IDENTIFICATION OF PLAN. Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it.	(a) In General. In a Chapter 9 or 11 case, every proposed plan or modification must be dated. In a Chapter 11 case, the plan or modification must name the entity or entities proposing or filing it.
(b) DISCLOSURE STATEMENT. In a chapter 9 or 11 case, a disclosure statement under § 1125 of the Code or evidence showing compliance with § 1126(b) shall be filed with the plan or within a time fixed by the court, unless the plan is intended to provide adequate information under § 1125(f)(1). If the plan is intended to provide adequate information under § 1125(f)(1), it shall be so designated and Rule 3017.1 shall apply as if the plan is a disclosure statement.	(b) Filing a Disclosure Statement. (1) <i>In General.</i> In a Chapter 9 or 11 case, unless (2) applies, the disclosure statement required by § 1125 or evidence showing compliance with § 1126(b) must be filed with the plan or at another time set by the court. (2) <i>Providing Information Under § 1125(f)(1).</i> A plan intended to provide adequate information under § 1125(f)(1) must be so designated. Rule 3017.1 then applies as if the plan were a disclosure statement.
(c) INJUNCTION UNDER A PLAN. If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the plan and disclosure statement shall describe in specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined and identify the entities that would be subject to the injunction.	(c) Injunction in a Plan. If the plan provides for an injunction against conduct not otherwise enjoined by the Code, the plan and disclosure statement must: (1) describe in specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined; and (2) identify the entities that would be subject to the injunction.
(d) STANDARD FORM SMALL BUSINESS DISCLOSURE STATEMENT AND PLAN. In a small business case, the court may approve a disclosure statement and may confirm a plan that conform substantially to the appropriate Official Forms or other standard forms approved by the court.	(d) Form of a Disclosure Statement and Plan in a Small Business Case. In a small business case, the court may approve a disclosure statement that substantially conforms to Form 425B and confirm a plan that substantially conforms to Form 425A—or, in either instance, to a standard form approved by the court.

Committee Note

The language of Rule 3016 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 3016(a) the words “or modification” were inserted after “the plan” in the second sentence.

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC noted that the words “or modification” were erroneously omitted from the second sentence in (a).

Response: Suggestion accepted.

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<p>Rule 3017. Court Consideration of Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case</p>	<p>Rule 3017. Chapter 9 or 11—Hearing on a Disclosure Statement and Plan</p>
<p>(a) HEARING ON DISCLOSURE STATEMENT AND OBJECTIONS. Except as provided in Rule 3017.1, after a disclosure statement is filed in accordance with Rule 3016(b), the court shall hold a hearing on at least 28 days' notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider the disclosure statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed and served on the debtor, the trustee, any committee appointed under the Code, and any other entity designated by the court, at any time before the disclosure statement is approved or by an earlier date as the court may fix. In a chapter 11 reorganization case, every notice, plan, disclosure statement, and objection required to be served or mailed pursuant to this subdivision shall be transmitted to the United States trustee within the time provided in this subdivision.</p>	<p>(a) Hearing on a Disclosure Statement; Objections.</p> <p>(1) <i>Notice and Hearing.</i></p> <p>(A) <i>Notice.</i> Except as provided in Rule 3017.1 for a small business case, the court must hold a hearing on a disclosure statement filed under Rule 3016(b) and any objection or modification to it. The hearing must be held on at least 28 days' notice under Rule 2002(b) to:</p> <ul style="list-style-type: none"> • the debtor; • creditors; • equity security holders; and • other parties in interest. <p>(B) <i>Limit on Sending the Plan and Disclosure Statement.</i> A copy of the plan and disclosure statement must be mailed with the notice of a hearing to:</p> <ul style="list-style-type: none"> • the debtor; • any trustee or appointed committee; • the Securities and Exchange Commission; and • any party in interest that, in writing, requests a copy of the disclosure statement or plan. <p>(2) <i>Objecting to a Disclosure Statement.</i> An objection to a disclosure statement must be filed and served before the disclosure statement</p>

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	<p>is approved or by an earlier date the court sets. The objection must be served on:</p> <ul style="list-style-type: none"> • the debtor; • the trustee; • any appointed committee; and • any other entity the court designates. <p>(3) Chapter 11—Copies to the United States Trustee. In a Chapter 11 case, a copy of every item required to be served or mailed under this Rule 3017(a) must also be sent to the United States trustee within the prescribed time.</p>
<p>(b) DETERMINATION ON DISCLOSURE STATEMENT. Following the hearing the court shall determine whether the disclosure statement should be approved.</p>	<p>(b) Court Ruling on the Disclosure Statement. After the hearing, the court must determine whether the disclosure statement should be approved.</p>
<p>(c) DATES FIXED FOR VOTING ON PLAN AND CONFIRMATION. On or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.</p>	<p>(c) Time to Accept or Reject a Plan and for the Confirmation Hearing. At the time or before the disclosure statement is approved, the court:</p> <ol style="list-style-type: none"> (1) must set a deadline for the holders of claims and interests to accept or reject the plan; and (2) may set a date for a confirmation hearing.
<p>(d) TRANSMISSION AND NOTICE TO UNITED STATES TRUSTEE, CREDITORS, AND EQUITY SECURITY HOLDERS. Upon approval of a disclosure statement,—¹ except to the extent that the court orders otherwise with respect to one or more unimpaired classes of creditors or</p>	<p>(d) Hearing on Confirmation.</p> <p>(1) Transmitting the Plan and Related Documents.</p> <p>(A) <i>In General.</i> After the disclosure statement has been approved, the court must order the debtor in possession, the trustee, the plan</p>

¹ So in original. The comma probably should not appear.

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<p>equity security holders—the debtor in possession, trustee, proponent of the plan, or clerk as the court orders shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee,</p> <p>(1) the plan or a court-approved summary of the plan;</p> <p>(2) the disclosure statement approved by the court;</p> <p>(3) notice of the time within which acceptances and rejections of the plan may be filed; and</p> <p>(4) any other information as the court may direct, including any court opinion approving the disclosure statement or a court-approved summary of the opinion.</p> <p>In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders in accordance with Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. If the court opinion is not transmitted or only a summary of the plan is transmitted, the court opinion or the plan shall be provided on request of a party in interest at the plan proponent's expense. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan</p>	<p>proponent, or the clerk to mail the following items to creditors and equity security holders and, in a Chapter 11 case, to send a copy of each to the United States trustee:</p> <p>(i) the court-approved disclosure statement;</p> <p>(ii) the plan or a court-approved summary of it;</p> <p>(iii) a notice of the time to file acceptances and rejections of the plan; and</p> <p>(iv) any other information as the court directs—including any opinion approving the disclosure statement or a court-approved summary of the opinion.</p> <p>(B) <i>Exception.</i> The court may vary the requirements for an unimpaired class of creditors or equity security holders.</p> <p>(2) <i>Time to Object to a Plan; Notice of the Confirmation Hearing.</i> Notice of the time to file an objection to a plan's confirmation and the date of the hearing on confirmation must be mailed to creditors and equity security holders in accordance with Rule 2002(b). A ballot that conforms to Form 314 must also be mailed to creditors and equity security holders who are entitled to vote on the plan. If the court's opinion is not sent (or only a summary of the plan was sent), a party in interest may request a copy of the opinion or plan, which must be provided at the plan proponent's expense.</p> <p>(3) <i>Notice to Unimpaired Classes.</i> If the court orders that the disclosure statement and plan (or the plan</p>

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<p>proponent's expense, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record on the date the order approving the disclosure statement is entered or another date fixed by the court, for cause, after notice and a hearing.</p>	<p>summary) not be mailed to an unimpaired class, a notice that the class has been designated in the plan as unimpaired must be mailed to the class members. The notice must show:</p> <ul style="list-style-type: none"> (A) the name and address of the person from whom the plan (or summary) and the disclosure statement may be obtained at the plan proponent's expense; (B) the time to file an objection to the plan's confirmation; and (C) the date of the confirmation hearing. <p>(4) <i>Definition of "Creditors" and "Equity Security Holders."</i> In this Rule 3017(d), "creditors" and "equity security holders" include record holders of stock, bonds, debentures, notes, and other securities on the date the order approving the disclosure statement is entered—or another date the court sets for cause and after notice and a hearing.</p>
<p>(e) TRANSMISSION TO BENEFICIAL HOLDERS OF SECURITIES. At the hearing held pursuant to subdivision (a) of this rule, the court shall consider the procedures for transmitting the documents and information required by subdivision (d) of this rule to beneficial holders of stock, bonds, debentures, notes, and other securities, determine the adequacy of the procedures, and enter any orders the court deems appropriate.</p>	<p>(e) Procedure for Sending Information to Beneficial Holders of Securities. At the hearing under (a), the court must:</p> <ul style="list-style-type: none"> (1) determine the adequacy of the procedures for sending the documents and information listed in (d)(1) to beneficial holders of stock, bonds, debentures, notes, and other securities; and (2) issue any appropriate orders.
<p>(f) NOTICE AND TRANSMISSION OF DOCUMENTS TO ENTITIES SUBJECT TO AN INJUNCTION UNDER A PLAN. If a plan provides for an injunction against conduct not otherwise enjoined under the Code and</p>	<p>(f) Sending Information to Entities Subject to an Injunction.</p> <p>(1) <i>Timing of the Notice.</i> This Rule 3017(f) applies if, under a plan, an entity that is not a creditor or equity</p>

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<p>an entity that would be subject to the injunction is not a creditor or equity security holder, at the hearing held under Rule 3017(a), the court shall consider procedures for providing the entity with:</p> <p>(1) at least 28 days' notice of the time fixed for filing objections and the hearing on confirmation of the plan containing the information described in Rule 2002(c)(3); and</p> <p>(2) to the extent feasible, a copy of the plan and disclosure statement.</p>	<p>security holder is subject to an injunction against conduct not otherwise enjoined by the Code. At the hearing under (a), the court must consider procedures to provide the entity with at least 28 days' notice of:</p> <p>(A) the time to file an objection; and</p> <p>(B) the date of the confirmation hearing.</p> <p>(2) <i>Contents of the Notice.</i> The notice must:</p> <p>(A) provide the information required by Rule 2002(c)(3); and</p> <p>(B) if feasible, include a copy of the plan and disclosure statement.</p>

Committee Note

The language of Rule 3017 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC interprets the revised 3017(a)(1)(B) as requiring that every chapter 11 disclosure statement be sent to the SEC. But they note that the current rule could be read the same way. They suggest adding language that requires submission to the SEC only if notice is required to the SEC under Rule 2002.

Response: This would be a substantive change.

ORIGINAL	REVISION
Rule 3017.1. Court Consideration of Disclosure Statement in a Small Business Case	Rule 3017.1. Disclosure Statement in a Small Business Case
<p>(a) CONDITIONAL APPROVAL OF DISCLOSURE STATEMENT. In a small business case, the court may, on application of the plan proponent or on its own initiative, conditionally approve a disclosure statement filed in accordance with Rule 3016. On or before conditional approval of the disclosure statement, the court shall:</p> <p>(1) fix a time within which the holders of claims and interests may accept or reject the plan;</p> <p>(2) fix a time for filing objections to the disclosure statement;</p> <p>(3) fix a date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and</p> <p>(4) fix a date for the hearing on confirmation.</p>	<p>(a) Conditionally Approving a Disclosure Statement. In a small business case, the court may, on motion of the plan proponent or on its own, conditionally approve a disclosure statement filed under Rule 3016. On or before doing so, the court must:</p> <p>(1) set the time within which the claim holders and interest holders may accept or reject the plan;</p> <p>(2) set the time to file an objection to the disclosure statement;</p> <p>(3) set the date to hold the hearing on final approval of the disclosure statement if a timely objection is filed; and</p> <p>(4) set a date for the confirmation hearing.</p>
<p>(b) APPLICATION OF RULE 3017. Rule 3017(a), (b), (c), and (e) do not apply to a conditionally approved disclosure statement. Rule 3017(d) applies to a conditionally approved disclosure statement, except that conditional approval is considered approval of the disclosure statement for the purpose of applying Rule 3017(d).</p>	<p>(b) Effect of a Conditional Approval. Rule 3017(a)–(c) and (e) do not apply to a conditionally approved disclosure statement. But conditional approval is considered approval in applying Rule 3017(d).</p>
<p>(c) FINAL APPROVAL.</p> <p>(1) <i>Notice.</i> Notice of the time fixed for filing objections and the hearing to consider final approval of the disclosure statement shall be given in accordance with Rule 2002 and may be combined with notice of the hearing on confirmation of the plan.</p>	<p>(c) Time to File an Objection; Date of a Hearing.</p> <p>(1) <i>Notice.</i> Notice must be given under Rule 2002(b) of the time to file an objection and the date of a hearing to consider final approval of the disclosure statement. The notice may</p>

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<p>(2) <i>Objections.</i> Objections to the disclosure statement shall be filed, transmitted to the United States trustee, and served on the debtor, the trustee, any committee appointed under the Code and any other entity designated by the court at any time before final approval of the disclosure statement or by an earlier date as the court may fix.</p> <p>(3) <i>Hearing.</i> If a timely objection to the disclosure statement is filed, the court shall hold a hearing to consider final approval before or combined with the hearing on confirmation of the plan.</p>	<p>be combined with notice of the confirmation hearing.</p> <p>(2) <i>Time to File an Objection to the Disclosure Statement.</i> An objection to the disclosure statement must be filed before the disclosure statement is finally approved or by an earlier date set by the court. The objection must be served on:</p> <ul style="list-style-type: none"> • the debtor; • the trustee; • any appointed committee; and • any other entity the court designates. <p>A copy must also be sent to the United States trustee.</p> <p>(3) <i>Hearing on an Objection to the Disclosure Statement.</i> If a timely objection to the disclosure statement is filed, the court must hold a hearing on final approval either before or combined with the confirmation hearing.</p>

Committee Note

The language of Rule 3017.1 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In the introductory language to 3017.1(a), the words “Before doing so” have been replaced with “On or before doing so.”
- In 3017.1(a)(3), the phrase “if a timely objection is filed,” was moved from the beginning of the clause to the end after “disclosure statement” and the words “to hold” replaced the word “for” before “the hearing.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC objects to the structure of 3017.1(a)(3), suggesting that the insertion of “if a timely objection is filed” at the beginning of the clause “creates confusion.”

Response: Suggestion accepted. The court does not set the date when the objection is filed but sets the date in advance of any objection.

ORIGINAL	REVISION
<p>Rule 3018. Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case</p>	<p>Rule 3018. Chapter 9 or 11—Accepting or Rejecting a Plan</p>
<p>(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or on another date fixed by the court, for cause, after notice and a hearing. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.</p>	<p>(a) In General.</p> <p>(1) <i>Who May Accept or Reject a Plan.</i> Within the time set by the court under Rule 3017, a claim holder or equity security holder may accept or reject a Chapter 9 or Chapter 11 plan under § 1126.</p> <p>(2) <i>Claim Based on a Security of Record.</i> Subject to (b), an equity security holder or creditor whose claim is based on a security of record may accept or reject a plan only if the equity security holder or creditor is the holder of record:</p> <p>(A) on the date the order approving the disclosure statement is entered; or</p> <p>(B) on another date the court sets after notice and a hearing and for cause.</p> <p>(3) <i>Changing or Withdrawing an Acceptance or Rejection.</i> After notice and a hearing and for cause, the court may permit a creditor or equity security holder to change or withdraw an acceptance or rejection.</p> <p>(4) <i>Temporarily Allowing a Claim or Interest.</i> Even if an objection to a claim or interest has been filed, the court may, after notice and a hearing, temporarily allow a claim or interest in an amount that the court considers proper for voting to accept or reject a plan.</p>
<p>(b) ACCEPTANCES OR REJECTIONS OBTAINED BEFORE PETITION. An equity security holder or creditor whose claim is based on a security of record who accepted or</p>	<p>(b) Treatment of Acceptances or Rejections Obtained Before the Petition Was Filed.</p> <p>(1) <i>Acceptance or Rejection by a Nonholder of Record.</i> An equity security holder or creditor who</p>

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<p>rejected the plan before the commencement of the case shall not be deemed to have accepted or rejected the plan pursuant to § 1126(b) of the Code unless the equity security holder or creditor was the holder of record of the security on the date specified in the solicitation of such acceptance or rejection for the purposes of such solicitation. A holder of a claim or interest who has accepted or rejected a plan before the commencement of the case under the Code shall not be deemed to have accepted or rejected the plan if the court finds after notice and hearing that the plan was not transmitted to substantially all creditors and equity security holders of the same class, that an unreasonably short time was prescribed for such creditors and equity security holders to accept or reject the plan, or that the solicitation was not in compliance with § 1126(b) of the Code.</p>	<p>accepted or rejected a plan before the petition was filed will not be considered to have accepted or rejected the plan under § 1126(b) if the equity security holder or creditor:</p> <ul style="list-style-type: none"> (A) has a claim or interest based on a security of record; and (B) was not the security's holder of record on the date specified in the solicitation of the acceptance or rejection. <p>(2) <i>Defective Solicitations.</i> A holder of a claim or interest who accepted or rejected a plan before the petition was filed will not be considered to have accepted or rejected the plan if the court finds, after notice and a hearing, that:</p> <ul style="list-style-type: none"> (A) the plan was not sent to substantially all creditors and equity security holders of the same class; (B) an unreasonably short time was prescribed for those creditors and equity security holders to accept or reject the plan; or (C) the solicitation did not comply with § 1126(b).
<p>(c) FORM OF ACCEPTANCE OR REJECTION. An acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to the appropriate Official Form. If more than one plan is transmitted pursuant to Rule 3017, an acceptance or rejection may be filed by each creditor or equity security holder for any number of plans transmitted and if acceptances are filed for more than one plan, the creditor or equity security</p>	<p>(c) Form for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed.</p> <ul style="list-style-type: none"> (1) <i>Form.</i> An acceptance or rejection of a plan must: <ul style="list-style-type: none"> (A) be in writing; (B) identify the plan or plans; (C) be signed by the creditor or equity security holder—or an authorized agent; and

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holder may indicate a preference or preferences among the plans so accepted.	(D) conform to Form 314. (2) <i>When More Than One Plan Is Distributed.</i> If more than one plan is transmitted under Rule 3017, a creditor or equity security holder may accept or reject one or more plans and may indicate preferences among the plans accepted.
(d) ACCEPTANCE OR REJECTION BY PARTIALLY SECURED CREDITOR. A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim shall be entitled to accept or reject a plan in both capacities.	(d) Partially Secured Creditor. If a creditor's claim has been allowed in part as a secured claim and in part as an unsecured claim, the creditor may accept or reject a plan in both capacities.

Committee Note

The language of Rule 3018 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
<p>Rule 3019. Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case</p>	<p>Rule 3019. Chapter 9 or 11—Modifying a Plan</p>
<p>(a) MODIFICATION OF PLAN BEFORE CONFIRMATION. In a chapter 9 or chapter 11 case, after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.</p>	<p>(a) Modifying a Plan Before Confirmation. In a Chapter 9 or 11 case, after a plan has been accepted and before confirmation, the plan proponent may file a modification. The modification is considered accepted by any creditor or equity security holder who has accepted it in writing. For others who have not accepted it in writing but have accepted the plan, the modification is considered accepted if, after notice and a hearing, the court finds that it does not adversely change the treatment of their claims or interests. The notice must be served on:</p> <ul style="list-style-type: none"> • the trustee; • any appointed committee; and • any other entity the court designates.
<p>(b) MODIFICATION OF PLAN AFTER CONFIRMATION IN INDIVIDUAL DEBTOR CASE. If the debtor is an individual, a request to modify the plan under § 1127(e) of the Code is governed by Rule 9014. The request shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' notice by mail of the time fixed to file objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee, together with a copy of the proposed modification. Any objection to the proposed modification</p>	<p>(b) Modifying a Plan After Confirmation in an Individual Debtor's Chapter 11 Case.</p> <p>(1) <i>In General.</i> When a plan in an individual debtor's Chapter 11 case has been confirmed, a request to modify it under § 1127(e) is governed by Rule 9014. The request must identify the proponent, and the proposed modification must be filed with it.</p> <p>(2) <i>Time to File an Objection; Service.</i></p> <p>(A) <i>Time.</i> Unless the court orders otherwise for creditors who are not affected by the proposed modification, the clerk—or the court's designee—must give the debtor, trustee, and creditors at least 21 days' notice, by mail, of:</p> <ul style="list-style-type: none"> (i) the time to file an objection; and

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<p>shall be filed and served on the debtor, the proponent of the modification, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee.</p>	<p>(ii) if an objection is filed, the date of a hearing to consider the proposed modification.</p> <p>(B) <i>Service.</i> Any objection must be served on:</p> <ul style="list-style-type: none"> • the debtor; • the entity proposing the modification; • the trustee; and • any other entity the court designates. <p>A copy of the notice, modification, and objection must also be sent to the United States trustee.</p>

Committee Note

The language of Rule 3019 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC first suggested that 3019(a) be divided into four paragraphs, one for each sentence.

Response: Rule 3019(a) deals with modification before confirmation, and Rule 3019(b) deals with modification after confirmation. Creating more paragraphs does not seem desirable.

The NBC also suggests that 3019(b)(1) should revert to the original language “If the debtor is an individual” rather than referring to “a plan in an individual debtor’s Chapter 11 case.” They think the individual referred to could be a natural person or refer to a solo person (as opposed to a joint debtor).

Response: “Individual debtor” is used in the heading of Rule 3019(b) in both the original version and the restyled version. In the Code “individual” is

contrasted with partnership or corporation (see definition of “person” in 11 U.S.C. § 101(41)). The term is never used to in the rules to mean anything other than a living, breathing person. No change was made in response to this suggestion.

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<p>Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or Chapter 11 Reorganization Case</p>	<p>Rule 3020. In a Chapter 11 Case, Depositing Funds Before the Plan is Confirmed; Confirmation in a Chapter 9 or 11 Case</p>
<p>(a) DEPOSIT. In a chapter 11 case, prior to entry of the order confirming the plan, the court may order the deposit with the trustee or debtor in possession of the consideration required by the plan to be distributed on confirmation. Any money deposited shall be kept in a special account established for the exclusive purpose of making the distribution.</p>	<p>(a) Chapter 11—Depositing Funds Before the Plan is Confirmed. Before a plan is confirmed in a Chapter 11 case, the court may order that the consideration required to be distributed upon confirmation be deposited with the trustee or debtor in possession. Any funds deposited must be kept in a special account established for the sole purpose of making the distribution.</p>
<p>(b) OBJECTION TO AND HEARING ON CONFIRMATION IN A CHAPTER 9 OR CHAPTER 11 CASE.</p> <p>(1) <i>Objection.</i> An objection to confirmation of the plan shall be filed and served on the debtor, the trustee, the proponent of the plan, any committee appointed under the Code, and any other entity designated by the court, within a time fixed by the court. Unless the case is a chapter 9 municipality case, a copy of every objection to confirmation shall be transmitted by the objecting party to the United States trustee within the time fixed for filing objections. An objection to confirmation is governed by Rule 9014.</p> <p>(2) <i>Hearing.</i> The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.</p>	<p>(b) Chapter 9 or 11—Objecting to Confirmation; Confirmation Hearing.</p> <p>(1) <i>Objecting to Confirmation.</i> In a Chapter 9 or 11 case, an objection to confirmation is governed by Rule 9014. The objection must be filed and served within the time set by the court and be served on:</p> <ul style="list-style-type: none"> • the debtor; • the trustee; • the plan proponent; • any appointed committee; and • any other entity the court designates. <p>(2) <i>Copy to the United States Trustee.</i> In a Chapter 11 case, the objecting party must send a copy of the objection to the United States trustee within the time set to file an objection.</p> <p>(3) <i>Hearing on the Objection; Procedure If No Objection Is Filed.</i> After notice and a hearing as provided in Rule 2002, the court must rule on confirmation. If no objection is timely filed, the court may, without receiving</p>

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	evidence, determine that the plan was proposed in good faith and not by any means forbidden by law.
<p>(c) ORDER OF CONFIRMATION.</p> <p>(1) The order of confirmation shall conform to the appropriate Official Form. If the plan provides for an injunction against conduct not otherwise enjoined under the Code, the order of confirmation shall (1) describe in reasonable detail all acts enjoined; (2) be specific in its terms regarding the injunction; and (3) identify the entities subject to the injunction.</p> <p>(2) Notice of entry of the order of confirmation shall be mailed promptly to the debtor, the trustee, creditors, equity security holders, other parties in interest, and, if known, to any identified entity subject to an injunction provided for in the plan against conduct not otherwise enjoined under the Code.</p> <p>(3) Except in a chapter 9 municipality case, notice of entry of the order of confirmation shall be transmitted to the United States trustee as provided in Rule 2002(k).</p>	<p>(c) Confirmation Order.</p> <p>(1) <i>Form of the Order; Injunctive Relief.</i> A confirmation order must conform to Form 315. If the plan provides for an injunction against conduct not otherwise enjoined under the Code, the order must:</p> <p>(A) describe the acts enjoined in reasonable detail;</p> <p>(B) be specific in its terms regarding the injunction; and</p> <p>(C) identify the entities subject to the injunction.</p> <p>(2) <i>Notice of Confirmation.</i> Notice of entry of a confirmation order must be promptly mailed to:</p> <ul style="list-style-type: none"> • the debtor; • the trustee; • creditors; • equity security holders; • other parties in interest; and • if known, identified entities subject to an injunction described in (1). <p>(3) <i>Copy to the United States Trustee.</i> In a Chapter 11 case, a copy of the order must be sent to the United States trustee under Rule 2002(k).</p>
<p>(d) RETAINED POWER.</p> <p>Notwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate.</p>	<p>(d) Retained Power to Issue Future Orders Relating to Administration. After a plan is confirmed, the court may continue to issue orders needed to administer the estate.</p>

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(e) STAY OF CONFIRMATION ORDER. An order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.	(e) Staying a Confirmation Order. Unless the court orders otherwise, a confirmation order is stayed for 14 days after its entry.

Committee Note

The language of Rule 3020 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 3020(a) the word “funds” was replaced with “consideration” and the final sentence was changed from “The funds must be kept in a special account and used only to make the distribution” to “Any funds deposited must be kept in a special account established for the sole purpose of making the distribution.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC objects to the change of the word “consideration” in the existing rule to “funds” as “too limiting.” They also suggested changing the last sentence to refer to “any funds deposited” and return to that sentence the language “established for the exclusive purpose.”

- **National Conference of Bankruptcy Judges (BK-2021-0002-0020) (NCBJ)**

The NCBJ objected to the change of the word “consideration” in the existing rule to “funds” because consideration could be in another form. The NCBJ also objected to the deletion of the language “established for the exclusive purpose of making the distribution” from the current rule.

ORIGINAL	REVISION
Rule 3021. Distribution Under Plan	Rule 3021. Distributing Funds Under a Plan
<p>Except as provided in Rule 3020(e), after a plan is confirmed, distribution shall be made to creditors whose claims have been allowed, to interest holders whose interests have not been disallowed, and to indenture trustees who have filed claims under Rule 3003(c)(5) that have been allowed. For purposes of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other equity securities, of record at the time of commencement of distribution, unless a different time is fixed by the plan or the order confirming the plan.</p>	<p>(a) In General. After confirmation and when any stay under Rule 3020(e) expires, payments under the plan must be distributed to:</p> <ul style="list-style-type: none"> • creditors whose claims have been allowed; • interest holders whose interests have not been disallowed; and • indenture trustees whose claims under Rule 3003(c)(5) have been allowed. <p>(b) Definition of “Creditors” and “Interest Holders.” In this Rule 3021:</p> <p>(1) “creditors” includes record holders of bonds, debentures, notes, and other debt securities as of the initial distribution date, unless the plan or confirmation order states a different date; and</p> <p>(2) “interest holders” includes record holders of stock and other equity securities as of the initial distribution date, unless the plan or confirmation order states a different date.</p>

Committee Note

The language of Rule 3021 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
Rule 3022. Final Decree in Chapter 11 Reorganization Case	Rule 3022. Chapter 11—Final Decree
After an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case.	After the estate is fully administered in a Chapter 11 case, the court must, on its own or on a party in interest's motion, enter a final decree closing the case.

Committee Note

The language of Rule 3022 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

Bankruptcy Rules Restyling

4000 Series

Preface

This revision is a restyling of the Federal Rules of Bankruptcy Procedure to provide greater clarity, consistency, and conciseness without changing practice and procedure.

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PART IV—THE DEBTOR: DUTIES AND BENEFITS	PART IV. THE DEBTOR’S DUTIES AND BENEFITS
Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements	Rule 4001. Relief from the Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Using Cash Collateral; Obtaining Credit; Various Agreements
<p>(a) RELIEF FROM STAY; PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY.</p> <p>(1) <i>Motion</i>. A motion for relief from an automatic stay provided by the Code or a motion to prohibit or condition the use, sale, or lease of property pursuant to § 363(e) shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.</p> <p>(2) <i>Ex Parte Relief</i>. Relief from a stay under § 362(a) or a request to prohibit or condition the use, sale, or lease of property pursuant to § 363(e) may be granted without prior notice only if (A) it clearly appears from specific facts shown by affidavit or by a verified motion that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or the attorney for the adverse party can be heard in opposition, and (B) the movant’s attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the</p>	<p>(a) Relief from the Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property.</p> <p>(1) <i>Motion</i>. A motion under § 362(d) for relief from the automatic stay—or a motion under § 363(e) to prohibit or condition the use, sale, or lease of property—must comply with Rule 9014. The motion must be served on:</p> <p>(A) the following, as applicable:</p> <ul style="list-style-type: none"> (i) a committee elected under § 705 or appointed under § 1102; (ii) the committee’s authorized agent; or (iii) the creditors included on the list filed under Rule 1007(d) if the case is a Chapter 9 or Chapter 11 case and no committee of unsecured creditors has been appointed under § 1102; and <p>(B) any other entity the court designates.</p> <p>(2) <i>Relief Without Notice</i>. Relief from a stay under § 362(a)—or a request under § 363(e) to prohibit or condition the use, sale, or lease of property—may be granted without prior notice only if:</p> <p>(A) specific facts—shown by either an affidavit or a verified motion—</p>

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<p>reasons why notice should not be required. The party obtaining relief under this subdivision and § 362(f) or § 363(e) shall immediately give oral notice thereof to the trustee or debtor in possession and to the debtor and forthwith mail or otherwise transmit to such adverse party or parties a copy of the order granting relief. On two days notice to the party who obtained relief from the stay without notice or on shorter notice to that party as the court may prescribe, the adverse party may appear and move reinstatement of the stay or reconsideration of the order prohibiting or conditioning the use, sale, or lease of property. In that event, the court shall proceed expeditiously to hear and determine the motion.</p> <p>(3) <i>Stay of Order.</i> An order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.</p>	<p>clearly demonstrate that the movant will suffer immediate and irreparable injury, loss, or damage before the adverse party or its attorney can be heard in opposition; and</p> <p>(B) the movant’s attorney certifies to the court in writing what efforts, if any, have been made to give notice and why it should not be required.</p> <p>(3) <i>Notice of Relief; Motion for Reinstatement or Reconsideration.</i></p> <p>(A) <i>Notice of Relief.</i> A party who obtains relief under (2) and under § 362(f) or § 363(e) must:</p> <p>(i) immediately give oral notice both to the debtor and to the trustee or the debtor in possession; and</p> <p>(ii) promptly send them a copy of the order granting relief.</p> <p>(B) <i>Motion for Reinstatement or Reconsideration.</i> On 2 days’ notice to the party who obtained relief under (2)—or on shorter notice as the court may order—the adverse party may move to reinstate the stay or reconsider the order prohibiting or conditioning the use, sale, or lease of property. The court must proceed expeditiously to hear and decide the motion.</p> <p>(4) <i>Stay of an Order Granting Relief from the Automatic Stay.</i> Unless the court orders otherwise, an order granting a motion for relief from the automatic stay under (1) is stayed for 14 days after it is entered.</p>

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<p>(b) USE OF CASH COLLATERAL.</p> <p>(1) <i>Motion; Service.</i></p> <p>(A) <i>Motion.</i> A motion for authority to use cash collateral shall be made in accordance with Rule 9014 and shall be accompanied by a proposed form of order.</p> <p>(B) <i>Contents.</i> The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions, including:</p> <p>(i) the name of each entity with an interest in the cash collateral;</p> <p>(ii) the purposes for the use of the cash collateral;</p> <p>(iii) the material terms, including duration, of the use of the cash collateral; and</p> <p>(iv) any liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity's interest is adequately protected.</p> <p>(C) <i>Service.</i> The motion shall be served on: (1) any entity with an interest in the cash collateral; (2) any committee elected under § 705 or appointed under § 1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, the</p>	<p>(b) Using Cash Collateral.</p> <p>(1) <i>Motion; Contents; Service.</i></p> <p>(A) <i>Motion.</i> A motion for authorization to use cash collateral must comply with Rule 9014 and must be accompanied by a proposed form of order.</p> <p>(B) <i>Contents.</i> The motion must consist of—or if the motion exceeds five pages, begin with—a concise statement of the relief requested, no longer than five pages. The statement must list or summarize all material provisions (citing their locations in the relevant documents), including:</p> <p>(i) the name of each entity with an interest in the cash collateral;</p> <p>(ii) how it will be used;</p> <p>(iii) the material terms of its use, including duration; and</p> <p>(iv) all liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral or, if no such protection is proposed, an explanation of how each entity's interest is adequately protected.</p> <p>(C) <i>Service.</i> The motion must be served on:</p> <p>(i) each entity with an interest in the cash collateral;</p> <p>(ii) all those who must be served under (a)(1)(A); and</p> <p>(iii) any other entity the court designates.</p>

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<p>creditors included on the list filed under Rule 1007(d); and (3) any other entity that the court directs.</p> <p>(2) <i>Hearing.</i> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.</p> <p>(3) <i>Notice.</i> Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.</p>	<p>(2) <i>Hearings; Notice.</i></p> <p>(A) <i>Preliminary and Final Hearings.</i> The court may begin a final hearing on the motion no earlier than 14 days after it has been served. If the motion so requests, the court may conduct a preliminary hearing before that 14-day period ends. After a preliminary hearing, the court may authorize using only the cash collateral necessary to avoid immediate and irreparable harm to the estate pending a final hearing.</p> <p>(B) <i>Notice.</i> Notice of a hearing must be given to the parties who must be served with the motion under (1)(C) and to any other entity the court designates.</p>
<p>(c) OBTAINING CREDIT.</p> <p>(1) <i>Motion; Service.</i></p> <p>(A) <i>Motion.</i> A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be accompanied by a copy of the credit agreement and a proposed form of order.</p> <p>(B) <i>Contents.</i> The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the proposed credit agreement and form of order, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. If the proposed credit agreement or form of order</p>	<p>(c) Obtaining Credit.</p> <p>(1) <i>Motion; Contents; Service.</i></p> <p>(A) <i>Motion.</i> A motion for authorization to obtain credit must comply with Rule 9014 and must be accompanied by a copy of the credit agreement and a proposed form of order.</p> <p>(B) <i>Contents.</i> The motion must consist of—or if the motion exceeds five pages, begin with—a concise statement of the relief requested, no longer than five pages. The statement must list or summarize all material provisions of the credit agreement and form of order (citing their locations in the relevant documents), including interest rates, maturity dates, default provisions, liens, and borrowing</p>

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<p>includes any of the provisions listed below, the concise statement shall also: briefly list or summarize each one; identify its specific location in the proposed agreement and form of order; and identify any such provision that is proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Rule 4001(c)(2). In addition, the motion shall describe the nature and extent of each provision listed below:</p> <p style="padding-left: 40px;">(i) a grant of priority or a lien on property of the estate under § 364(c) or (d);</p> <p style="padding-left: 40px;">(ii) the providing of adequate protection or priority for a claim that arose before the commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property of the estate or credit obtained under § 364 to make cash payments on account of the claim;</p> <p style="padding-left: 40px;">(iii) a determination of the validity, enforceability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim;</p> <p style="padding-left: 40px;">(iv) a waiver or modification of Code provisions or applicable rules relating to the automatic stay;</p> <p style="padding-left: 40px;">(v) a waiver or modification of any entity’s authority or right to file a plan, seek an extension of time in which the debtor has the exclusive right to file a plan, request the use of cash collateral under § 363(c), or request authority to obtain credit under § 364;</p>	<p>limits and conditions. If the credit agreement or form of order includes any of the provisions listed below in (i)-(xi), the concise statement must also list or summarize each one, describe its nature and extent, cite its location in the proposed agreement and form of order, and identify any that would remain effective if interim approval were to be granted but final relief denied under (2). The provisions are:</p> <p style="padding-left: 40px;">(i) a grant of priority or a lien on property of the estate under § 364(c) or (d);</p> <p style="padding-left: 40px;">(ii) the providing of adequate protection or priority for a claim that arose before the case commenced—including a lien on property of the estate, or the use of property of the estate or of credit obtained under § 364 to make cash payments on the claim;</p> <p style="padding-left: 40px;">(iii) a determination of the validity, enforceability, priority, or amount of a claim that arose before the case commenced, or of any lien securing the claim;</p> <p style="padding-left: 40px;">(iv) a waiver or modification of Code provisions or applicable rules regarding the automatic stay;</p> <p style="padding-left: 40px;">(v) a waiver or modification of an entity’s right to file a plan, seek to extend the time in which the debtor has the exclusive right to file a plan, request the use of cash collateral under § 363(c), or</p>

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<p>(vi) the establishment of deadlines for filing a plan of reorganization, for approval of a disclosure statement, for a hearing on confirmation, or for entry of a confirmation order;</p> <p>(vii) a waiver or modification of the applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien;</p> <p>(viii) a release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;</p> <p>(ix) the indemnification of any entity;</p> <p>(x) a release, waiver, or limitation of any right under § 506(c); or</p> <p>(xi) the granting of a lien on any claim or cause of action arising under §§ 544,¹ 545, 547, 548, 549, 553(b), 723(a), or 724(a).</p> <p>(C) <i>Service.</i> The motion shall be served on: (1) any committee elected under § 705 or appointed under § 1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity that the court directs.</p> <p>(2) <i>Hearing.</i> The court</p>	<p>request authorization to obtain credit under § 364;</p> <p>(vi) the establishment of deadlines for filing a plan of reorganization, approving a disclosure statement, holding a hearing on confirmation, or entering a confirmation order;</p> <p>(vii) a waiver or modification of the applicability of nonbankruptcy law regarding perfecting or enforcing a lien on property of the estate;</p> <p>(viii) a release, waiver, or limitation on a claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;</p> <p>(ix) the indemnification of any entity;</p> <p>(x) a release, waiver, or limitation of any right under § 506(c); or</p> <p>(xi) the granting of a lien on a claim or cause of action arising under § 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a).</p> <p>(C) <i>Service.</i> The motion must be served on all those who must be served under (a)(1)(A) and any other entity the court designates.</p> <p>(2) <i>Hearings; Notice.</i></p> <p>(A) <i>Preliminary and Final Hearings.</i> The court may begin a final hearing on the motion no earlier than 14 days after it has been served. If the</p>

¹ So in original. Probably should be only one section symbol.

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<p>may commence a final hearing on a motion for authority to obtain credit no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 14-day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.</p> <p>(3) <i>Notice.</i> Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.</p> <p>(4) <i>Inapplicability in a Chapter 13 Case.</i> This subdivision (c) does not apply in a chapter 13 case.</p>	<p>motion so requests, the court may conduct a preliminary hearing before that 14-day period ends. After a preliminary hearing, the court may authorize obtaining credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.</p> <p>(B) <i>Notice.</i> Notice of a hearing must be given to the parties who must be served with the motion under (1)(C) and to any other entity the court designates.</p> <p>(3) <i>Inapplicability in a Chapter 13 Case.</i> This subdivision (c) does not apply in a chapter 13 case.</p>
<p>(d) AGREEMENT RELATING TO RELIEF FROM THE AUTOMATIC STAY, PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY, PROVIDING ADEQUATE PROTECTION, USE OF CASH COLLATERAL, AND OBTAINING CREDIT.</p> <p>(1) <i>Motion; Service.</i></p> <p>(A) <i>Motion.</i> A motion for approval of any of the following shall be accompanied by a copy of the agreement and a proposed form of order:</p> <p>(i) an agreement to provide adequate protection;</p> <p>(ii) an agreement to prohibit or condition the use, sale, or lease of property;</p> <p>(iii) an agreement to modify or terminate the stay provided</p>	<p>(d) Various Agreements: Relief from the Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Providing Adequate Protection; Using Cash Collateral; or Obtaining Credit.</p> <p>(1) <i>Motion; Contents; Service.</i></p> <p>(A) <i>Motion.</i> A motion to approve any of the following must be accompanied by a copy of the agreement and a proposed form of order:</p> <p>(i) an agreement to provide adequate protection;</p> <p>(ii) an agreement to prohibit or condition the use, sale, or lease of property;</p> <p>(iii) an agreement to modify or terminate the stay provided for in § 362;</p>

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<p>for in § 362;</p> <p style="padding-left: 40px;">(iv) an agreement to use cash collateral; or</p> <p style="padding-left: 40px;">(v) an agreement between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property.</p> <p style="padding-left: 40px;">(B) <i>Contents.</i> The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the agreement. In addition, the concise statement shall briefly list or summarize, and identify the specific location of, each provision in the proposed form of order, agreement, or other document of the type listed in subdivision (c)(1)(B). The motion shall also describe the nature and extent of each such provision.</p> <p style="padding-left: 40px;">(C) <i>Service.</i> The motion shall be served on: (1) any committee elected under § 705 or appointed under § 1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity the court directs.</p> <p style="padding-left: 40px;">(2) <i>Objection.</i> Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of</p>	<p style="padding-left: 40px;">(iv) an agreement to use cash collateral; or</p> <p style="padding-left: 40px;">(v) an agreement between the debtor and an entity that has a lien or interest in property of the estate under which the entity consents to creating a lien that is senior or equal to the entity's lien or interest in the property.</p> <p style="padding-left: 20px;">(B) <i>Contents.</i> The motion must consist of—or if the motion exceeds five pages, begin with—a concise statement of the relief requested, no longer than five pages. The statement must:</p> <p style="padding-left: 40px;">(i) list or summarize all the agreement's material provisions (citing their locations in the relevant documents); and</p> <p style="padding-left: 40px;">(ii) briefly list or summarize, cite the location of, and describe the nature and extent of each provision in the proposed form of order, agreement, or other document of the type listed in (c)(1)(B).</p> <p style="padding-left: 20px;">(C) <i>Service.</i> The motion must be served on all those who must be served under (a)(1)(A) and any other entity the court designates.</p> <p style="padding-left: 20px;">(2) <i>Objection.</i> Notice of the motion must be mailed to the parties on whom service of the motion is required and any other entity the court designates. The notice must include the time within which objections may be filed and served on the debtor in possession or trustee. Unless the court sets a different time, any objections must be</p>

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<p>this subdivision and to such other entities as the court may direct. Unless the court fixes a different time, objections may be filed within 14 days of the mailing of the notice.</p> <p>(3) <i>Disposition; Hearing.</i> If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than seven days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.</p> <p>(4) <i>Agreement in Settlement of Motion.</i> The court may direct that the procedures prescribed in paragraphs (1), (2), and (3) of this subdivision shall not apply and the agreement may be approved without further notice if the court determines that a motion made pursuant to subdivisions (a), (b), or (c) of this rule was sufficient to afford reasonable notice of the material provisions of the agreement and opportunity for a hearing.</p>	<p>filed within 14 days after the notice is mailed.</p> <p>(3) <i>Disposition Without a Hearing.</i> If no objection is filed, the court may enter an order approving or disapproving the agreement without holding a hearing.</p> <p>(4) <i>Hearing.</i> If an objection is filed or if the court decides that a hearing is appropriate, the court must hold one after giving at least 7 days' notice to:</p> <ul style="list-style-type: none"> • the objector; • the movant; • the parties who must be served with the motion under (1)(C); and • any other entity the court designates. <p>(5) <i>Agreement to Settle a Motion.</i> The court may decide that a motion made under (a), (b), or (c) was sufficient to give reasonable notice of the agreement's material provisions and an opportunity for a hearing. If so, the court may order that the procedures prescribed in (1)–(4) do not apply and may approve the agreement without further notice.</p>

Committee Note

The language of Rule 4001 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 4001(a)(3)(A)(i) and (d)(2) “debtor-in-possession” was changed to “debtor in possession.”
- In 4001(b)(1)(B), 4001(c)(1)(B), and 4001(d)(1)(B) the word “include” was replaced with “consist of – or if the motion exceeds fives pages, begin with –” and the second sentence was eliminated.

Summary of Public Comment

• National Bankruptcy Conference (BK-2021-0002-0001) (NBC)

The NBC noted that the requirements of 4001(a)(2)(A) for “an affidavit or a verified motion” are “an anomaly in federal practice.” 28 U.S.C. § 1746 allows an unsworn declaration made under penalty of perjury. They suggested a rule change or a comment on the anomaly.

Response: As the NBC acknowledged, this is the language of the current rule so this would be a substantive change.

In 4001(a)(2)(B) the NBC objected to the term “it” as creating ambiguity. They suggested replacing the word with “additional or other notice.”

Response: The use of “it” in the clause clearly refers to notice. No change was made.

In 4001(a)(3)(A)(i) and (d)(2) the NBC suggested eliminating the hyphens in “debtor-in-possession both because it is inconsistent with the Code and the other rules and because it is not a compound modifier.

Response: This is correct. We have taken the view that any term defined in the Code should be used in the rules exactly as so defined. “Debtor in possession” (no hyphens) is defined in § 1101(1) and is used in the restyled rules to date without hyphens.

In 4001(b)(1)(B)(ii)-(iii), the NBC said the use of “it” and “its” ambiguous. They suggested “the cash collateral.”

Response: There is no ambiguity. There is nothing else that “it” or “its” could refer to. This is a matter of style and on style.

In 4001(b)(2)(A), the NBC believes that the phrase “using only the cash collateral necessary to avoid” is ambiguous, and should be changed to “using only that portion of the cash collateral which is necessary to avoid.”

Response: “Only the cash collateral necessary” means only that portion of the total cash collateral that is necessary. There is no ambiguity.

In 4001(b)(1)(B), (c)(1)(B) and (d)(1)(B) the NBC notes that the current rule requires a motion of not more than five pages in length to “consist of” the concise statement. The restyled version states that it must “include a concise statement.” They suggest alternative language if the intent to allow more than a concise statement for motions not more than five pages in length.

Response: This was an unintentional substantive change. The existing rules require a motion of not more than five pages to consist of the concise statement, and we modified those sections to return to that language.

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Rule 4002. Duties of Debtor	Rule 4002. Debtor's Duties
<p>(a) IN GENERAL. In addition to performing other duties prescribed by the Code and rules, the debtor shall:</p> <p>(1) attend and submit to an examination at the times ordered by the court;</p> <p>(2) attend the hearing on a complaint objecting to discharge and testify, if called as a witness;</p> <p>(3) inform the trustee immediately in writing as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal or order if a schedule of property has not yet been filed pursuant to Rule 1007;</p> <p>(4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate; and</p> <p>(5) file a statement of any change of the debtor's address.</p>	<p>(a) In General. In addition to performing other duties that are required by the Code or these rules, the debtor must:</p> <p>(1) attend and submit to an examination when the court orders;</p> <p>(2) attend the hearing on a complaint objecting to discharge and, if called, testify as a witness;</p> <p>(3) if a schedule of property has not yet been filed under Rule 1007, report to the trustee immediately in writing:</p> <p>(A) the location of any real property in which the debtor has an interest; and</p> <p>(B) the name and address of every person holding money or property subject to the debtor's withdrawal or order;</p> <p>(4) cooperate with the trustee in preparing an inventory, examining proofs of claim, and administering the estate; and</p> <p>(5) file a statement of any change in the debtor's address.</p>
<p>(b) INDIVIDUAL DEBTOR'S DUTY TO PROVIDE DOCUMENTATION.</p> <p>(1) <i>Personal Identification.</i> Every individual debtor shall bring to the meeting of creditors under § 341:</p> <p>(A) a picture identification issued by a governmental unit, or other personal identifying information that establishes the debtor's identity; and</p> <p>(B) evidence of social security number(s), or a written statement that such documentation does not exist.</p>	<p>(b) Individual Debtor's Duty to Provide Documents.</p> <p>(1) <i>Personal Identifying Information.</i> An individual debtor must bring to the § 341 meeting of creditors:</p> <p>(A) a government-issued identification containing the debtor's picture, or other personal identifying information that establishes the debtor's identity; and</p> <p>(B) evidence of any social-security number, or a written statement that no such evidence exists.</p>

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<p>(2) <i>Financial Information.</i> Every individual debtor shall bring to the meeting of creditors under § 341, and make available to the trustee, the following documents or copies of them, or provide a written statement that the documentation does not exist or is not in the debtor's possession:</p> <p>(A) evidence of current income such as the most recent payment advice;</p> <p>(B) unless the trustee or the United States trustee instructs otherwise, statements for each of the debtor's depository and investment accounts, including checking, savings, and money market accounts, mutual funds and brokerage accounts for the time period that includes the date of the filing of the petition; and</p> <p>(C) documentation of monthly expenses claimed by the debtor if required by § 707(b)(2)(A) or (B).</p> <p>(3) <i>Tax Return.</i> At least 7 days before the first date set for the meeting of creditors under § 341, the debtor shall provide to the trustee a copy of the debtor's federal income tax return for the most recent tax year ending immediately before the commencement of the case and for which a return was filed, including any attachments, or a transcript of the tax return, or provide a written statement that the documentation does not exist.</p> <p>(4) <i>Tax Returns Provided to Creditors.</i> If a creditor, at least 14 days before the first date set for the meeting of creditors under § 341, requests a copy of the debtor's tax return that is to be provided to the trustee under subdivision (b)(3), the debtor, at least 7 days before the first date set for the</p>	<p>(2) <i>Financial Documents.</i> An individual debtor must bring the following documents (or copies) to the § 341 meeting of creditors and make them available to the trustee—or provide a written statement that they do not exist or are not in the debtor's possession:</p> <p>(A) evidence of current income, such as the most recent payment advice;</p> <p>(B) unless the trustee or the United States trustee instructs otherwise, a statement for each depository or investment account—including a checking, savings, or money-market account, mutual fund or brokerage account—for the period that includes the petition's filing date; and</p> <p>(C) if required by § 707(b)(2)(A) or (B), documents showing claimed monthly expenses.</p> <p>(3) <i>Tax Return to Be Provided to the Trustee.</i> At least 7 days before the first date set for the § 341 meeting of creditors, the debtor must provide the trustee with:</p> <p>(A) a copy of the debtor's federal income-tax return, including any attachments to it, for the most recent tax year ending before the case was commenced and for which the debtor filed a return;</p> <p>(B) a transcript of the return; or</p> <p>(C) a written statement that the documentation does not exist.</p> <p>(4) <i>Tax Return to Be Provided to a Creditor.</i> Upon a creditor's request at least 14 days before the first date set for the § 341 meeting of creditors, the debtor must provide the creditor with the documents to be provided to the trustee under (3).</p>

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<p>meeting of creditors under § 341, shall provide to the requesting creditor a copy of the return, including any attachments, or a transcript of the tax return, or provide a written statement that the documentation does not exist.</p> <p>(5) <i>Confidentiality of Tax Information.</i> The debtor’s obligation to provide tax returns under Rule 4002(b)(3) and (b)(4) is subject to procedures for safeguarding the confidentiality of tax information established by the Director of the Administrative Office of the United States Courts.</p>	<p>The debtor must do so at least 7 days before the meeting.</p> <p>(5) <i>Safeguarding Confidential Tax Information.</i> The debtor’s obligation to provide tax returns under (3) and (4) is subject to procedures established by the Director of the Administrative Office of the United States Courts for safeguarding confidential tax information.</p>

Committee Note

The language of Rule 4002 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 4002(a)(2) the phrase “a hearing” was changed to “the hearing.”
- In 4002(b)(4) the words “tax information specified in (3)” was replaced with “documents to be provided to the trustee under (3).”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC questioned the language of Rule 4002(a)(2) requiring the debtor to “attend a hearing on a complaint objecting to discharge.” They noted that there may be many hearings.

Response: The only difference in the restyled version of the rule from the original is a change from “the hearing” to “a hearing.” The language was changed back to “the hearing” to avoid suggesting that the debtor may choose one hearing to attend and need not attend the others. Any other change would be substantive in nature.

- **National Conference of Bankruptcy Judges (BK-2021-0002-0020) (NCBJ)**

In 4002(b)(4) the NCBJ did not think that the term “tax information specified in (3)” was helpful, and suggested changing the term to “documents specified in (3).”

Response: Comment accepted.

• **National Association of Consumer Bankruptcy Attorneys (BK-2021-0002-0032) (NCBJ)**

In 4002(b)(4), the NACBA detected a substantive change. The existing rule, they stated, requires the debtor to provide tax documents to a creditor that timely requests it only at the time the debtor provides those documents to the trustee, meaning that if the debtor has already provided the documents to the trustee when the creditor makes its request, the debtor does not have to honor the request. The restyled rule required the request to be honored whenever it was made at least 14 days before the first date set for the § 341 meeting.

Response: Without taking any position on the meaning of the existing rule, we have modified the language to use language that closely tracks the existing rule.

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Rule 4003. Exemptions	Rule 4003. Exemptions
<p>(a) CLAIM OF EXEMPTIONS. A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. If the debtor fails to claim exemptions or file the schedule within the time specified in Rule 1007, a dependent of the debtor may file the list within 30 days thereafter.</p>	<p>(a) Claiming an Exemption. A debtor must list the property claimed as exempt under § 522 on Form 106C filed under Rule 1007. If the debtor fails to do so within the time specified in Rule 1007(c), a debtor's dependent may file the list within 30 days after the debtor's time to file expires.</p>
<p>(b) OBJECTING TO A CLAIM OF EXEMPTIONS.</p> <p>(1) Except as provided in paragraphs (2) and (3), a party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension.</p> <p>(2) The trustee may file an objection to a claim of exemption at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption. The trustee shall deliver or mail the objection to the debtor and the debtor's attorney, and to any person filing the list of exempt property and that person's attorney.</p> <p>(3) An objection to a claim of exemption based on § 522(q) shall be filed before the closing of the case. If an exemption is first claimed after a case is reopened, an objection shall be filed before the reopened case is closed.</p> <p>(4) A copy of any objection shall</p>	<p>(b) Objecting to a Claimed Exemption.</p> <p>(1) By a Party in Interest. Except as (2) and (3) provide, a party in interest may file an objection to a claimed exemption within 30 days after the later of:</p> <ul style="list-style-type: none"> • the conclusion of the § 341 meeting of creditors; • the filing of an amendment to the list; or • the filing of a supplemental schedule. <p>On a party in interest's motion filed before the time to object expires, the court may, for cause, extend the time to file an objection.</p> <p>(2) By the Trustee for a Fraudulently Claimed Exemption. If the debtor has fraudulently claimed an exemption, the trustee may file an objection to it within one year after the case is closed. The trustee must deliver or mail the objection to:</p> <ul style="list-style-type: none"> • the debtor; • the debtor's attorney; • the person who filed the list of exempt property; and • that person's attorney.

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<p>be delivered or mailed to the trustee, the debtor and the debtor's attorney, and the person filing the list and that person's attorney.</p>	<p>(3) <i>Objection Based on § 522(q).</i> An objection based on § 522(q) must be filed:</p> <p>(A) before the case is closed; or</p> <p>(B) if an exemption is first claimed after a case has been reopened, before the reopened case is closed.</p> <p>(4) <i>Distributing Copies of the Objection.</i> A copy of any objection, other than one filed by the trustee under (b)(2), must be delivered or mailed to:</p> <ul style="list-style-type: none"> • the trustee; • the debtor; • the debtor's attorney; • the person who filed the list of exempt property; and • that person's attorney.
<p>(c) BURDEN OF PROOF. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.</p>	<p>(c) Burden of Proof. In a hearing under this Rule 4003, the objecting party has the burden of proving that an exemption was not properly claimed. After notice and a hearing, the court must determine the issues presented.</p>
<p>(d) AVOIDANCE BY DEBTOR OF TRANSFERS OF EXEMPT PROPERTY. A proceeding under § 522(f) to avoid a lien or other transfer of property exempt under the Code shall be commenced by motion in the manner provided by Rule 9014, or by serving a chapter 12 or chapter 13 plan on the affected creditors in the manner provided by Rule 7004 for service of a summons and complaint. Notwithstanding the provisions of subdivision (b), a creditor may object to a request under § 522(f) by challenging the validity of the exemption asserted to</p>	<p>(d) Avoiding a Lien or Other Transfer of Exempt Property.</p> <p>(1) <i>Bringing a Proceeding.</i> A proceeding under § 522(f) to avoid a lien or other transfer of exempt property must be commenced by:</p> <p>(A) filing a motion under Rule 9014; or</p> <p>(B) serving a Chapter 12 or 13 plan on the affected creditors as Rule 7004 provides for serving a summons and complaint.</p>

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be impaired by the lien.	<p>(2) <i>Objecting to a Request Under § 522(f).</i> As an exception to (b), a creditor may object to a request under § 522(f) by challenging the validity of the exemption asserted to be impaired by the lien.</p>

Committee Note

The language of Rule 4003 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- The words “to it” have been inserted after the words “file an objection” in 4003(b)(2).
- 4003(d) has been divided into two new subsections, and new subsection (1) has been given the heading “Bringing a Proceeding” and new subsection (2) has been given the heading “Objecting to a Request Under § 522(f).” New subsection (1) now includes a new clause (A) in which the word “by” is replaced with “filing a” and the comma after “Rule 9014” has been replaced with a semicolon. The word “by” is also eliminated at the beginning of new clause (B).

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC suggested modifying the language “file an objection” in the first sentence of 4003(b)(2) to limit the objection to the claimed fraudulent exemption.

Response: Suggestion accepted.

The NBC suggested adding “by the objection” at the end of the final sentence in 4003(c) after “the issues presented” for clarity.

Response: The substance of (c) is dealing with a hearing under Rule 4003, which is a hearing on objections to claimed exemptions. The only issues to be presented would be those raised by objections to the claimed exemptions. No change is necessary.

In 4002(d) the NBC suggested replacing “as Rule 7004 provides” with “in the manner Rule 7004 provides.”

Response: The Advisory Committee sees no difference in the two formulations, and “as Rule 7004 provides” is shorter.

- **National Conference of Bankruptcy Judges (BK-2021-0002-0020) (NCBJ)**

The NCBJ found Rule 4003(d) difficult to read and suggested alternative language.

Response: Although the suggested language was not used, the subsection has been rewritten to be more comprehensible.

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<p>Rule 4004. Grant or Denial of Discharge</p>	<p>Rule 4004. Granting or Denying a Discharge</p>
<p>(a) TIME FOR OBJECTING TO DISCHARGE; NOTICE OF TIME FIXED. In a chapter 7 case, a complaint, or a motion under § 727(a)(8) or (a)(9) of the Code, objecting to the debtor’s discharge shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). In a chapter 11 case, the complaint shall be filed no later than the first date set for the hearing on confirmation. In a chapter 13 case, a motion objecting to the debtor’s discharge under § 1328(f) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). At least 28 days’ notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee’s attorney.</p>	<p>(a) Time to Object to a Discharge; Notice.</p> <p>(1) Chapter 7. In a Chapter 7 case, a complaint—or a motion under § 727(a)(8) or (9)—objecting to a discharge must be filed within 60 days after the first date set for the § 341(a) meeting of creditors.</p> <p>(2) Chapter 11. In a Chapter 11 case, a complaint objecting to a discharge must be filed on or before the first date set for the hearing on confirmation.</p> <p>(3) Chapter 13. In a Chapter 13 case, a motion objecting to a discharge under § 1328(f) must be filed within 60 days after the first date set for the § 341(a) meeting of creditors.</p> <p>(4) Notice to the United States Trustee, the Creditors, and the Trustee. At least 28 days’ notice of the time so fixed must be given to:</p> <ul style="list-style-type: none"> • the United States trustee under Rule 2002(k); • all creditors under Rule 2002(f); • the trustee; and • the trustee’s attorney.
<p>(b) EXTENSION OF TIME.</p> <p>(1) On motion of any party in interest, after notice and hearing, the court may for cause extend the time to object to discharge. Except as provided in subdivision (b)(2), the motion shall be filed before the time has expired.</p> <p>(2) A motion to extend the time to object to discharge may be filed after the time for objection has expired and</p>	<p>(b) Extending the Time to File an Objection.</p> <p>(1) Motion Before the Time Expires. On a party in interest’s motion and after notice and a hearing, the court may, for cause, extend the time to object to a discharge. The motion must be filed before the time has expired.</p> <p>(2) Motion After the Time Has Expired. After the time to object has</p>

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<p>before discharge is granted if (A) the objection is based on facts that, if learned after the discharge, would provide a basis for revocation under § 727(d) of the Code, and (B) the movant did not have knowledge of those facts in time to permit an objection. The motion shall be filed promptly after the movant discovers the facts on which the objection is based.</p>	<p>expired and before a discharge is granted, a party in interest may file a motion to extend the time to object if:</p> <p>(A) the objection is based on facts that, if learned after the discharge is granted, would provide a basis for revocation under § 727(d), and the movant did not know those facts in time to object; and</p> <p>(B) the movant files the motion promptly after learning those facts.</p>
<p>(c) GRANT OF DISCHARGE.</p> <p>(1) In a chapter 7 case, on expiration of the times fixed for objecting to discharge and for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge, except that the court shall not grant the discharge if:</p> <p>(A) the debtor is not an individual;</p> <p>(B) a complaint, or a motion under § 727(a)(8) or (a)(9), objecting to the discharge has been filed and not decided in the debtor’s favor;</p> <p>(C) the debtor has filed a waiver under § 727(a)(10);</p> <p>(D) a motion to dismiss the case under § 707 is pending;</p> <p>(E) a motion to extend the time for filing a complaint objecting to the discharge is pending;</p> <p>(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending;</p> <p>(G) the debtor has not paid in full the filing fee prescribed by</p>	<p>(c) Granting a Discharge.</p> <p>(1) Chapter 7. In a Chapter 7 case, when the times to object to discharge and to file a motion to dismiss the case under Rule 1017(e) expire, the court must promptly grant the discharge—except under these circumstances:</p> <p>(A) the debtor is not an individual;</p> <p>(B) a complaint, or a motion under § 727(a)(8) or (9), objecting to the discharge is pending;</p> <p>(C) the debtor has filed a waiver under § 727(a)(10);</p> <p>(D) a motion is pending to dismiss the case under § 707;</p> <p>(E) a motion is pending to extend the time to file a complaint objecting to the discharge;</p> <p>(F) a motion is pending to extend the time to file a motion to dismiss the case under Rule 1017(e)(1);</p> <p>(G) the debtor has not fully paid the filing fee required by 28 U.S.C. § 1930(a), together with any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is</p>

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<p>28 U.S.C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code, unless the court has waived the fees under 28 U.S.C. § 1930(f);</p> <p>(H) the debtor has not filed with the court a statement of completion of a course concerning personal financial management if required by Rule 1007(b)(7);</p> <p>(I) a motion to delay or postpone discharge under § 727(a)(12) is pending;</p> <p>(J) a motion to enlarge the time to file a reaffirmation agreement under Rule 4008(a) is pending;</p> <p>(K) a presumption is in effect under § 524(m) that a reaffirmation agreement is an undue hardship and the court has not concluded a hearing on the presumption; or</p> <p>(L) a motion is pending to delay discharge because the debtor has not filed with the court all tax documents required to be filed under § 521(f).</p> <p>(2) Notwithstanding Rule 4004(c)(1), on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within that period, the court may defer entry of the order to a date certain.</p> <p>(3) If the debtor is required to file a statement under Rule 1007(b)(8), the court shall not grant a discharge earlier than 30 days after the statement is filed.</p>	<p>payable to the clerk upon commencing a case—unless the court has waived the fees under 28 U.S.C. § 1930(f);</p> <p>(H) the debtor has not filed a statement showing that a course on personal financial management has been completed—if such a statement is required by Rule 1007(b)(7);</p> <p>(I) a motion is pending to delay or postpone a discharge under § 727(a)(12);</p> <p>(J) a motion is pending to extend the time to file a reaffirmation agreement under Rule 4008(a);</p> <p>(K) the court has not concluded a hearing on a presumption—in effect under § 524(m)—that a reaffirmation agreement is an undue hardship; or</p> <p>(L) a motion is pending to delay discharge because the debtor has not filed with the court all tax documents required to be filed under § 521(f).</p> <p>(2) <i>Delay in Entering a Discharge in General.</i> On the debtor’s motion, the court may delay entering a discharge for 30 days and, on a motion made within that time, delay entry to a date certain.</p> <p>(3) <i>Delaying Entry Because of Rule 1007(b)(8).</i> If the debtor is required to file a statement under Rule 1007(b)(8), the court must not grant a discharge until at least 30 days after the statement is filed.</p> <p>(4) <i>Individual Chapter 11 or Chapter 13 Case.</i> In a Chapter 11 case in which the debtor is an individual—or in a Chapter 13 case—the court must not</p>

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(4) In a chapter 11 case in which the debtor is an individual, or a chapter 13 case, the court shall not grant a discharge if the debtor has not filed any statement required by Rule 1007(b)(7).	grant a discharge if the debtor has not filed a statement required by Rule 1007(b)(7).
(d) APPLICABILITY OF RULES IN PART VII AND RULE 9014. An objection to discharge is governed by Part VII of these rules, except that an objection to discharge under §§ 727(a)(8), (a)(9), or 1328(f) is commenced by motion and governed by Rule 9014.	(d) Applying Part VII Rules and Rule 9014. The Part VII rules govern an objection to a discharge, except that Rule 9014 governs an objection to a discharge under § 727(a)(8) or (9) or § 1328(f).
(e) ORDER OF DISCHARGE. An order of discharge shall conform to the appropriate Official Form.	(e) Form of a Discharge Order. A discharge order must conform to the appropriate Official Form.
(f) REGISTRATION IN OTHER DISTRICTS. An order of discharge that has become final may be registered in any other district by filing a certified copy of the order in the office of the clerk of that district. When so registered the order of discharge shall have the same effect as an order of the court of the district where registered.	(f) Registering a Discharge in Another District. A discharge order that becomes final may be registered in another district by filing a certified copy with the clerk of the court for that district. When registered, the order has the same effect as an order of the court where it is registered.
(g) NOTICE OF DISCHARGE. The clerk shall promptly mail a copy of the final order of discharge to those specified in subdivision (a) of this rule.	(g) Notice of a Final Discharge Order. The clerk must promptly mail a copy of the final discharge order to those entities listed in (a)(4).

Committee Note

The language of Rule 4004 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

In the last sentence of 4004(b)(1) the NBC suggests inserting “to object” between “time” and “has expired.”

Response: The only time to which the rule refers is the time to object. The heading of (b)(1) is “Motion Before the Time Expires.” It is clear what time is referred to by the language.

ORIGINAL	REVISION
Rule 4005. Burden of Proof in Objecting to Discharge	Rule 4005. Burden of Proof in Objecting to a Discharge
At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection.	At a trial on a complaint objecting to a discharge, the plaintiff has the burden of proof.

Committee Note

The language of Rule 4005 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
Rule 4006. Notice of No Discharge	Rule 4006. Notice When No Discharge Is Granted
If an order is entered: denying a discharge; revoking a discharge; approving a waiver of discharge; or, in the case of an individual debtor, closing the case without the entry of a discharge, the clerk shall promptly notify all parties in interest in the manner provided by Rule 2002.	The clerk must promptly notify in the manner provided by Rule 2002(f) all parties in interest of an order: (a) denying a discharge; (b) revoking a discharge; (c) approving a waiver of discharge; or (d) closing an individual debtor's case without entering a discharge.

Committee Note

The language of Rule 4006 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
Rule 4007. Determination of Dischargeability of a Debt	Rule 4007. Determining Whether a Debt Is Dischargeable
(a) PERSONS ENTITLED TO FILE COMPLAINT. A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt.	(a) Who May File a Complaint. A debtor or any creditor may file a complaint to determine whether a debt is dischargeable.
(b) TIME FOR COMMENCING PROCEEDING OTHER THAN UNDER § 523(c) OF THE CODE. A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule.	(b) Time to File; No Fee for a Reopened Case. A complaint, except one under § 523(c), may be filed at any time. If a case is reopened to permit filing the complaint, no fee for reopening is required.
(c) TIME FOR FILING COMPLAINT UNDER § 523(c) IN A CHAPTER 7 LIQUIDATION, CHAPTER 11 REORGANIZATION, CHAPTER 12 FAMILY FARMER'S DEBT ADJUSTMENT CASE, OR CHAPTER 13 INDIVIDUAL'S DEBT ADJUSTMENT CASE; NOTICE OF TIME FIXED. Except as otherwise provided in subdivision (d), a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.	(c) Chapter 7, 11, 12, or 13—Time to File a Complaint Under § 523(c); Notice of Time; Extension. Except as (d) provides, a complaint to determine whether a debt is dischargeable under § 523(c) must be filed within 60 days after the first date set for the § 341(a) meeting of creditors. The clerk must give all creditors at least 30 days' notice of the time to file in the manner provided by Rule 2002. On a party in interest's motion filed before the time expires, the court may, after notice and a hearing and for cause, extend the time to file.
(d) TIME FOR FILING COMPLAINT UNDER § 523(a)(6) IN A CHAPTER 13 INDIVIDUAL'S DEBT ADJUSTMENT CASE; NOTICE OF	(d) Chapter 13—Time to File a Complaint Under § 523(a)(6); Notice of Time; Extension. When a debtor files a motion for a discharge under § 1328(b), the court

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<p>TIME FIXED. On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing the time to file a complaint to determine the dischargeability of any debt under § 523(a)(6) and shall give no less than 30 days' notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.</p>	<p>must set the time to file a complaint under § 523(a)(6) to determine whether a debt is dischargeable. The clerk must give all creditors at least 30 days' notice of the time to file in the manner provided by Rule 2002. On a party in interest's motion filed before the time expires, the court may, after notice and a hearing and for cause, extend the time to file.</p>
<p>(e) APPLICABILITY OF RULES IN PART VII. A proceeding commenced by a complaint filed under this rule is governed by Part VII of these rules.</p>	<p>(e) Applying Part VII Rules. The Part VII rules govern a proceeding on a complaint filed under this Rule 4007.</p>

Committee Note

The language of Rule 4007 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- The heading of 4007(b) was modified to add a reference to fees.

Summary of Public Comment

- **National Conference of Bankruptcy Judges (BK-2021-0002-0020) (NCBJ)**

In the heading of Rule 4007(b), the NCBJ suggests adding a reference to filing fees, because the second sentence of that provision deals with filing fees.

Response: Suggestion accepted in modified form.

ORIGINAL	REVISION
Rule 4008. Filing of Reaffirmation Agreement; Statement in Support of Reaffirmation Agreement	Rule 4008. Reaffirmation Agreement and Supporting Statement
(a) FILING OF REAFFIRMATION AGREEMENT. A reaffirmation agreement shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a) of the Code. The reaffirmation agreement shall be accompanied by a cover sheet, prepared as prescribed by the appropriate Official Form. The court may, at any time and in its discretion, enlarge the time to file a reaffirmation agreement.	(a) Time to File; Cover Sheet. A reaffirmation agreement must be filed within 60 days after the first date set for the § 341(a) meeting of creditors. The agreement must have a cover sheet prepared as prescribed by Form 427. At any time, the court may extend the time to file an agreement.
(b) STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT. The debtor’s statement required under § 524(k)(6)(A) of the Code shall be accompanied by a statement of the total income and expenses stated on schedules I and J. If there is a difference between the total income and expenses stated on those schedules and the statement required under § 524(k)(6)(A), the statement required by this subdivision shall include an explanation of the difference.	(b) Supporting Statement. The debtor’s supporting statement required by § 524(k)(6)(A) must be accompanied by a statement of the total income and expenses as shown on Schedules I and J. If the income and expenses shown on the supporting statement differ from those shown on the schedules, the supporting statement must explain the difference.

Committee Note

The language of Rule 4008 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 4008(a) the phrase “the agreement” has been changed to “an agreement.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

In 4008(a) the NBC suggests changing “file the agreement” to “file an agreement” because there may be multiple applicable agreements for which the debtor may request an extension.

Response: Suggestion accepted.

Bankruptcy Rules Restyling

5000 Series

Preface

This revision is a restyling of the Federal Rules of Bankruptcy Procedure to provide greater clarity, consistency, and conciseness without changing practice and procedure.

ORIGINAL	REVISION
PART V—Courts and Clerks	PART V. COURTS AND CLERKS
Rule 5001. Courts and Clerks’ Offices	Rule 5001. Courts and Clerks’ Offices
(a) COURTS ALWAYS OPEN. The courts shall be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules.	(a) Courts Always Open. Bankruptcy courts are considered always open for filing a pleading, motion, or other paper; issuing and returning process; making rules; or entering an order.
(b) TRIALS AND HEARINGS; ORDERS IN CHAMBERS. All trials and hearings shall be conducted in open court and so far as convenient in a regular court room. Except as otherwise provided in 28 U.S.C. § 152(c), all other acts or proceedings may be done or conducted by a judge in chambers and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.	(b) Location for Trials and Hearings; Proceedings in Chambers. Every trial or hearing must be held in open court—in a regular courtroom if convenient. Except as provided in 28 U.S.C. § 152(c), any other act may be performed—or a proceeding held—in chambers anywhere within or outside the district. But unless it is ex parte, a hearing may be held outside the district only if all affected parties consent.
(c) CLERK’S OFFICE. The clerk’s office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays and the legal holidays listed in Rule 9006(a).	(c) Clerk’s Office Hours. A clerk’s office—with the clerk or a deputy in attendance—must be open during business hours on all days except Saturdays, Sundays, and the legal holidays listed in Rule 9006(a)(6).

Committee Note

The language of Rule 5001 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

NBC notes that the current rule and restyled version do not specify where the hearing is “held”. They suggest a revision to state that “a hearing is considered conducted within the district if persons appearing at the hearing are doing so by using methods of communication operated or approved by the court.”

Response: As the NBC notes, this is “likely not within the present remit” (meaning it is a substantive change).

ORIGINAL	REVISION
<p>Rule 5002. Restrictions on Approval of Appointments</p>	<p>Rule 5002. Restrictions on Approving Court Appointments</p>
<p>(a) APPROVAL OF APPOINTMENT OF RELATIVES PROHIBITED. The appointment of an individual as a trustee or examiner pursuant to § 1104 of the Code shall not be approved by the court if the individual is a relative of the bankruptcy judge approving the appointment or the United States trustee in the region in which the case is pending. The employment of an individual as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 shall not be approved by the court if the individual is a relative of the bankruptcy judge approving the employment. The employment of an individual as attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 may be approved by the court if the individual is a relative of the United States trustee in the region in which the case is pending, unless the court finds that the relationship with the United States trustee renders the employment improper under the circumstances of the case. Whenever under this subdivision an individual may not be approved for appointment or employment, the individual's firm, partnership, corporation, or any other form of business association or relationship, and all members, associates and professional employees thereof also may not be approved for appointment or employment.</p>	<p>(a) Appointing or Employing Relatives.</p> <p>(1) <i>Trustee or Examiner.</i> A bankruptcy judge must not approve appointing an individual as a trustee or examiner under § 1104 if the individual is a relative of either the judge or the United States trustee in the region in which the case is pending.</p> <p>(2) <i>Attorney, Accountant, Appraiser, Auctioneer, or Other Professional Person.</i> A bankruptcy judge must not approve employing under § 327, § 1103, or § 1114 an individual as an attorney, accountant, appraiser, auctioneer, or other professional person who is a relative of the judge. The court may approve employing a relative of the United States trustee in the region in which the case is pending unless, under the circumstances in the case, the relationship makes the employment improper.</p> <p>(3) <i>Related Entities and Associates.</i> If an appointment under (1) or an employment under (2) is forbidden, so is appointing or employing:</p> <p>(A) the individual's firm, partnership, corporation, or any other form of business association or relationship; or</p> <p>(B) a member, associate, or professional employee of an entity listed in (A).</p>
<p>(b) JUDICIAL DETERMINATION THAT APPROVAL OF APPOINTMENT OR EMPLOYMENT IS IMPROPER. A bankruptcy judge may not approve the</p>	<p>(b) Other Considerations in Approving Appointments or Employment. A bankruptcy judge must not approve appointing a person as a trustee or examiner under (a)(1), or employing a</p>

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<p>appointment of a person as a trustee or examiner pursuant to § 1104 of the Code or approve the employment of a person as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 of the Code if that person is or has been so connected with such judge or the United States trustee as to render the appointment or employment improper.</p>	<p>person under (a)(2), if the person is, or has been, so connected with the judge or the United States trustee as to make the appointment or employment improper.</p>

Committee Note

The language of Rule 5002 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
Rule 5003. Records Kept By the Clerk	Rule 5003. Records to Be Kept by the Clerk
(a) BANKRUPTCY DOCKETS. The clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case as prescribed by the Director of the Administrative Office of the United States Courts. The entry of a judgment or order in a docket shall show the date the entry is made.	(a) Bankruptcy Docket. The clerk must keep a docket in each case and must: <ol style="list-style-type: none"> (1) enter on the docket each judgment, order, and activity, as prescribed by the Director of the Administrative Office of the United States Courts; and (2) show the date of entry for each judgment or order.
(b) CLAIMS REGISTER. The clerk shall keep in a claims register a list of claims filed in a case when it appears that there will be a distribution to unsecured creditors.	(b) Claims Register. When it appears that there will be a distribution to unsecured creditors, the clerk must keep in a claims register a list of the claims filed in the case.
(c) JUDGMENTS AND ORDERS. The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a correct copy of every final judgment or order affecting title to or lien on real property or for the recovery of money or property, and any other order which the court may direct to be kept. On request of the prevailing party, a correct copy of every judgment or order affecting title to or lien upon real or personal property or for the recovery of money or property shall be kept and indexed with the civil judgments of the district court.	(c) Judgments and Orders. <ol style="list-style-type: none"> (1) <i>In General.</i> In the form and manner prescribed by the Director of the Administrative Office of the United States Courts, the clerk must keep a copy of: <ol style="list-style-type: none"> (A) every final judgment or order affecting title to, or a lien on, real property; (B) every final judgment or order for the recovery of money or property; and (C) any other order the court designates. (2) <i>Indexing with the District Court.</i> On a prevailing party's request, a copy of the following must be kept and indexed with the district court's civil judgments: <ol style="list-style-type: none"> (A) every final judgment or order affecting title to, or a lien on, real or personal property; and

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	(B) every final judgment or order for the recovery of money or property.
<p>(d) INDEX OF CASES; CERTIFICATE OF SEARCH. The clerk shall keep indices of all cases and adversary proceedings as prescribed by the Director of the Administrative Office of the United States Courts. On request, the clerk shall make a search of any index and papers in the clerk's custody and certify whether a case or proceeding has been filed in or transferred to the court or if a discharge has been entered in its records.</p>	<p>(d) Index of Cases; Certificate of Search.</p> <p>(1) <i>Index of Cases.</i> The clerk must keep an index of cases and adversary proceedings in the form and manner prescribed by the Director of the Administrative Office of the United States Courts.</p> <p>(2) <i>Searching the Index; Certificate of Search.</i> On request, the clerk must search the index and papers in the clerk's custody and certify whether:</p> <p>(A) a case or proceeding has been filed in or transferred to the court; or</p> <p>(B) a discharge has been entered.</p>
<p>(e) REGISTER OF MAILING ADDRESSES OF FEDERAL AND STATE GOVERNMENTAL UNITS AND CERTAIN TAXING AUTHORITIES. The United States or the state or territory in which the court is located may file a statement designating its mailing address. The United States, state, territory, or local governmental unit responsible for collecting taxes within the district in which the case is pending may also file a statement designating an address for service of requests under § 505(b) of the Code, and the designation shall describe where further information concerning additional requirements for filing such requests may be found. The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a register that includes the mailing addresses designated under the first sentence of this subdivision, and a</p>	<p>(e) Register of Mailing Addresses of Federal and State Governmental Units and Certain Taxing Authorities.</p> <p>(1) <i>In General.</i> The United States—or a state or a territory where the court is located—may file a statement designating its mailing address. A taxing authority (including a local taxing authority) may also file a statement designating an address for serving requests under § 505(b). The designation must describe where to find further information about additional requirements for serving a request.</p> <p>(2) <i>Register of Mailing Address.</i></p> <p>(A) <i>In General.</i> In the form and manner prescribed by the Director of the Administrative Office of the United States Courts, the clerk must keep a register of the mailing addresses</p>

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<p>separate register of the addresses designated for the service of requests under § 505(b) of the Code. The clerk is not required to include in any single register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory. If more than one address for a department, agency, or instrumentality is included in the register, the clerk shall also include information that would enable a user of the register to determine the circumstances when each address is applicable, and mailing notice to only one applicable address is sufficient to provide effective notice. The clerk shall update the register annually, effective January 2 of each year. The mailing address in the register is conclusively presumed to be a proper address for the governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law.</p>	<p>of the governmental units listed in the first sentence of (1) and a separate register containing the addresses of taxing authorities for serving requests under § 505(b).</p> <p>(B) <i>Number of Entries.</i> The clerk need not include in any register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory. But if more than one mailing address is included, the clerk must also include information that would enable a user to determine when each address is applicable. Mailing to only one applicable address provides effective notice.</p> <p>(C) <i>Keeping the Register Current.</i> The clerk must update the register annually, as of January 2 of each year.</p> <p>(D) <i>Mailing Address Presumed to Be Proper.</i> A mailing address in the register is conclusively presumed to be proper. But a failure to use that address does not invalidate any notice that is otherwise effective under applicable law.</p>
<p>(f) OTHER BOOKS AND RECORDS OF THE CLERK. The clerk shall keep any other books and records required by the Director of the Administrative Office of the United States Courts.</p>	<p>(f) Other Books and Records. The clerk must keep any other books and records required by the Director of the Administrative Office of the United States Courts.</p>

Committee Note

The language of Rule 5003 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 5003(d)(2) two subsections have been created and in the new subsection (A) the words “-- and if so, whether” have been deleted and a semicolon inserted followed by the word “or.”
- In 5003(e)(2)(D) the word “any” has been inserted before the word “notice.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

In 5003(a)(1), the NBC suggests modifying “activity” with “in that case” as in the original rule.

Response: The rule is specifying what is entered on the “docket in each case” and an activity would not be entered if it was not in that case. Those words are unnecessary.

In 5003(e)(2)(D) the NBC suggested retaining the word “any” before “notice” in the penultimate line to make clear that the reference is to a particular notice rather than notice in general.

Response: Suggestion accepted.

- **National Conference of Bankruptcy Judges (BK-2021-0002-0020) (NCBJ)**

In 5003(d)(2) the NCBJ believes the restyling makes a substantive change. It assumes (by using the phrase “and if so”) that, in order for a discharge to be entered, there must have been a case or proceeding filed in or transferred to the court. This is not true. For example an order of discharge may be registered with the district under Rule 4004(f). They recommended returning to the original language of the rule, “or if.”

Response: Suggestion accepted.

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Rule 5004. Disqualification	Rule 5004. Disqualifying a Bankruptcy Judge
(a) DISQUALIFICATION OF JUDGE. A bankruptcy judge shall be governed by 28 U.S.C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstances arises or, if appropriate, shall be disqualified from presiding over the case.	(a) From Presiding Over a Proceeding, Contested Matter, or Case. A bankruptcy judge’s disqualification is governed by 28 U.S.C. § 455. The judge is disqualified from presiding over a proceeding or contested matter in which a disqualifying circumstance arises—and, when appropriate, from presiding over the entire case.
(b) DISQUALIFICATION OF JUDGE FROM ALLOWING COMPENSATION. A bankruptcy judge shall be disqualified from allowing compensation to a person who is a relative of the bankruptcy judge or with whom the judge is so connected as to render it improper for the judge to authorize such compensation.	(b) From Allowing Compensation. The bankruptcy judge is disqualified from allowing compensation to a relative or to a person who is so connected with the judge as to make the judge’s allowing it improper.

Committee Note

The language of Rule 5004 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

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<p>Rule 5005. Filing and Transmittal of Papers</p>	<p>Rule 5005. Filing Papers and Sending Copies to the United States Trustee</p>
<p>(a) FILING.</p> <p>(1) <i>Place of Filing.</i> The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices.</p> <p>(2) <i>Electronic Filing and Signing.</i></p> <p>(A) <i>By a Represented Entity—Generally Required; Exceptions.</i> An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.</p> <p>(B) <i>By an Unrepresented Individual—When Allowed or Required.</i> An individual not represented by an attorney:</p> <p>(i) may file electronically only if allowed by court order or by local rule; and</p> <p>(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.</p>	<p>(a) Filing Papers.</p> <p>(1) <i>With the Clerk.</i> Except as provided in 28 U.S.C. § 1409, the following papers required to be filed by these rules must be filed with the clerk in the district where the case is pending:</p> <ul style="list-style-type: none"> • lists; • schedules; • statements; • proofs of claim or interest; • complaints; • motions; • applications; • objections; and • other required papers. <p>The clerk must not refuse to accept for filing any petition or other paper solely because it is not in the form required by these rules or any local rule or practice.</p> <p>(2) <i>With a Judge of the Court.</i> A judge may personally accept for filing a paper listed in (1). The judge must note on the paper the date of filing and promptly send it to the clerk.</p> <p>(3) <i>Electronic Filing and Signing.</i></p> <p>(A) <i>By a Represented Entity—Generally Required; Exceptions.</i> An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.</p> <p>(B) <i>By an Unrepresented Individual—</i></p>

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<p>(C) <i>Signing</i>. A filing made through a person's electronic filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.</p> <p>(D) <i>Same as a Written Paper</i>. A paper filed electronically is a written paper for purposes of these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.</p>	<p><i>When Allowed or Required</i>. An individual not represented by an attorney:</p> <ul style="list-style-type: none"> (i) may file electronically only if allowed by court order or by local rule; and (ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions. <p>(C) <i>Signing</i>. A filing made through a person's electronic filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.</p> <p>(D) <i>Same as a Written Paper</i>. A paper filed electronically is a written paper for purposes of these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107.</p>
<p>(b) TRANSMITTAL TO THE UNITED STATES TRUSTEE.</p> <p>(1) The complaints, motions, applications, objections and other papers required to be transmitted to the United States trustee by these rules shall be mailed or delivered to an office of the United States trustee, or to another place designated by the United States trustee, in the district where the case under the Code is pending.</p> <p>(2) The entity, other than the clerk, transmitting a paper to the United States trustee shall promptly file as proof of such transmittal a verified statement identifying the paper and stating the date on which it was transmitted to the United States trustee.</p> <p>(3) Nothing in these rules shall</p>	<p>(b) Sending Copies to the United States Trustee. All papers required to be sent to the United States trustee must be mailed or delivered to the office of the United States trustee or other place within the district that the United States trustee designates. An entity, other than the clerk, that sends a paper to the United States trustee must promptly file a verified statement identifying the paper and stating the date it was sent. The clerk need not send a copy of a paper to a United States trustee who requests in writing that it not be sent.</p>

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<p>require the clerk to transmit any paper to the United States trustee if the United States trustee requests in writing that the paper not be transmitted.</p>	
<p>(c) ERROR IN FILING OR TRANSMITTAL. A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. A paper intended to be transmitted to the United States trustee but erroneously delivered to the clerk, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the United States trustee. In the interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery.</p>	<p>(c) When a Paper Is Erroneously Filed or Delivered.</p> <p>(1) <i>Paper Intended for the Clerk.</i> If a paper intended to be filed with the clerk is erroneously delivered to a person listed below, that person must note on it the date of receipt and promptly send it to the clerk:</p> <ul style="list-style-type: none"> • the United States trustee; • the trustee; • the trustee’s attorney; • a bankruptcy judge; • a district judge; • the clerk of the bankruptcy appellate panel; or • the clerk of the district court. <p>(2) <i>Paper Intended for the United States Trustee.</i> If a paper intended for the United States trustee is erroneously delivered to the clerk or to another person listed in (1), the clerk or that person must note on it the date of receipt and promptly send it to the United States trustee.</p> <p>(3) <i>Applicable Filing Date.</i> In the interests of justice, the court may order that the original date of receipt shown on a paper erroneously delivered under (1) or (2) be deemed the date it was filed with the clerk or sent to the United States trustee.</p>

Committee Note

The language of Rule 5005 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 5005(a)(1) last bullet point, the word “required” has been inserted before “papers.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC suggests in the last bullet point of 5005(a)(1) replacing “other papers” with “other required papers” to clarify that the only papers referred to are those required to be filed by the rules.

Response: The original rule refers to “other papers required to be filed by these rules, so “other required papers” seems an appropriate phrase to express that. Suggestion accepted.

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Rule 5006. Certification of Copies of Papers	Rule 5006. Providing Certified Copies
The clerk shall issue a certified copy of the record of any proceeding in a case under the Code or of any paper filed with the clerk on payment of any prescribed fee.	Upon payment of the prescribed fee, the clerk must issue a certified copy of the record of any proceeding or any paper filed with the clerk.

Committee Note

The language of Rule 5006 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
Rule 5007. Record of Proceedings and Transcripts	Rule 5007. Record of Proceedings and Transcripts
(a) FILING OF RECORD OR TRANSCRIPT. The reporter or operator of a recording device shall certify the original notes of testimony, tape recording, or other original record of the proceeding and promptly file them with the clerk. The person preparing any transcript shall promptly file a certified copy.	(a) Filing Original Notes, Tape Recordings, and Other Original Records of a Proceeding; Transcripts. (1) Records. The reporter or operator of a recording device must certify the original notes of testimony, tape recordings, and other original records of a proceeding and must promptly file them with the clerk. (2) Transcripts. A person who prepares a transcript must promptly file a certified copy with the clerk.
(b) TRANSCRIPT FEES. The fees for copies of transcripts shall be charged at rates prescribed by the Judicial Conference of the United States. No fee may be charged for the certified copy filed with the clerk.	(b) Fee for a Transcript. The fee for a copy of a transcript must be charged at the rate prescribed by the Judicial Conference of the United States. No fee may be charged for filing the certified copy.
(c) ADMISSIBILITY OF RECORD IN EVIDENCE. A certified sound recording or a transcript of a proceeding shall be admissible as prima facie evidence to establish the record.	(c) Sound Recording or Transcript as Prima Facie Evidence. In any proceeding, a certified sound recording or a transcript of a proceeding is admissible as prima facie evidence of the record.

Committee Note

The language of Rule 5007 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
<p>Rule 5008. Notice Regarding Presumption of Abuse in Chapter 7 Cases of Individual Debtors</p>	<p>Rule 5008. Chapter 7—Notice That a Presumption of Abuse Has Arisen Under § 707(b)</p>
<p>If a presumption of abuse has arisen under § 707(b) in a chapter 7 case of an individual with primarily consumer debts, the clerk shall within 10 days after the date of the filing of the petition notify creditors of the presumption of abuse in accordance with Rule 2002. If the debtor has not filed a statement indicating whether a presumption of abuse has arisen, the clerk shall within 10 days after the date of the filing of the petition notify creditors that the debtor has not filed the statement and that further notice will be given if a later filed statement indicates that a presumption of abuse has arisen. If a debtor later files a statement indicating that a presumption of abuse has arisen, the clerk shall notify creditors of the presumption of abuse as promptly as practicable.</p>	<p>(a) Notice to Creditors. When a presumption of abuse under § 707(b) arises in a Chapter 7 case of an individual with primarily consumer debts, the clerk must, within 10 days after the petition is filed, so notify the creditors in accordance with Rule 2002.</p> <p>(b) Debtor’s Statement. If the debtor does not file a statement indicating whether a presumption has arisen, the clerk must, within 10 days after the petition is filed, so notify creditors and indicate that further notice will be given if a later-filed statement shows that the presumption has arisen. If the debtor later files such a statement , the clerk must promptly notify the creditors.</p>

Committee Note

The language of Rule 5008 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 5008(a) the reference to “Rule 2002(f)(1)(J)” has been replaced with a reference to “Rule 2002.”

Summary of Public Comment

- **National Conference of Bankruptcy Judges (BK-2021-0002-0020) (NCBJ)**

The NCBJ notes that the reference in (a) to Rule 2002(f)(1)(J) is a phantom reference; there is no such provision. They suggest referring to Rule 2002 generally or Rule 2002(f).

Response: Suggestion accepted.

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<p>Rule 5009. Closing Chapter 7, Chapter 12, Chapter 13, and Chapter 15 Cases; Order Declaring Lien Satisfied</p>	<p>Rule 5009. Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied</p>
<p>(a) CLOSING OF CASES UNDER CHAPTERS 7, 12, AND 13. If in a chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered.</p>	<p>(a) Closing a Chapter 7, 12, or 13 Case. The estate in a Chapter 7, 12, or 13 case is presumed to have been fully administered when:</p> <ol style="list-style-type: none"> (1) the trustee has filed a final report and final account and has certified that the estate has been fully administered; and (2) within 30 days after the filing, no objection to the report has been filed by the United States trustee or a party in interest.
<p>(b) NOTICE OF FAILURE TO FILE RULE 1007(b)(7) STATEMENT. If an individual debtor in a chapter 7 or 13 case is required to file a statement under Rule 1007(b)(7) and fails to do so within 45 days after the first date set for the meeting of creditors under § 341(a) of the Code, the clerk shall promptly notify the debtor that the case will be closed without entry of a discharge unless the required statement is filed within the applicable time limit under Rule 1007(c).</p>	<p>(b) Chapter 7 or 13—Notice of a Failure to File a Statement About Completing a Course on Personal Financial Management. This subdivision (b) applies if an individual debtor in a Chapter 7 or 13 case is required to file a statement under Rule 1007(b) and fails to do so within 45 days after the first date set for the meeting of creditors under § 341(a). The clerk must promptly notify the debtor that the case will be closed without entering a discharge unless the statement is filed within the time prescribed by Rule 1007(c).</p>
<p>(c) CASES UNDER CHAPTER 15. A foreign representative in a proceeding recognized under § 1517 of the Code shall file a final report when the purpose of the representative's appearance in the court is completed. The report shall describe the nature and results of the representative's activities in the court. The foreign representative shall transmit the report to the United States trustee, and give notice of its filing to the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all parties to litigation pending in</p>	<p>(c) Closing a Chapter 15 Case.</p> <ol style="list-style-type: none"> (1) <i>Foreign Representative's Final Report.</i> In a proceeding recognized under § 1517, when the purpose of a foreign representative's appearance is completed, the representative must file a final report describing the nature and results of the representative's activities in the court. (2) <i>Giving Notice of the Report.</i> The representative must send a copy of the report to the United States trustee, give notice of its filing, and file a certificate

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<p>the United States in which the debtor was a party at the time of the filing of the petition, and such other entities as the court may direct. The foreign representative shall file a certificate with the court that notice has been given. If no objection has been filed by the United States trustee or a party in interest within 30 days after the certificate is filed, there shall be a presumption that the case has been fully administered.</p>	<p>with the court indicating that the notice has been given, to:</p> <ul style="list-style-type: none"> (A) the debtor; (B) all persons or bodies authorized to administer the debtor’s foreign proceedings; (C) all parties to litigation pending in the United States in which the debtor was a party when the petition was filed; and (D) any other entity the court designates. <p>(3) <i>Presumption of Full Administration.</i> If the United States trustee or a party in interest does not file an objection within 30 days after the certificate is filed, the case is presumed to have been fully administered.</p>
<p>(d) ORDER DECLARING LIEN SATISFIED. In a chapter 12 or chapter 13 case, if a claim that was secured by property of the estate is subject to a lien under applicable nonbankruptcy law, the debtor may request entry of an order declaring that the secured claim has been satisfied and the lien has been released under the terms of a confirmed plan. The request shall be made by motion and shall be served on the holder of the claim and any other entity the court designates in the manner provided by Rule 7004 for service of a summons and complaint.</p>	<p>(d) Order Declaring a Lien Satisfied. This subdivision (d) applies in a Chapter 12 or 13 case when a claim secured by property of the estate is subject to a lien under applicable nonbankruptcy law. The debtor may move for an order declaring that the secured claim has been satisfied and the lien has been released under the terms of the confirmed plan. The motion must be served—in the manner provided by Rule 7004 for serving a summons and complaint—on the claim holder and any other entity the court designates.</p>

Committee Note

The language of Rule 5009 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 5009(b) and (d) the word “subdivision” replaces the word “rule” before “(b)” and “(d)” respectively.

Summary of Public Comment

- **National Conference of Bankruptcy Judges (BK-2021-0002-0020) (NCBJ)**

The NCBJ objects to the word “closing” in the titles of various parts of rule 5009 because the word “closing” does not appear in the text itself.

Response: The word “closing” is in the current heading of Rule 5009 and 5009(a). No change was made in response to this suggestion.

The NCBJ also suggests that Rule 5009(a) and Rule 5009(c) be rewritten to insert the words “and may be closed” after the words “fully administered.”

Response: This is a substantive change.

The NCBJ also thinks the restyled Rule 5009(b) “does not simplify the paragraph and leads to the awkward “This rule (b)” and suggests the rule should not be restyled.

Response: The word “subdivision” replaces the word “rule” before “(b)” and “(d)” in 5009(b) and (d) respectively. No other change was made in response to this suggestion.

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

As previously mentioned, the NBC objected to the absence of the word “subdivision” before (b) in Rule 5009(b) and (d) in Rule 5009(d).

Response: The word “subdivision” replaces the word “rule” before “(b)” and “(d)” in 5009(b) and (d) respectively.

ORIGINAL	REVISION
Rule 5010. Reopening Cases	Rule 5010. Reopening a Case
A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code. In a chapter 7, 12, or 13 case a trustee shall not be appointed by the United States trustee unless the court determines that a trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.	On the debtor's or another party in interest's motion, the court may, under § 350(b), reopen a case. In a reopened Chapter 7, 12, or 13 case, the United States trustee must not appoint a trustee unless the court determines that one is needed to protect the interests of the creditors and the debtor, or to ensure that the reopened case is efficiently administered.

Committee Note

The language of Rule 5010 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
Rule 5011. Withdrawal and Abstention from Hearing a Proceeding	Rule 5011. Motion to Withdraw a Case or Proceeding or to Abstain from Hearing a Proceeding; Staying a Proceeding
(a) WITHDRAWAL. A motion for withdrawal of a case or proceeding shall be heard by a district judge.	(a) Withdrawing a Case or Proceeding. A motion to withdraw a case or proceeding under 28 U.S.C. § 157(d) must be heard by a district judge.
(b) ABSTENTION FROM HEARING A PROCEEDING. A motion for abstention pursuant to 28 U.S.C. § 1334(c) shall be governed by Rule 9014 and shall be served on the parties to the proceeding.	(b) Abstaining from Hearing a Proceeding. A motion requesting the court to abstain from hearing a proceeding under 28 U.S.C. § 1334(c) is governed by Rule 9014. The motion must be served on all parties to the proceeding.
(c) EFFECT OF FILING OF MOTION FOR WITHDRAWAL OR ABSTENTION. The filing of a motion for withdrawal of a case or proceeding or for abstention pursuant to 28 U.S.C. § 1334(c) shall not stay the administration of the case or any proceeding therein before the bankruptcy judge except that the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the motion. A motion for a stay ordinarily shall be presented first to the bankruptcy judge. A motion for a stay or relief from a stay filed in the district court shall state why it has not been presented to or obtained from the bankruptcy judge. Relief granted by the district judge shall be on such terms and conditions as the judge deems proper.	(c) Staying a Proceeding After a Motion to Withdraw or Abstain. A motion filed under (a) or (b) does not stay proceedings in a case or affect its administration. But a bankruptcy judge may, on proper terms and conditions, stay a proceeding until the motion is decided.
	(d) Motion to Stay a Proceeding. A motion to stay a proceeding must ordinarily be submitted first to the bankruptcy judge. If it—or a motion for relief from a stay—is filed in the district court, the motion must state why it has not been first presented to or obtained from the bankruptcy judge. The district judge may grant relief on terms and conditions the judge considers proper.

Committee Note

The language of Rule 5011 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

In 5011(c) the NBC suggests amending the final clause to read “stay any or all contested matters or proceedings” because there may be more than one matter or proceeding affected by the motion to withdraw or abstain.

Response: The reference to “a proceeding” in the restyled rule does not limit the court to staying only one proceeding. It is consistent with the style of changing plural references to single. Adding “matter or” before “proceeding” would be a substantive change.

ORIGINAL	REVISION
Rule 5012. Agreements Concerning Coordination of Proceedings in Chapter 15 Cases	Rule 5012. Chapter 15—Agreement to Coordinate Proceedings
Approval of an agreement under § 1527(4) of the Code shall be sought by motion. The movant shall attach to the motion a copy of the proposed agreement or protocol and, unless the court directs otherwise, give at least 30 days' notice of any hearing on the motion by transmitting the motion to the United States trustee, and serving it on the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519, all parties to litigation pending in the United States in which the debtor was a party at the time of the filing of the petition, and such other entities as the court may direct.	An agreement to coordinate proceedings under § 1527(4) may be approved on motion with an attached copy of the agreement or protocol. Unless the court orders otherwise, the movant must give at least 30 days' notice of any hearing on the motion by sending a copy to the United States trustee and serving it on: <ul style="list-style-type: none"> • the debtor; • all persons or bodies authorized to administer the debtor's foreign proceedings; • all entities against whom provisional relief is sought under § 1519; • all parties to litigation pending in the United States in which the debtor was a party when the petition was filed; and • any other entity the court designates.

Committee Note

The language of Rule 5012 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- No comments were submitted.

Bankruptcy Rules Restyling

6000 Series

Preface

This revision is a restyling of the Federal Rules of Bankruptcy Procedure to provide greater clarity, consistency, and conciseness without changing practice and procedure.

ORIGINAL	REVISION
PART VI—COLLECTION AND LIQUIDATION OF THE ESTATE	PART VI. COLLECTING AND LIQUIDATING THE ESTATE
Rule 6001. Burden of Proof As to Validity of Postpetition Transfer	Rule 6001. Burden of Proving the Validity of a Postpetition Transfer
Any entity asserting the validity of a transfer under § 549 of the Code shall have the burden of proof.	An entity that asserts the validity of a postpetition transfer under § 549 has the burden of proof.

Committee Note

The language of Rule 6001 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- The heading of Part VI has been modified to remove the words “Property of.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC objects to the removal of nominalizations from the title, and insertion of the reference to “property of” the estate in the new title. They note that the current title replicates the language of subchapter II of chapter 7 of the Code (“Collection, Liquidation, and Distribution of the Estate”). Inserting the reference to property of the estate they view as a substantive change given case law holding, for example, that an avoidance action is not “property of the estate.”

Response: The elimination of nominalizations is a consistent style choice. The reference to “property of” the estate in the title has been removed.

The NBC questioned the insertion of “postpetition” before the word “transfer” in the text, suggesting it makes a substantive change. They ask whether the section applies to prepetition transfers.

Response: Because Rule 6001 has always been titled in a way that indicates it refers only to postpetition transfers, putting that word in the text is not a substantive change.

ORIGINAL	REVISION
Rule 6002. Accounting by Prior Custodian of Property of the Estate	Rule 6002. Custodian’s Report to the United States Trustee
(a) ACCOUNTING REQUIRED. Any custodian required by the Code to deliver property in the custodian’s possession or control to the trustee shall promptly file and transmit to the United States trustee a report and account with respect to the property of the estate and the administration thereof.	(a) Custodian’s Report and Account. A custodian required by the Code to deliver property to the trustee must promptly file and send to the United States trustee a report and account about the property of the estate and its administration.
(b) EXAMINATION OF ADMINISTRATION. On the filing and transmittal of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, after notice and a hearing, the court shall determine the propriety of the administration, including the reasonableness of all disbursements.	(b) Examining the Administration. After the custodian’s report and account has been filed and the superseded administration has been examined, the court must, after notice and a hearing, determine whether the custodian’s administration has been proper, including whether disbursements have been reasonable.

Committee Note

The language of Rule 6002 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 6002(a), the words “§ 543” was replaced with “the Code.”
- In 6002(b) the words “proper and” were replaced with “proper, including whether.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

NBC suggested that the change in 6002(a) from “required by the Code” to “required by § 543” is substantive and the language should be changed back. A custodian may be required to deliver property under § 362(a) and § 542, for example.

Response: Suggestion accepted.

NBC suggested that the drafting of (b) implies that disbursements are distinct from administration, rather than a part of it. They suggested revised language.

Response: Suggestion accepted.

ORIGINAL	REVISION
<p>Rule 6003. Interim and Final Relief Immediately Following the Commencement of the Case— Applications for Employment; Motions for Use, Sale, or Lease of Property; and Motions for Assumption or Assignment of Executory Contracts</p>	<p>Rule 6003. Delay in Granting Certain Applications and Motions Made Immediately After the Petition Is Filed</p>
<p>Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, issue an order granting the following:</p> <p>(a) an application under Rule 2014;</p> <p>(b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; or</p> <p>(c) a motion to assume or assign an executory contract or unexpired lease in accordance with § 365.</p>	<p>(a) In General. Unless relief is needed to avoid immediate and irreparable harm, the court must not, within 21 days after the petition is filed, grant an application or motion to:</p> <ol style="list-style-type: none"> (1) employ a professional person under Rule 2014; (2) use, sell, or lease property of the estate, including a motion to pay all or a part of a claim that arose before the petition was filed; (3) incur any other obligation regarding the property of the estate; or (4) assume or assign an executory contract or unexpired lease under § 365. <p>(b) Exception. This rule does not apply to a motion under Rule 4001.</p>

Committee Note

The language of Rule 6003 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC suggests a revision to the title by deleting “Made Immediately After the Petition Is Filed.”

Response: That language is a substitute for the reference in the original rule to “Interim and Final Relief Immediately Following the Commencement of the Case.” Without that language it is not clear what motions are covered by Rule 6003. No change was made.

ORIGINAL	REVISION
Rule 6004. Use, Sale, or Lease of Property	Rule 6004. Use, Sale, or Lease of Property
(a) NOTICE OF PROPOSED USE, SALE, OR LEASE OF PROPERTY. Notice of a proposed use, sale, or lease of property, other than cash collateral, not in the ordinary course of business shall be given pursuant to Rule 2002(a)(2), (c)(1), (i), and (k) and, if applicable, in accordance with § 363(b)(2) of the Code.	(a) Notice. (1) <i>In General.</i> Notice of a proposed use, sale, or lease of property that is not in the ordinary course of business must be given: (A) under Rule 2002(a)(2), (c)(1), (i), and (k); and (B) in accordance with § 363(b)(2), if applicable. (2) <i>Exceptions.</i> Notice under (a) is not required if (d) applies or the proposal involves cash collateral only.
(b) OBJECTION TO PROPOSAL. Except as provided in subdivisions (c) and (d) of this rule, an objection to a proposed use, sale, or lease of property shall be filed and served not less than seven days before the date set for the proposed action or within the time fixed by the court. An objection to the proposed use, sale, or lease of property is governed by Rule 9014.	(b) Objection. Except as provided in (c) and (d), an objection to a proposed use, sale, or lease of property must be filed and served at least 7 days before the date set for the proposed action or within the time set by the court. Rule 9014 governs the objection.
(c) SALE FREE AND CLEAR OF LIENS AND OTHER INTERESTS. A motion for authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold. The notice required by subdivision (a) of this rule shall include the date of the hearing on the motion and the time within which objections may be filed and served on the debtor in possession or trustee.	(c) Motion to Sell Property Free and Clear of Liens and Other Interests; Objection. A motion for authority to sell property free and clear of liens or other interests must be made in accordance with Rule 9014 and served on the parties who have the liens or other interests. The notice required by (a) must include: (1) the date of the hearing on the motion; and (2) the time to file and serve an objection on the debtor in possession or trustee.
(d) SALE OF PROPERTY UNDER \$2,500. Notwithstanding subdivision (a) of this rule, when all of the nonexempt	(d) Notice of an Intent to Sell Property Valued at Less Than \$2500; Objection. If all the nonexempt property of the estate

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<p>property of the estate has an aggregate gross value less than \$2,500, it shall be sufficient to give a general notice of intent to sell such property other than in the ordinary course of business to all creditors, indenture trustees, committees appointed or elected pursuant to the Code, the United States trustee and other persons as the court may direct. An objection to any such sale may be filed and served by a party in interest within 14 days of the mailing of the notice, or within the time fixed by the court. An objection is governed by Rule 9014.</p>	<p>—in the aggregate—has a gross value less than \$2500, a notice of an intent to sell the property that is not in the ordinary course of business must be given to:</p> <ul style="list-style-type: none"> • all creditors; • all indenture trustees; • any committees appointed or elected under the Code; • the United States trustee; and • other persons as the court orders. <p>A party in interest may file and serve an objection within 14 days after the notice is mailed or within the time set by the court. Rule 9014 governs the objection.</p>
<p>(e) HEARING. If a timely objection is made pursuant to subdivision (b) or (d) of this rule, the date of the hearing thereon may be set in the notice given pursuant to subdivision (a) of this rule.</p>	<p>(e) Notice of a Hearing on an Objection. The date of a hearing on an objection under (b) or (d) may be set in the notice under (a).</p>
<p>(f) CONDUCT OF SALE NOT IN THE ORDINARY COURSE OF BUSINESS.</p> <p>(1) <i>Public or Private Sale.</i> All sales not in the ordinary course of business may be by private sale or by public auction. Unless it is impracticable, an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot or for the property as a whole if sold in bulk shall be filed on completion of a sale. If the property is sold by an auctioneer, the auctioneer shall file the statement, transmit a copy thereof to the United States trustee, and furnish a copy to the trustee, debtor in possession, or chapter 13 debtor. If the property is not sold by an auctioneer, the trustee, debtor in possession, or chapter 13 debtor shall file the statement and transmit a copy</p>	<p>(f) Conducting a Sale That Is Not in the Ordinary Course of Business.</p> <p>(1) <i>Public Auction or Private Sale.</i></p> <p>(A) <i>Itemized Statement Required.</i> A sale that is not in the ordinary course of business may be made by public auction or private sale. Unless it is impracticable, when the sale is completed, an itemized statement must be filed that shows:</p> <ul style="list-style-type: none"> • the property sold; • the name of each purchaser; and • the consideration received for each item or lot or, if sold in bulk, for the entire property. <p>(B) <i>If by an Auctioneer.</i> If the property is sold by an auctioneer, the auctioneer must file</p>

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<p>thereof to the United States trustee.</p> <p>(2) <i>Execution of Instruments.</i> After a sale in accordance with this rule the debtor, the trustee, or debtor in possession, as the case may be, shall execute any instrument necessary or ordered by the court to effectuate the transfer to the purchaser.</p>	<p>the itemized statement and send a copy to the United States trustee and to either the trustee, debtor in possession, or Chapter 13 debtor.</p> <p>(C) <i>If Not by an Auctioneer.</i> If the property is not sold by an auctioneer, the trustee, debtor in possession, or Chapter 13 debtor must file the itemized statement and send a copy to the United States trustee.</p> <p>(2) <i>Signing the Sale Documents.</i> When a sale is complete, the debtor, trustee, or debtor in possession must sign any document that is necessary or court-ordered to transfer the property to the purchaser.</p>
<p>(g) SALE OF PERSONALLY IDENTIFIABLE INFORMATION.</p> <p>(1) <i>Motion.</i> A motion for authority to sell or lease personally identifiable information under § 363(b)(1)(B) shall include a request for an order directing the United States trustee to appoint a consumer privacy ombudsman under § 332. Rule 9014 governs the motion which shall be served on: any committee elected under § 705 or appointed under § 1102 of the Code, or if the case is a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list of creditors filed under Rule 1007(d); and on such other entities as the court may direct. The motion shall be transmitted to the United States trustee.</p> <p>(2) <i>Appointment.</i> If a consumer privacy ombudsman is appointed under § 332, no later than seven days before the hearing on the motion under § 363(b)(1)(B), the United States trustee shall file a notice of the appointment,</p>	<p>(g) Selling Personally Identifiable Information.</p> <p>(1) <i>Request for a Consumer-Privacy Ombudsman.</i> A motion for authority to sell or lease personally identifiable information under § 363(b)(1)(B) must include a request for an order directing the United States trustee to appoint a consumer-privacy ombudsman under § 332. Rule 9014 governs the motion. It must be sent to the United States trustee and served on:</p> <ul style="list-style-type: none"> • any committee elected under § 705 or appointed under § 1102; • in a Chapter 11 case in which no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and • other entities as the court orders. <p>(2) <i>Notice That an Ombudsman Has Been Appointed.</i> If a consumer-privacy ombudsman is appointed, the United States trustee must give notice of the appointment at least 7 days</p>

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<p>including the name and address of the person appointed. The United States trustee’s notice shall be accompanied by a verified statement of the person appointed setting forth the person’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.</p>	<p>before the hearing on any motion under § 363(b)(1)(B). The notice must give the name and address of the person appointed and include the person’s verified statement that sets forth any connection with:</p> <ul style="list-style-type: none"> • the debtor, creditors, or any other party in interest; • their respective attorneys and accountants; • the United States trustee; and • any person employed in the United States trustee’s office.
<p>(h) STAY OF ORDER AUTHORIZING USE, SALE, OR LEASE OF PROPERTY. An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.</p>	<p>(h) Staying an Order Authorizing the Use, Sale, or Lease of Property. Unless the court orders otherwise, an order authorizing the use, sale, or lease of property (other than cash collateral) is stayed for 14 days after the order is entered.</p>

Committee Note

The language of Rule 6004 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 6004(d) the words “served on” were replaced with “given to.” The word “all” was inserted at the beginning of each of the two following bullet points, and the third bullet point was modified to read “any committees appointed or elected under the Code.”
- In 6004(f)(1)(A) the words “amount paid” have been changed to “consideration received” and the comma in the third bullet point was moved to follow the word “or” rather than the word “lot.”
- In 6004(f)(1)(B) the title has been changed to “If by an Auctioneer” from “If by Auction” and the first clause is changed from “If the property is sold by auction” to “If the property is sold by an auctioneer.” The heading to 6004(f)(1)(C) is changed to “If Not by an Auctioneer” from “If by Private Sale” and the phrase “sold by auction” is replaced by “sold by an auctioneer.”

Summary of Public Comment

• National Bankruptcy Conference (BK-2021-0002-0001) (NBC)

The NBC first made comments on the bullet points in 6004(d). They objected to the omission of the word “all” before “creditors”; they suggested inserting “all” before “indenture trustees” as in restyled Rule 2002(a); and they suggested reverting to the language “any committees appointed or elected pursuant to the Code” rather than referring to § 705 and § 1102 because theoretically a committee could be elected or appointed pursuant to § 105 or § 1181(b), for example.

Response: Suggestion accepted, but changed “pursuant to the Code” to “under the Code.”

Second, they suggested that the comma in 6004(f)(1)(A), last bullet point, be moved.

Response: Suggestion accepted.

Third, in 6004(f)(1)(A) they do not think “price received” (in the existing rule) is the same as “amount paid” and may not include noncash consideration. They suggested “price paid” or “consideration paid” or “consideration given.”

Response: An amount paid for an item is the price that is paid for it, whether cash or noncash. And when the amount is paid for an item, that is the consideration paid (and received). No change was made in response to this suggestion.

Fourth, the NBC believes the restyled version of 6004(f)(1)(B) &(C) is substantively different from the original because having property “sold by an auctioneer” is different from having property “sold by auction.” They note that there may be auctions in which there is no auctioneer (such as one conducted virtually or by a lawyer).

Response: Suggestion accepted.

Fifth, in 6004(f)(2) the NBC questioned how a sale can be “complete” if the applicable transaction documents have not been signed. They also questioned the modification of the references in the existing rule to “execute” and “execution” to “sign” and “signing.” They believe that execution may require more than signing, such as procuring witnesses, attestation, notarization, etc.

Response: The existing rule says “after a sale in accordance with this rule” the debtor will execute all the necessary documents. There is no difference between that and “when a sale is complete.” The rule means that the winning bidder has been selected as provided in the rule.

We have consistently changed “executed” and similar words) to “signed”. See, for example, Rule 3001(b) and (f) and Rule 3003(c)(5).

No change was made in response to these suggestions.

Sixth, in 6004(g) the NBC objected to hyphenation of “consumer-privacy” even if grammatically superior because it deviates from the usage in the Code.

Response: “Consumer-privacy ombudsman” is not defined in the Code, and therefore it is a matter of style on which we defer to the style consultants. No change was made in response to this suggestion

Seventh, in the last sentence of 6004(g)(1), the NBC objected to the use of “it” and suggested replacing it with “the motion.”

Response: There is nothing other than the motion that “it” can refer to. It certainly can’t refer to Rule 9014, the subject of the immediately preceding sentence. No change was made in response to this suggestion.

ORIGINAL	REVISION
Rule 6005. Appraisers and Auctioneers	Rule 6005. Employing an Appraiser or Auctioneer
The order of the court approving the employment of an appraiser or auctioneer shall fix the amount or rate of compensation. No officer or employee of the Judicial Branch of the United States or the United States Department of Justice shall be eligible to act as appraiser or auctioneer. No residence or licensing requirement shall disqualify an appraiser or auctioneer from employment.	A court order approving the employment of an appraiser or auctioneer must set the amount or rate of compensation. An officer or employee of the United States judiciary or United States Department of Justice is not eligible to act as an appraiser or auctioneer. No residence or licensing requirement disqualifies a person from being employed.

Committee Note

The language of Rule 6005 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC suggested adding “as an appraiser or auctioneer” at the end of the last sentence.

Response: Given that the rule is dealing with the employment of appraisers or auctioneers, there is no need for the additional language. No change was made in response to this suggestion.

ORIGINAL	REVISION
Rule 6006. Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease	Rule 6006. Assuming, Rejecting, or Assigning an Executory Contract or Unexpired Lease
(a) PROCEEDING TO ASSUME, REJECT, OR ASSIGN. A proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014.	(a) Procedure in General. A proceeding to assume, reject, or assign an executory contract or unexpired lease—other than as part of a plan—is governed by Rule 9014.
(b) PROCEEDING TO REQUIRE TRUSTEE TO ACT. A proceeding by a party to an executory contract or unexpired lease in a chapter 9 municipality case, chapter 11 reorganization case, chapter 12 family farmer’s debt adjustment case, or chapter 13 individual’s debt adjustment case, to require the trustee, debtor in possession, or debtor to determine whether to assume or reject the contract or lease is governed by Rule 9014.	(b) Requiring a Trustee, Debtor in Possession, or Debtor to Assume or Reject a Contract or Lease. In a Chapter 9, 11, 12, or 13 case, Rule 9014 governs a proceeding by a party to an executory contract or unexpired lease to require the trustee, debtor in possession, or debtor to determine whether to assume or reject the contract or lease.
(c) NOTICE. Notice of a motion made pursuant to subdivision (a) or (b) of this rule shall be given to the other party to the contract or lease, to other parties in interest as the court may direct, and, except in a chapter 9 municipality case, to the United States trustee.	(c) Notice of a Motion. Notice of a motion under (a) or (b) must be given to: <ul style="list-style-type: none"> • the other party to the contract or lease; • other parties in interest as the court orders; and • except in a Chapter 9 case, the United States trustee.
(d) STAY OF ORDER AUTHORIZING ASSIGNMENT. An order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.	(d) Staying an Order Authorizing an Assignment. Unless the court orders otherwise, an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed for 14 days after the order is entered.

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<p>(e) LIMITATIONS. The trustee shall not seek authority to assume or assign multiple executory contracts or unexpired leases in one motion unless:</p> <p>(1) all executory contracts or unexpired leases to be assumed or assigned are between the same parties or are to be assigned to the same assignee;</p> <p>(2) the trustee seeks to assume, but not assign to more than one assignee, unexpired leases of real property; or</p> <p>(3) the court otherwise authorizes the motion to be filed. Subject to subdivision (f), the trustee may join requests for authority to reject multiple executory contracts or unexpired leases in one motion.</p>	<p>(e) Combining in One Motion a Request Involving Multiple Contracts or Leases.</p> <p>(1) <i>Requests to Assume or Assign.</i> The trustee must not seek authority to assume or assign multiple executory contracts or unexpired leases in one omnibus motion unless:</p> <p>(A) they are all between the same parties or are to be assigned to the same assignee;</p> <p>(B) the trustee seeks to assume, but not assign to more than one assignee, unexpired leases of real property; or</p> <p>(C) the court allows the motion to be filed.</p> <p>(2) <i>Requests to Reject.</i> Subject to (f), a trustee may join requests for authority to reject multiple executory contracts or unexpired leases in one omnibus motion.</p>
<p>(f) OMNIBUS MOTIONS. A motion to reject or, if permitted under subdivision (e), a motion to assume or assign multiple executory contracts or unexpired leases that are not between the same parties shall:</p> <p>(1) state in a conspicuous place that parties receiving the omnibus motion should locate their names and their contracts or leases listed in the motion;</p> <p>(2) list parties alphabetically and identify the corresponding contract or lease;</p> <p>(3) specify the terms, including the curing of defaults, for each requested assumption or assignment;</p> <p>(4) specify the terms, including the identity of each assignee and the</p>	<p>(f) Content of an Omnibus Motion. A motion to reject—or, if permitted under (e), a motion to assume or assign—multiple executory contracts or unexpired leases that are not between the same parties must:</p> <p>(1) state in a conspicuous place that the parties’ names and their contracts or leases are listed in the motion;</p> <p>(2) list the parties alphabetically and identify the corresponding contract or lease;</p> <p>(3) specify the terms, including how a default will be cured, for each requested assumption or assignment;</p> <p>(4) specify the terms, including the assignee’s identity and the adequate assurance of future performance by each assignee, for each requested assignment;</p>

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<p>adequate assurance of future performance by each assignee, for each requested assignment;</p> <p>(5) be numbered consecutively with other omnibus motions to assume, assign, or reject executory contracts or unexpired leases; and</p> <p>(6) be limited to no more than 100 executory contracts or unexpired leases.</p>	<p>(5) be numbered consecutively with other omnibus motions to reject, assume, or assign executory contracts or unexpired leases; and</p> <p>(6) be limited to no more than 100 executory contracts or unexpired leases.</p>
<p>(g) FINALITY OF DETERMINATION. The finality of any order respecting an executory contract or unexpired lease included in an omnibus motion shall be determined as though such contract or lease had been the subject of a separate motion.</p>	<p>(g) Determining the Finality of an Order Regarding an Omnibus Motion. The finality of an order regarding any executory contract or unexpired lease included in an omnibus motion must be determined as though the contract or lease were the subject of a separate motion.</p>

Committee Note

The language of Rule 6006 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- The title of 6006(e)(1) was changed to “Requests to Assume or Assign” and the title of 6006(e)(2) was changed to “Requests to Reject.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC expressed the view that the title of 6006(b) is “unduly long and cumbersome” and would prefer a title that reads: “Requiring Assumption or Rejection of a Contract or Lease.”

Response: This is a matter of style rather than substance. We made no change in response to this suggestion.

In 6006(d) the NBC suggested deleting “an” from the title.

Response: This is a matter of style rather than substance. No change was made in response to this suggestion.

In 6006(e)(1)(A) the NBC suggested that the word “they” at the beginning of the clause is unclear and suggests “all of the contracts and leases.”

Response: There is nothing else “they” could refer to other than the contracts and leases. There is no ambiguity. No change was made in response to this suggestion.

The NBC suggested changing the title of 6006(e)(1) to “Assumption or Assignment.”

Response: The title to 6006(e)(1) has been changed to “Requests to Assume or Assign.”

The NBC suggested changing the title of 6006(e)(2) to “Authority to Reject” or “Rejection.” They do not think the substance of the paragraph is an “exception.”

Response: The title to 6006(e)(2) has been changed to “Requests to Reject.”

ORIGINAL	REVISION
<p>Rule 6007. Abandonment or Disposition of Property</p>	<p>Rule 6007. Abandoning or Disposing of Property</p>
<p>(a) NOTICE OF PROPOSED ABANDONMENT OR DISPOSITION; OBJECTIONS; HEARING. Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to 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 the mailing of the notice, 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.</p>	<p>(a) Notice by the Trustee or Debtor in Possession.</p> <p>(1) <i>In General.</i> Unless the court orders otherwise, the trustee or debtor in possession must give notice of a proposed abandonment or disposition of property to:</p> <ul style="list-style-type: none"> • the United States trustee; • all creditors; • all indenture trustees; and • any committees elected under § 705 or appointed under § 1102. <p>(2) <i>Objection.</i> A party in interest may file and serve an objection within 14 days after the notice is mailed or within the time set by the court. If a timely objection is filed, the court must set a hearing on notice to the United States trustee and other entities as the court orders.</p>
<p>(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</p>	<p>(b) Motion by a Party in Interest.</p> <p>(1) <i>Service.</i> A party in interest may file and serve a motion to require the trustee or debtor in possession to abandon property of the estate. Unless the court orders otherwise, the motion (and any notice of the motion) must be served on:</p> <ul style="list-style-type: none"> • the trustee or debtor in possession; • the United States trustee; • all creditors; • all indenture trustees; and • any committees elected under § 705 or appointed under § 1102.

ORIGINAL	REVISION
<p>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.</p>	<p>(2) Objection. A party in interest may file and serve an objection within 14 days after service or within the time set by the court. If a timely objection is filed, the court must set a hearing on notice to the United States trustee and other entities as the court orders.</p> <p>(3) Order. Unless the court orders otherwise, an order granting the motion to abandon property effects the trustee’s or debtor in possession’s abandonment without further notice.</p>
[[c] HEARING]	

Committee Note

The language of Rule 6007 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- The phrase “; Objections” has been deleted from the title to the Rule
- The heading to 6007(a)(1) has been changed from “Notice” to “In General.”
- The word “all” has been inserted at the beginning of the second and third bullet points in 6007(a)(1) and the third and fourth bullet points in 6007(b)(1).
- 6007(b)(3) has been rewritten to put replace the words “if the court grants the motion to abandon property, the order” with the clause “Unless the court orders otherwise, an order granting the motion to abandon property.” The language “—unless the court orders otherwise” at the end has been deleted.

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC suggested deleting “; Objections” from the title. They note that other rules (such as Rule 6004) include procedures governing objections without including it in the title

Response: Suggestion accepted.

The NBC suggested that the title of 6007(a)(1) should be “In General” as in Rule 6004(a)(1).

Response: Suggestion accepted.

With respect to the bullet points in (a)(1) and in (b)(1), the NBC suggested that the word “all” be inserted before “creditors” and “indenture trustees” consistent with other places in the restyled rules.

Response: Suggestion accepted.

In 6007(b)(3) the NBC objected to the use of the em dash as “cumbersome.” They suggested moving the clause “unless the court orders otherwise” to the beginning of (b)(3).

Response: Suggestion accepted.

ORIGINAL	REVISION
Rule 6008. Redemption of Property from Lien or Sale	Rule 6008. Redeeming Property from a Lien or a Sale to Enforce a Lien
On motion by the debtor, trustee, or debtor in possession and after hearing on notice as the court may direct, the court may authorize the redemption of property from a lien or from a sale to enforce a lien in accordance with applicable law.	On motion by the debtor, trustee, or debtor in possession and after a hearing on notice as the court may order, the court may authorize property to be redeemed from a lien or from a sale to enforce a lien under applicable law.

Committee Note

The language of Rule 6008 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- No changes were made after publication and comment.

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC objected to the new title. They suggested conforming to Section 722 of the Code – “Redemption” or “Redemption of Property.”

Response: The new title accurately describes the content of the Rule. No change was made in response to this suggestion.

ORIGINAL	REVISION
Rule 6009. Prosecution and Defense of Proceedings by Trustee or Debtor in Possession	Rule 6009. Right of the Trustee or Debtor in Possession to Prosecute and Defend Proceedings
With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.	With or without court approval, the trustee or debtor in possession may: <ul style="list-style-type: none"> (a) prosecute—or appear in and defend—any pending action or proceeding by or against the debtor; or (b) commence and prosecute in any tribunal an action or proceeding on the estate’s behalf.

Committee Note

The language of Rule 6009 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- The title of the Rule was changed from “Prosecuting and Defending the Debtor’s Interests” to “Right of the Trustee or Debtor in Possession to Prosecute and Defend Proceedings.”
- In 6009(a), the words “prosecute—or” were inserted before the words “appear in” and the words “and defend—” were inserted immediately following the words “appear in.” The word “pending” was inserted before the words “action or proceeding” and the phrase “and act on the debtor’s behalf” were deleted.

Summary of Public Comment

• National Bankruptcy Conference (BK-2021-0002-0001) (NBC)

The NBC objected to the phrase “the debtor’s interests” in the title. The trustee is not acting on behalf of the individual debtor but on behalf of the estate.

Response: For the reasons given by the NBC, and because the term “interests” has a definite meaning in bankruptcy practice, the phrase was deleted.

The NBC also objected to “act on the debtor’s behalf” because they believe it connotes agency with the agent having the power to bind the principal. They do not think the nature of the trustee’s appearance in an action or proceeding has this quality. They suggested deleting this phrase and returning to language more like the original rule.

Response: Suggested accepted.

- **National Conference of Bankruptcy Judges (BK-2021-0002-0020) (NCBJ)**

The NCBJ suggests that 6009(a) is missing the words “before any tribunal” which they think are applicable to all clauses in the existing rule.

Response: Because the existing rule has a comma after the phrase “by or against the debtor,” the words “before any tribunal” do not modify the first half of the existing rule. Nor are they necessary; presumably an action or proceeding by or against the debtor must be in a tribunal. No change was made in response to this suggestion.

ORIGINAL	REVISION
Rule 6010. Proceeding to Avoid Indemnifying Lien or Transfer to Surety	Rule 6010. Avoiding an Indemnifying Lien or a Transfer to a Surety
If a lien voidable under § 547 of the Code has been dissolved by the furnishing of a bond or other obligation and the surety thereon has been indemnified by the transfer of, or the creation of a lien upon, nonexempt property of the debtor, the surety shall be joined as a defendant in any proceeding to avoid the indemnifying transfer or lien. Such proceeding is governed by the rules in Part VII.	This rule applies if a lien voidable under § 547 has been dissolved by furnishing a bond or other obligation and the surety has been indemnified by the transfer of or creation of a lien on the debtor's nonexempt property. The surety must be joined as a defendant in any proceeding to avoid that transfer or lien. The proceeding is governed by the rules in Part VII.

Committee Note

The language of Rule 6010 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- The word “of” was inserted after the word “transfer.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

The NBC suggested inserting the word “of” after the word “transfer” in the first sentence.

Response: Suggestion accepted.

ORIGINAL	REVISION
<p>Rule 6011. Disposal of Patient Records in Health Care Business Case</p>	<p>Rule 6011. Claiming Patient Records Scheduled for Destruction in a Health-Care-Business Case</p>
<p>(a) NOTICE BY PUBLICATION UNDER § 351(1)(A). A notice regarding the claiming or disposing of patient records under § 351(1)(A) shall not identify any patient by name or other identifying information, but shall:</p> <ol style="list-style-type: none"> (1) identify with particularity the health care facility whose patient records the trustee proposes to destroy; (2) state the name, address, telephone number, email address, and website, if any, of a person from whom information about the patient records may be obtained; (3) state how to claim the patient records; and (4) state the date by which patient records must be claimed, and that if they are not so claimed the records will be destroyed. 	<p>(a) Notice by Publication About the Records. A notice by publication about destroying or claiming patient records under § 351(1)(A) must not identify any patient by name or contain other identifying information. The notice must:</p> <ol style="list-style-type: none"> (1) identify with particularity the health-care facility whose patient records the trustee proposes to destroy; (2) state the name, address, telephone number, e-mail address, and website (if any) of the person from whom information about the records may be obtained; (3) state how to claim the records and the final date for doing so; and (4) state that if they are not claimed by that date, they will be destroyed.
<p>(b) NOTICE BY MAIL UNDER § 351(1)(B). Subject to applicable nonbankruptcy law relating to patient privacy, a notice regarding the claiming or disposing of patient records under § 351(1)(B) shall, in addition to including the information in subdivision (a), direct that a patient's family member or other representative who receives the notice inform the patient of the notice. Any notice under this subdivision shall be mailed to the patient and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care, to the Attorney General of the State where the health care facility is located, and to any</p>	<p>(b) Notice by Mail About the Records.</p> <ol style="list-style-type: none"> (1) Required Information. Subject to applicable nonbankruptcy law relating to patient privacy, a notice by mail about destroying or claiming patient records under § 351(1)(B) must: <ol style="list-style-type: none"> (A) include the information described in (a); and (B) direct a family member or other representative who receives the notice to tell the patient about it. (2) Mailing. The notice must be mailed to: <ul style="list-style-type: none"> • the patient;

ORIGINAL	REVISION
insurance company known to have provided health care insurance to the patient.	<ul style="list-style-type: none"> • any family member or other contact person whose name and address have been given to the trustee or debtor for providing information about the patient’s health care; • the Attorney General of the State where the health-care facility is located; and • any insurance company known to have provided health-care insurance to the patient.
(c) PROOF OF COMPLIANCE WITH NOTICE REQUIREMENT. Unless the court orders the trustee to file proof of compliance with § 351(1)(B) under seal, the trustee shall not file, but shall maintain, the proof of compliance for a reasonable time.	(c) Proof of Compliance with Notice Requirements. Unless the court orders the trustee to file a proof of compliance with § 351(1)(B) under seal, the trustee must keep the proof of compliance for a reasonable time but not file it.
(d) REPORT OF DESTRUCTION OF RECORDS. The trustee shall file, no later than 30 days after the destruction of patient records under § 351(3), a report certifying that the unclaimed records have been destroyed and explaining the method used to effect the destruction. The report shall not identify any patient by name or other identifying information.	(d) Report on the Destruction of Unclaimed Records. Within 30 days after a patient’s unclaimed records have been destroyed under § 351(3), the trustee must file a report that certifies the destruction and explains the method used. The report must not identify any patient by name or by other identifying information.

Committee Note

The language of Rule 6011 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Changes Made After Publication and Comment

- In 6011(c) the word “the” was inserted immediately before “proof of compliance” and a comma was deleted after the words “reasonable time.”

Summary of Public Comment

- **National Bankruptcy Conference (BK-2021-0002-0001) (NBC)**

In 6011(a)(4) the NBC objected to use of the word “they” and suggested replacing it with “the records.”

Response: “They” in (a)(4) clearly refers to the “records” in (a)(3). No change was made in response to this suggestion.

In 6011(b)(1)(B) NBC objected to the use of “it.” They suggested replacing the word with “the notice.”

Response: There is nothing else “it” could be other than the notice, which appears six words earlier. No change was made in response to this suggestion.

In 6011(c) the NBC also objected to the use of “it” and suggested replacing the phrase “, but not file it” with a separate sentence reading “The trustee must not file the proof of compliance.”

Response: We have inserted the word “the” before “proof of compliance” the second time that phrase appears, and with that insertion the reference to “it” clearly refers to the proof of compliance.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

1 **Rule 3011. Unclaimed Funds in Chapter 7**
2 **Liquidation, Chapter 12 Family Farmer's**
3 **Debt Adjustment, and Chapter 13**
4 **Individual's Debt Adjustment Cases**

5 (a) The trustee shall file a list of all known names
6 and addresses of the entities and the amounts which they are
7 entitled to be paid from remaining property of the estate that
8 is paid into court pursuant to § 347 of the Code.

9 (b) On the court's website, the clerk must
10 provide searchable access to information about funds
11 deposited under § 347(a). The court may, for cause, limit
12 access to information about funds in a specific case.

Committee Note

Rule 3011 is amended to require the clerk to provide searchable access (as by providing a link to the U.S. Bankruptcy Unclaimed Funds Locator) on the court's website to information about unclaimed funds deposited pursuant to § 347(a). The court may limit access to information about such funds in a specific case for cause, including, for example, if such access risks disclosing the

¹ New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

identity of claimants whose privacy should be protected, or if the information about the unclaimed funds is so old as to be unreliable.

Changes Made After Publication and Comment

The subdivision has been restyled to move the phrase “on the court’s website” to the beginning of the subsection. The phrase “searchable access . . . to the funds” was changed to “searchable access to information about funds.” The phrase “information in the data base for” was changed to “information about funds in.” Conforming changes were made to the Committee Note.

Summary of Public Comment

Daniel J. Isaacs-Smith (BK-BK-2021-0002-0011). Suggested as a “technical change” that the language in (b) that reads “information in the data base for” be replaced with “data about such funds in” and that the accompanying Committee Note be changed accordingly. He notes that the original language “may cause confusion because there is no reference elsewhere in Bankruptcy Rule 3011 (or any other Bankruptcy Rule) to a ‘data base,’ so it is unclear what database is meant.” Even if it were intended to refer to the online database included in the Unclaimed Funds Locator, not all bankruptcy courts participate in the Unclaimed Funds Locator.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF BANKRUPTCY PROCEDURE¹**

- 1 **Rule 8003. Appeal as of Right—How Taken;**
2 **Docketing the Appeal**
- 3 (a) FILING THE NOTICE OF APPEAL.
- 4 * * * * *
- 5 (3) *Contents.* The notice of appeal
6 must:
- 7 (A) conform substantially
8 to the appropriate Official Form;
- 9 (B) be accompanied by
10 the judgment, or the appealable
11 order, or decree, from which the
12 appeal is taken ~~or the part of it, being~~
13 ~~appealed~~; and
- 14 (C) be accompanied by
15 the prescribed fee.

¹ New material is underlined in red; matter to be omitted is lined through.

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16 (4) Merger. The notice of appeal
17 encompasses all orders that, for purposes of
18 appeal, merge into the identified judgment or
19 appealable order or decree. It is not
20 necessary to identify those orders in the
21 notice of appeal.

22 (5) Final Judgment. The notice
23 of appeal encompasses the final judgment,
24 whether or not that judgment is set out in a
25 separate document under Rule 7058, if the
26 notice identifies:

27 (A) an order that
28 adjudicates all remaining claims and
29 the rights and liabilities of all
30 remaining parties; or

31 (B) an order described in
32 Rule 8002(b)(1).

33 (6) Limited Appeal. An appellant
34 may identify only part of a judgment or
35 appealable order or decree by expressly
36 stating that the notice of appeal is so limited.
37 Without such an express statement, specific
38 identifications do not limit the scope of the
39 notice of appeal.

40 (7) Impermissible Ground for
41 Dismissal. An appeal must not be dismissed
42 for failure to properly identify the judgment
43 or appealable order or decree if the notice of
44 appeal was filed after entry of the judgment
45 or appealable order or decree and identifies
46 an order that merged into that judgment or
47 appealable order or decree.

48 ~~(4)~~(8) *Additional Copies. * * * * **

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Committee Note

Subdivision (a) is amended to conform to recent amendments to Fed. R. App. P. 3(c), which clarified that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment or appealable order or decree. These amendments reflect that a notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the appellate court. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus the issues on appeal.

Subdivision (a)(3)(B) is amended in an effort to avoid the misconception that it is necessary or appropriate to identify each and every order of the bankruptcy court that the appellant may wish to challenge on appeal. It requires the attachment of “the judgment—or the appealable order or decree—from which the appeal is taken”—and the phrase “or part thereof” is deleted. In most cases, because of the merger principle, it is appropriate to identify and attach only the judgment or the appealable order or decree from which the appeal as of right is taken.

Subdivision (a)(4) now calls attention to the merger principle. The general merger rule can be stated simply: an appeal from a final judgment or appealable order or decree permits review of all rulings that led up to the judgment, order, or decree. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law. The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that “a decision on the merits

FEDERAL RULES OF BANKRUPTCY PROCEDURE 5

is a ‘final decision’ . . . whether or not there remains for adjudication a request for attorney’s fees attributable to the case.”

Sometimes a party who is aggrieved by a final judgment will make a motion in the bankruptcy court instead of immediately filing a notice of appeal. Rule 8002(b)(1) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that identifies only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the appellate court for review. To reduce the unintended loss of appellate rights in this situation, subdivision (a)(5) is added. This amendment does not alter the requirement of Rule 8002(b)(3) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

Subdivision (a)(6) is added to enable deliberate limitations of the notice of appeal. It allows an appellant to identify only part of a judgment or appealable order or decree by expressly stating that the notice of appeal is so limited. Without such an express statement, however, specific identifications do not limit the scope of the notice of appeal.

On occasion, a party may file a notice of appeal after a judgment or appealable order or decree but identify only a previously nonappealable order that merged into that judgment or appealable order or decree. To deal with this situation, subdivision (a)(7) is added to provide that an appeal must not be dismissed for failure to properly identify the judgment or appealable order or decree if the notice of appeal was filed after entry of the judgment or appealable order or decree and identifies an order that merged into the

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judgment, order, or decree from which the appeal is taken. In this situation, a court should act as if the notice had properly identified the judgment or appealable order or decree. In determining whether a notice of appeal was filed after the entry of judgment, Rule 8002(a)(2) and (b)(2) apply.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

No comments were submitted.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (if known): _____ Chapter you are filing under:

Chapter 7

Chapter 11

Chapter 12

Chapter 13

Check if this is an amended filing

Version 1

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/22

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, “Do you own a car,” the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
<p>1. Your full name</p> <p>Write the name that is on your government-issued picture identification (for example, your driver’s license or passport).</p> <p>Bring your picture identification to your meeting with the trustee.</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Suffix (Sr., Jr., II, III) _____</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Suffix (Sr., Jr., II, III) _____</p>
<p>2. All other names you have used in the last 8 years</p> <p>Include your married or maiden names and any assumed, trade names and <i>doing business as</i> names.</p> <p>Do NOT list the name of any separate legal entity such as a corporation, partnership, or LLC that is not filing this petition.</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Business name (if applicable) _____</p> <p>Business name (if applicable) _____</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Business name (if applicable) _____</p> <p>Business name (if applicable) _____</p>
<p>3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)</p>	<p>XXX – XX – _____</p> <p>OR</p> <p>9 XX – XX – _____</p>	<p>XXX – XX – _____</p> <p>OR</p> <p>9 XX – XX – _____</p>

Debtor 1

First Name Middle Name Last Name

Case number (if known) _____

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
<p>4. Your Employer Identification Number (EIN), if any.</p>	<p>EIN _____</p> <p>EIN _____</p>	<p>EIN _____</p> <p>EIN _____</p>
<p>5. Where you live</p>	<p>Number _____ Street _____</p> <p>_____</p> <p>City _____ State _____ ZIP Code _____</p> <p>County _____</p> <p>If your mailing address is different from the one above, fill it in here. Note that the court will send any notices to you at this mailing address.</p> <p>Number _____ Street _____</p> <p>P.O. Box _____</p> <p>City _____ State _____ ZIP Code _____</p>	<p>If Debtor 2 lives at a different address:</p> <p>Number _____ Street _____</p> <p>_____</p> <p>City _____ State _____ ZIP Code _____</p> <p>County _____</p> <p>If Debtor 2's mailing address is different from yours, fill it in here. Note that the court will send any notices to this mailing address.</p> <p>Number _____ Street _____</p> <p>P.O. Box _____</p> <p>City _____ State _____ ZIP Code _____</p>
<p>6. Why you are choosing this district to file for bankruptcy</p>	<p><i>Check one:</i></p> <p><input type="checkbox"/> Over the last 180 days before filing this petition, I have lived in this district longer than in any other district.</p> <p><input type="checkbox"/> I have another reason. Explain. (See 28 U.S.C. § 1408.)</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p>	<p><i>Check one:</i></p> <p><input type="checkbox"/> Over the last 180 days before filing this petition, I have lived in this district longer than in any other district.</p> <p><input type="checkbox"/> I have another reason. Explain. (See 28 U.S.C. § 1408.)</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p>

Debtor 1

First Name _____ Middle Name _____ Last Name _____

Case number (if known) _____

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form 2010)). Also, go to the top of page 1 and check the appropriate box.

- Chapter 7
- Chapter 11
- Chapter 12
- Chapter 13

8. How you will pay the fee

I will pay the entire fee when I file my petition. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.

I need to pay the fee in installments. If you choose this option, sign and attach the *Application for Individuals to Pay The Filing Fee in Installments* (Official Form 103A).

I request that my fee be waived (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your petition.

9. Have you filed for bankruptcy within the last 8 years?

- No
- Yes. District _____ When _____ Case number _____
MM / DD / YYYY
- District _____ When _____ Case number _____
MM / DD / YYYY
- District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

- No
- Yes. Debtor _____ Relationship to you _____
District _____ When _____ Case number, if known _____
MM / DD / YYYY
- Debtor _____ Relationship to you _____
District _____ When _____ Case number, if known _____
MM / DD / YYYY

11. Do you rent your residence?

- No. Go to line 12.
- Yes. Has your landlord obtained an eviction judgment against you?
 - No. Go to line 12.
 - Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it as part of this bankruptcy petition.

Debtor 1

 First Name Middle Name Last Name

Case number (if known) _____

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

- No. Go to Part 4.
- Yes. Name and location of business

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

 Name of business, if any

 Number Street

 City State ZIP Code

Check the appropriate box to describe your business:

- Health Care Business (as defined in 11 U.S.C. § 101(27A))
- Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- Stockbroker (as defined in 11 U.S.C. § 101(53A))
- Commodity Broker (as defined in 11 U.S.C. § 101(6))
- None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a small business debtor?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines. If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

- No. I am not filing under Chapter 11.
- No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
- Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I do not choose to proceed under Subchapter V of Chapter 11.
- Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I choose to proceed under Subchapter V of Chapter 11.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

- No
- Yes. What is the hazard? _____

If immediate attention is needed, why is it needed? _____

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

Where is the property? _____
 Number Street

 City State ZIP Code

Debtor 1

First Name Middle Name Last Name

Case number (if known)

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you **MUST** file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you **MUST** file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Debtor 1

First Name Middle Name Last Name

Case number (if known)

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as “incurred by an individual primarily for a personal, family, or household purpose.”

- No. Go to line 16b.
- Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- No. Go to line 16c.
- Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

17. Are you filing under Chapter 7?

No. I am not filing under Chapter 7. Go to line 18.

Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?

- No
- Yes

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

18. How many creditors do you estimate that you owe?

- | | | |
|----------------------------------|--|--|
| <input type="checkbox"/> 1-49 | <input type="checkbox"/> 1,000-5,000 | <input type="checkbox"/> 25,001-50,000 |
| <input type="checkbox"/> 50-99 | <input type="checkbox"/> 5,001-10,000 | <input type="checkbox"/> 50,001-100,000 |
| <input type="checkbox"/> 100-199 | <input type="checkbox"/> 10,001-25,000 | <input type="checkbox"/> More than 100,000 |
| <input type="checkbox"/> 200-999 | | |

19. How much do you estimate your assets to be worth?

- | | | |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000 | <input type="checkbox"/> \$1,000,001-\$10 million | <input type="checkbox"/> \$500,000,001-\$1 billion |
| <input type="checkbox"/> \$50,001-\$100,000 | <input type="checkbox"/> \$10,000,001-\$50 million | <input type="checkbox"/> \$1,000,000,001-\$10 billion |
| <input type="checkbox"/> \$100,001-\$500,000 | <input type="checkbox"/> \$50,000,001-\$100 million | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion |

20. How much do you estimate your liabilities to be?

- | | | |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000 | <input type="checkbox"/> \$1,000,001-\$10 million | <input type="checkbox"/> \$500,000,001-\$1 billion |
| <input type="checkbox"/> \$50,001-\$100,000 | <input type="checkbox"/> \$10,000,001-\$50 million | <input type="checkbox"/> \$1,000,000,001-\$10 billion |
| <input type="checkbox"/> \$100,001-\$500,000 | <input type="checkbox"/> \$50,000,001-\$100 million | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion |

Debtor 1

First Name Middle Name Last Name

Case number (if known)

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11, 12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

X

Signature of Debtor 1

X

Signature of Debtor 2

Executed on MM / DD / YYYY

Executed on MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

X

Signature of Attorney for Debtor

Date

MM / DD / YYYY

Printed name

Firm name

Number Street

City

State

ZIP Code

Contact phone

Email address

Bar number

State

Debtor 1

First Name Middle Name Last Name

Case number (if known) _____

For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- No
- Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

- No
- Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

- No
- Yes. Name of Person _____

Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

x

 Signature of Debtor 1

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

x

 Signature of Debtor 2

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (if known): _____ Chapter you are filing under:

Chapter 7

Chapter 11

Chapter 12

Chapter 13

Check if this is an amended filing

Version 2

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/22

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, “Do you own a car,” the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
<p>1. Your full name</p> <p>Write the name that is on your government-issued picture identification (for example, your driver’s license or passport).</p> <p>Bring your picture identification to your meeting with the trustee.</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Suffix (Sr., Jr., II, III) _____</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Suffix (Sr., Jr., II, III) _____</p>
<p>2. All other names you have used in the last 8 years</p> <p>Include your married or maiden names and any assumed, trade names and <i>doing business as</i> names.</p> <p>Do NOT list the name of any separate legal entity such as a corporation, partnership, or LLC that is not filing this petition.</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Business name (if applicable) _____</p> <p>Business name (if applicable) _____</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Business name (if applicable) _____</p> <p>Business name (if applicable) _____</p>
<p>3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)</p>	<p>XXX – XX – _____</p> <p>OR</p> <p>9 XX – XX – _____</p>	<p>XXX – XX – _____</p> <p>OR</p> <p>9 XX – XX – _____</p>

Debtor 1

First Name Middle Name Last Name

Case number (if known)

		About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):	
4. Your Employer Identification Number (EIN), if any.	EIN	_____ - _____	EIN	_____ - _____
	EIN	_____ - _____	EIN	_____ - _____
5. Where you live	Number Street _____ _____		If Debtor 2 lives at a different address: Number Street _____ _____	
	City State ZIP Code _____		City State ZIP Code _____	
County		County		
If your mailing address is different from the one above, fill it in here. Note that the court will send any notices to you at this mailing address.		If Debtor 2's mailing address is different from yours, fill it in here. Note that the court will send any notices to this mailing address.		
Number Street _____ _____		Number Street _____ _____		
P.O. Box		P.O. Box		
City State ZIP Code		City State ZIP Code		
6. Why you are choosing this district to file for bankruptcy	Check one: <input type="checkbox"/> Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. <input type="checkbox"/> I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____		Check one: <input type="checkbox"/> Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. <input type="checkbox"/> I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____	

Debtor 1

First Name Middle Name Last Name

Case number (if known)

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form 2010)). Also, go to the top of page 1 and check the appropriate box.

- Chapter 7
- Chapter 11
- Chapter 12
- Chapter 13

8. How you will pay the fee

I will pay the entire fee when I file my petition. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.

I need to pay the fee in installments. If you choose this option, sign and attach the *Application for Individuals to Pay The Filing Fee in Installments* (Official Form 103A).

I request that my fee be waived (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your petition.

9. Have you filed for bankruptcy within the last 8 years?

- No
- Yes. District _____ When _____ Case number _____
MM / DD / YYYY
- District _____ When _____ Case number _____
MM / DD / YYYY
- District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

- No
- Yes. Debtor _____ Relationship to you _____
District _____ When _____ Case number, if known _____
MM / DD / YYYY
- Debtor _____ Relationship to you _____
District _____ When _____ Case number, if known _____
MM / DD / YYYY

11. Do you rent your residence?

- No. Go to line 12.
- Yes. Has your landlord obtained an eviction judgment against you?
 - No. Go to line 12.
 - Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it as part of this bankruptcy petition.

Debtor 1

First Name Middle Name Last Name

Case number (if known) _____

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

- No. Go to Part 4.
- Yes. Name and location of business

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

 Name of business, if any

 Number Street

 City State ZIP Code

Check the appropriate box to describe your business:

- Health Care Business (as defined in 11 U.S.C. § 101(27A))
- Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- Stockbroker (as defined in 11 U.S.C. § 101(53A))
- Commodity Broker (as defined in 11 U.S.C. § 101(6))
- None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code, and are you a small business debtor or a debtor as defined by 11 U.S. C. § 1182(1)?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor or a debtor choosing to proceed under Subchapter V so that it can set appropriate deadlines. If you indicate that you are a small business debtor or you are choosing to proceed under Subchapter V, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

- No. I am not filing under Chapter 11.
- No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
- Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I do not choose to proceed under Subchapter V of Chapter 11.
- Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in § 1182(1) of the Bankruptcy Code, and I choose to proceed under Subchapter V of Chapter 11.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

- No
- Yes. What is the hazard? _____

If immediate attention is needed, why is it needed? _____

Where is the property? _____
 Number Street

 City State ZIP Code

Debtor 1

First Name Middle Name Last Name

Case number (if known)

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you **MUST** file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you **MUST** file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Debtor 1

First Name Middle Name Last Name

Case number (if known)

Part 6: Answer These Questions for Reporting Purposes

16. **What kind of debts do you have?**

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

No. Go to line 16b.
 Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

No. Go to line 16c.
 Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

17. **Are you filing under Chapter 7?**

No. I am not filing under Chapter 7. Go to line 18.

Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?

No
 Yes

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

18. **How many creditors do you estimate that you owe?**

<input type="checkbox"/> 1-49	<input type="checkbox"/> 1,000-5,000	<input type="checkbox"/> 25,001-50,000
<input type="checkbox"/> 50-99	<input type="checkbox"/> 5,001-10,000	<input type="checkbox"/> 50,001-100,000
<input type="checkbox"/> 100-199	<input type="checkbox"/> 10,001-25,000	<input type="checkbox"/> More than 100,000
<input type="checkbox"/> 200-999		

19. **How much do you estimate your assets to be worth?**

<input type="checkbox"/> \$0-\$50,000	<input type="checkbox"/> \$1,000,001-\$10 million	<input type="checkbox"/> \$500,000,001-\$1 billion
<input type="checkbox"/> \$50,001-\$100,000	<input type="checkbox"/> \$10,000,001-\$50 million	<input type="checkbox"/> \$1,000,000,001-\$10 billion
<input type="checkbox"/> \$100,001-\$500,000	<input type="checkbox"/> \$50,000,001-\$100 million	<input type="checkbox"/> \$10,000,000,001-\$50 billion
<input type="checkbox"/> \$500,001-\$1 million	<input type="checkbox"/> \$100,000,001-\$500 million	<input type="checkbox"/> More than \$50 billion

20. **How much do you estimate your liabilities to be?**

<input type="checkbox"/> \$0-\$50,000	<input type="checkbox"/> \$1,000,001-\$10 million	<input type="checkbox"/> \$500,000,001-\$1 billion
<input type="checkbox"/> \$50,001-\$100,000	<input type="checkbox"/> \$10,000,001-\$50 million	<input type="checkbox"/> \$1,000,000,001-\$10 billion
<input type="checkbox"/> \$100,001-\$500,000	<input type="checkbox"/> \$50,000,001-\$100 million	<input type="checkbox"/> \$10,000,000,001-\$50 billion
<input type="checkbox"/> \$500,001-\$1 million	<input type="checkbox"/> \$100,000,001-\$500 million	<input type="checkbox"/> More than \$50 billion

Debtor 1

First Name Middle Name Last Name

Case number (if known) _____

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11, 12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

X _____

Signature of Debtor 1

Executed on _____
MM / DD / YYYY

X _____

Signature of Debtor 2

Executed on _____
MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

X _____

Signature of Attorney for Debtor

Date

MM / DD / YYYY

 Printed name

 Firm name

 Number Street

 City

 State

 ZIP Code

 Contact phone

 Email address

 Bar number

 State

Debtor 1

 First Name Middle Name Last Name

Case number (if known) _____

For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- No
- Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

- No
- Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

- No
- Yes. Name of Person _____

Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

x

 Signature of Debtor 1

Date _____
 MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

x

 Signature of Debtor 2

Date _____
 MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

Official Form 101 (Committee Note) (12/22)

Committee Note

Form 101 is amended to eliminate language in former Part 1, Question 4, which asked for “any business names . . . you have used in the last 8 years.” Instead, Part 1, Question 2, is modified to add to the direction with respect to “other names you have used in the last 8 years” – which currently directs the debtor to “Include your married and maiden names” – to ask the debtor to include “any assumed, trade names, or *doing business as* names,” and to direct that the debtor should not include the names of separate legal entities that are not filing the petition. Many individual debtors erroneously believed that Question 4 was asking for the names of corporations or Limited Liability Corporations in which they held any interest in the past 8 years, and any names listed in response were then treated as additional debtors for purposes of noticing and reporting. By asking for the information in Question 2, the form now makes it clearer that the only names to be listed are names that were used by the debtor personally in conducting business, not names used by other legal entities. This amendment also conforms Form 101 to Forms 105, 201 and 205 with respect to the same information.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

Sam Calvert, USC-RULES-BK-2021-0002-0027.
Suggested that Part 1, Question 2, be divided into question 2a (which would be the Question as published) and 2b which

Official Form 101 (Committee Note) (12/22)

would provide a space for information about an entity for whom the debtor was serving as guarantor or surety.

Information to identify the case:		
Debtor 1	_____	Last 4 digits of Social Security number or ITIN _____
	First Name Middle Name Last Name	EIN _____
Debtor 2 (Spouse, if filing)	_____	Last 4 digits of Social Security number or ITIN _____
	First Name Middle Name Last Name	EIN _____
United States Bankruptcy Court for the: _____	District of _____	[Date case filed for chapter 11 _____] OR
	(State)	MM / DD / YYYY
Case number: _____		[Date case filed in chapter _____] OR
		MM / DD / YYYY
		Date case converted to chapter 11 _____] OR
		MM / DD / YYYY

Official Form 309E1 (For Individuals or Joint Debtors)

Notice of Chapter 11 Bankruptcy Case

12/22

For the debtors listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors and debtors, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 10 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at <https://pacer.uscourts.gov>).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. Debtor's full name		
2. All other names used in the last 8 years		
3. Address		If Debtor 2 lives at a different address:
4. Debtor's attorney Name and address		Contact phone _____ Email _____
5. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at https://pacer.uscourts.gov .		Hours open _____ Contact phone _____

For more information, see page 2 ►

6. Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend.

Creditors may attend, but are not required to do so.

_____ at _____
Date Time

Location:

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

7. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

Deadline to file a complaint objecting to discharge or to challenge whether certain debts are dischargeable (see line 10 for more information):

- if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3), the deadline is the first date set for hearing on confirmation of the plan. The court or its designee will send you notice of that date later.
- if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6), **the deadline is:** _____

Deadline for filing proof of claim:

[Not yet set. If a deadline is set, the court will send you another notice.] or

[date, if set by the court]]

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed*, *contingent*, or *unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at <https://pacer.uscourts.gov>.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

Deadline to object to exemptions:

The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.

Filing deadline: 30 days after the *conclusion* of the meeting of creditors

8. Creditors with a foreign address

If you are a creditor receiving mailed notice at a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

9. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate the debtor's business.

10. Discharge of debts

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). However, unless the court orders otherwise, the debts will not be discharged until all payments under the plan are made. A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.

11. Exempt property

The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at <https://pacer.uscourts.gov>. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 7.

Information to identify the case:		
Debtor 1	_____	Last 4 digits of Social Security number or ITIN _____
	First Name Middle Name Last Name	EIN _____
Debtor 2	_____	Last 4 digits of Social Security number or ITIN _____
(Spouse, if filing)	First Name Middle Name Last Name	EIN _____
United States Bankruptcy Court for the: _____	District of _____	[Date case filed for chapter 11 _____] OR
	(State)	MM / DD / YYYY
Case number: _____		[Date case filed in chapter _____] OR
		MM / DD / YYYY
		Date case converted to chapter 11 _____] OR
		MM / DD / YYYY

Official Form 309E2 (For Individuals or Joint Debtors under Subchapter V)

Notice of Chapter 11 Bankruptcy Case

12/22

For the debtors listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read all pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 11 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at <https://pacer.uscourts.gov>).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

About Debtor 1:	About Debtor 2:
1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	If Debtor 2 lives at a different address:
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy trustee Name and address	Contact phone _____ Email _____

For more information, see page 2 ►

6. Bankruptcy clerk's office

Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at <https://pacer.uscourts.gov>.

Hours open _____
 Contact phone _____

7. Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend.
 Creditors may attend, but are not required to do so.

_____ at _____ Location:
 Date Time

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

8. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

Deadline to file a complaint objecting to discharge or to challenge whether certain debts are dischargeable (see line 11 for more information):

- if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3), the deadline is the first date set for hearing on confirmation of the plan. The court or its designee will send you notice of that date later.
- if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6), **the deadline is:** _____

Deadline for filing proof of claim:

[Not yet set. If a deadline is set, the court will send you another notice.] or
 [date, if set by the court]]

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed*, *contingent*, or *unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at <https://pacer.uscourts.gov>.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

Deadline to object to exemptions:

The law permits debtors to keep certain property as exempt.

If you believe that the law does not authorize an exemption claimed, you may file an objection.

Filing deadline:

30 days after the *conclusion* of the meeting of creditors

9. Creditors with a foreign address

If you are a creditor receiving mailed notice at a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

10. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. The debtor will generally remain in possession of the property and may continue to operate the debtor's business.

For more information, see page 3 ►

11. Discharge of debts

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.

12. Exempt property

The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at <https://pacer.uscourts.gov>. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 8.

Official Form 309 (Committee Note) (12/22)

Committee Note

Official Form 309E1, line 7 and Official Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge.

Changes Made After Publication and Comment

A comma was inserted in line 7 of Form 309E1 and line 8 of Form 309E2 in two places, one after the words “§ 1141(d)(3)” in the first bullet and one after “or (6)” in the second bullet.

Summary of Public Comment

No comments were submitted.

[Caption as in Form 416A, 416B, or 416D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s):

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- Plaintiff
- Defendant
- Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- Debtor
- Creditor
- Trustee
- Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment—or the appealable order or decree—from which the appeal is taken:

2. State the date on which the judgment—or the appealable order or decree—was entered:

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment—or the appealable order or decree—from which the appeal is taken and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____

2. Party: _____ Attorney: _____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Date: _____

Name, address, and telephone number of attorney (or appellant(s) if not represented by an attorney):

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

[Note to inmate filers: If you are an inmate filer in an institution and you seek the timing benefit of Fed. R. Bankr. P. 8002(c)(1), complete Director’s Form 4170 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.]

Official Form 417 (Committee Note) (12/23)

Committee Note

Parts 2 and 3 of the form are amended to conform to wording in the simultaneously amended Rule 8003. The new wording is intended to remind appellants that appeals as of right from orders and decrees are limited to those that are “appealable”—that is, either deemed final or issued under § 1121(d). *See* 28 U.S.C. § 158(a)(2). It also seeks to avoid the misconception that it is necessary or appropriate to identify each and every order of the bankruptcy court that the appellant may wish to challenge on appeal. It requires identification of only “the judgment—or the appealable order or decree—from which the appeal is taken.”

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

No comments were submitted.

Bankruptcy Rules Restyling

7000 Series

Preface

This revision is a restyling of the Federal Rules of Bankruptcy Procedure to provide greater clarity, consistency, and conciseness without changing practice and procedure.

[The Committee Note to Rule 1001 is included here for reference for purposes of publication. It will not be included in the final rule.

Committee Note to Rule 1001

The Bankruptcy Rules are the fifth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence took effect in 2011. The restyled Bankruptcy Rules apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal, Civil and Evidence Rules.

General Guidelines. Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). See also Joseph Kimble, *Guiding Principles for Restyling the Civil Rules*, in Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure, at page x (Feb. 2005) (available at <https://www.michbar.org/file/barjournal/article/documents/pdf4article909.pdf> and <https://www.michbar.org/file/barjournal/article/documents/pdf4article921.pdf>); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 *Scribes J. Legal Writing* 25 (2008-2009).

Formatting Changes. Many of the changes in the restyled Bankruptcy Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed.

Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words. The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. The restyled rules also minimize the use of inherently ambiguous words. The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their

substantive meaning. The restyled rules also remove words and concepts that are outdated or redundant.

Rule Numbers. The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

No Substantive Change. The style changes to the rules are intended to make no changes in substantive meaning. The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee also declined to modify "sacred phrases"—those that have become so familiar in practice that to alter them would be unduly disruptive to practice and expectations. An example in the Bankruptcy Rules would be “meeting of creditors.”

Legislative Rules. In those cases in which Congress enacted a rule by statute, in particular Rule 2002(n) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 357), Rule 3001(g) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 361) and Rule 7004(h) (Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106), the Committee has not restyled the rule.]

ORIGINAL	REVISION
PART VII— ADVERSARY PROCEEDINGS	PART VII. ADVERSARY PROCEEDINGS
Rule 7001. Scope of Rules of Part VII	Rule 7001. Types of Adversary Proceedings
<p>An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:</p> <p>(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;</p> <p>(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, but not a proceeding under Rule 3012 or Rule 4003(d);</p> <p>(3) a proceeding to obtain approval under § 363(h) for the sale of both the interest of the estate and of a co-owner in property;</p> <p>(4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§ 727(a)(8)¹, (a)(9), or 1328(f);</p> <p>(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;</p> <p>(6) a proceeding to determine the dischargeability of a debt;</p> <p>(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;</p>	<p>An adversary proceeding is governed by the rules in this Part VII. The following are adversary proceedings:</p> <p>(a) a proceeding to recover money or property—except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b), § 725, Rule 2017, or Rule 6002;</p> <p>(b) a proceeding to determine the validity, priority, or extent of a lien or other interest in property—except a proceeding under Rule 3012 or Rule 4003(d);</p> <p>(c) a proceeding to obtain authority under § 363(h) to sell both the estate’s interest in property and that of a co-owner;</p> <p>(d) a proceeding to revoke or object to a discharge—except an objection under § 727(a)(8) or (a)(9), or § 1328(f);</p> <p>(e) a proceeding to revoke an order confirming a plan in a Chapter 11, 12, or 13 case;</p> <p>(f) a proceeding to determine whether a debt is dischargeable;</p> <p>(g) a proceeding to obtain an injunction or other equitable relief—except when the relief is provided in a Chapter 9, 11, 12, or 13 plan;</p> <p>(h) a proceeding to subordinate an allowed claim or interest—except when subordination is provided in a Chapter 9, 11, 12, or 13 plan;</p>

¹ So in original. Probably should be only one section symbol.

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<p>(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;</p> <p>(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or</p> <p>(10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. § 1452.</p>	<p>(i) a proceeding to obtain a declaratory judgment relating to any proceeding described in (a)–(h); and</p> <p>(j) a proceeding to determine a claim or cause of action removed under 28 U.S.C § 1452.</p>

Committee Note

The language of Rule 7001 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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Rule 7002. References to Federal Rules of Civil Procedure	Rule 7002. References to the Federal Rules of Civil Procedure
Whenever a Federal Rule of Civil Procedure applicable to adversary proceedings makes reference to another Federal Rule of Civil Procedure, the reference shall be read as a reference to the Federal Rule of Civil Procedure as modified in this Part VII.	When a Federal Rule of Civil Procedure applicable to an adversary proceeding refers to another civil rule, that reference must be read as a reference to the civil rule as modified by this Part VII.

Committee Note

The language of Rule 7002 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7003. Commencement of Adversary Proceeding	Rule 7003. Commencing an Adversary Proceeding
Rule 3 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 3 applies in an adversary proceeding.

Committee Note

The language of Rule 7003 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 7004. Process; Service of Summons, Complaint</p> <p>(a) SUMMONS; SERVICE; PROOF OF SERVICE.</p> <p>(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1),(d)(5), (e)–(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service under Rule 4(e)–(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.</p> <p>(2) The clerk may sign, seal, and issue a summons electronically by putting an “s/” before the clerk’s name and including the court’s seal on the summons.</p>	<p>Rule 7004. Process; Issuing and Serving a Summons and Complaint</p> <p>(b) Issuing, Delivering, and Personally Serving a Summons and Complaint.</p> <p>(1) <i>In General.</i> Except as provided in (3), Fed. R. Civ. P. 4(a), (b), (c)(1), (d)(5), (e)–(j), (l), and (m) applies in an adversary proceeding.</p> <p>(2) <i>Issuing and Delivering a Summons.</i> The clerk may:</p> <ul style="list-style-type: none"> • sign, seal, and issue the summons electronically by placing an “s/” before the clerk’s name and adding the court’s seal to the summons; and • deliver the summons for service. <p>(3) <i>Personally Serving a Summons and Complaint.</i> Any person who is at least 18 years old and not a party may personally serve a summons and complaint under Fed. R.Civ. P. 4(e)–(j).</p>
<p>(b) SERVICE BY FIRST CLASS MAIL. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)–(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:</p> <p>(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual’s dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.</p>	<p>(b) Service by Mail as an Alternative. Except as provided in subdivision (h), in addition to the methods of service authorized by Fed. R. Civ. P. 4(e)–(j), a copy of a summons and complaint may be served by first-class mail, postage prepaid, within the United States on:</p> <p>(1) an individual except an infant or an incompetent person—by mailing the copy to the individual’s dwelling or usual place of abode or where the individual regularly conducts a business or profession;</p>

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<p>(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state. The summons and complaint in that case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.</p> <p>(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.</p> <p>(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that officer or agency. The</p>	<p>(2) an infant or incompetent person—by mailing the copy:</p> <p>(A) to a person who, under the law of the state where service is made, is authorized to receive service on behalf of the infant or incompetent person when an action is brought in that state's courts of general jurisdiction; and</p> <p>(B) at that person's dwelling or usual place of abode or where the person regularly conducts a business or profession;</p> <p>(3) a domestic or foreign corporation, or a partnership or other unincorporated association—by mailing the copy:</p> <p>(A) to an officer, a managing or general agent, or an agent authorized by appointment or by law to receive service; and</p> <p>(B) also to the defendant if a statute authorizes an agent to receive service and the statute so requires;</p> <p>(4) the United States, with these requirements:</p> <p>(A) a copy of the summons and complaint must be mailed to:</p> <p>(i) the civil-process clerk in the United States attorney's office in the district where the case is filed;</p> <p>(ii) the Attorney General of the United States in Washington, D.C.; and</p> <p>(iii) in an action attacking the validity of an order of a United States officer or agency that is not a party, also to that officer or agency; and</p>

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<p>court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.</p> <p>(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.</p>	<p>(B) if the plaintiff has mailed a copy of the summons and complaint to a person specified in either (A)(i) or (ii), the court must allow a reasonable time to serve the others that must be served under (A);</p> <p>(5) an officer or agency of the United States, with these requirements:</p> <p>(A) the summons and complaint must be mailed not only to the officer or the agency—as prescribed in (3) if the agency is a corporation—but also to the United States, as prescribed in (4);²</p> <p>(B) if the plaintiff has mailed a copy of the summons and complaint to a person specified in either (4)(A)(i) or (ii), the court must allow a reasonable time to serve the others that must be served under (A); and</p> <p>(C) if a United States trustee is the trustee in the case, service may be made on the United States trustee solely as trustee, as prescribed in (10);</p> <p>(6) a state or municipal corporation or other governmental organization subject to suit, with these requirements:</p> <p>(A) the summons and complaint must be mailed to the person or office that, under the law of the state where service is made, is authorized to receive service in a case filed against that defendant in that state’s courts of general jurisdiction; and</p>

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<p>(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.</p> <p>(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state.</p> <p>(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.</p> <p>(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the</p>	<p>(B) if there is no such authorized person or office, the summons and complaint may be mailed to the defendant's chief executive officer;</p> <p>(7) a defendant of any class referred to in (1) and (3)—for whom it also suffices to mail the summons and complaint to the entity on which service must be made under a federal statute or under the law of the state where service is made when an action is brought against that defendant in that state's courts of general jurisdiction;</p> <p>(8) any defendant—for whom it also suffices to mail the summons and complaint to the defendant's agent under these conditions:</p> <p>(A) the agent is authorized by appointment or by law to accept service of process;</p> <p>(B) the mail is addressed to the agent's dwelling or usual place of abode or where the agent regularly conducts a business or profession; and</p> <p>(C) if the agent's authorization so requires, a copy is also mailed to the defendant as provided in this subdivision (b);</p> <p>(9) the debtor, with the qualification that after a petition has been filed by or served upon a debtor, and until the case is dismissed or closed—by addressing the mail to the debtor at the address shown on the debtor's petition or the address the debtor specifies in a filed writing;</p> <p>(10) a United States trustee who is the trustee in the case and service is made upon the United States trustee solely as trustee—by addressing the mail to the</p>

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<p>petition or to such other address as the debtor may designate in a filed writing.</p> <p>(10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States trustee in the district where the case under the Code is pending.</p>	<p>United States trustee's office or other place that the United States trustee designates within the district.</p>
<p>(c) SERVICE BY PUBLICATION. If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule 4(e)–(j) F.R.Civ.P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail, postage prepaid, to the party's last known address, and by at least one publication in such manner and form as the court may direct.</p>	<p>(c) Service by Publication in an Adversary Proceeding Involving Property Rights. If a party to an adversary proceeding to determine or protect rights in property in the court's custody cannot be served under (b) or Fed. R. Civ. P. 4(e)–(j), the court may order the summons and complaint to be served by:</p> <ol style="list-style-type: none"> (1) first-class mail, postage prepaid, to the party's last known address; and (2) at least one publication in a form and manner as the court orders.
<p>(d) NATIONWIDE SERVICE OF PROCESS. The summons and complaint and all other process except a subpoena may be served anywhere in the United States.</p>	<p>(d) Nationwide Service of Process. A summons and complaint (and all other process, except a subpoena) may be served anywhere within the United States.</p>
<p>(e) SUMMONS: TIME LIMIT FOR SERVICE WITHIN THE UNITED STATES. Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F.R.Civ.P. shall be by delivery of the summons and complaint within 7 days after the</p>	<p>(e) Time to Serve a Summons and Complaint.</p> <ol style="list-style-type: none"> (1) <i>In General.</i> A summons and complaint served under Fed. R. Civ. P. 4(e), (g), (h)(1), (i), or (j)(2) by delivery

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<p>summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 7 days after the summons is issued. If a summons is not timely delivered or mailed, another summons will be issued for service. This subdivision does not apply to service in a foreign country.</p>	<p>must be served within 7 days after the summons is issued. If served by mail, they must be deposited in the mail within 7 days after the summons is issued. If a summons is not timely delivered or mailed, a new summons must be issued.</p> <p>(2) Exception. This paragraph Error! Reference source not found. does not apply to service in a foreign country.</p>
<p>(f) PERSONAL JURISDICTION. If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.</p>	<p>(f) Establishing Personal Jurisdiction. If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service under this Rule 7004 or the applicable provisions of Fed. R. Civ. P. 4 establishes personal jurisdiction over the person of a defendant:</p> <ul style="list-style-type: none"> (A) in a bankruptcy case; (B) in a civil proceeding arising in or related to a bankruptcy case; or (C) in a civil proceeding under the Code.
<p>(g) SERVICE ON DEBTOR'S ATTORNEY. If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor's attorney by any means authorized under Rule 5(b) F.R.Civ.P.</p>	<p>(g) Serving a Debtor's Attorney. If, when served, a debtor is represented by an attorney, the attorney must also be served by any means authorized by Fed. R. Civ. P. 5(b).</p>
<p>(h) SERVICE OF PROCESS ON AN INSURED DEPOSITORY INSTITUTION. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—</p>	<p>(h) Service of Process on an Insured Depository Institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—</p> <ul style="list-style-type: none"> (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;

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<p>(1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;</p> <p>(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or</p> <p>(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.</p>	<p>(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or</p> <p>(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.</p>
<p>(i) SERVICE OF PROCESS BY TITLE. This subdivision (i) applies to service on a domestic or foreign corporation or partnership or other unincorporated association under Rule 7004(b)(3) or on an officer of an insured depository institution under Rule 7004(h). The defendant's officer or agent need not be correctly named in the address – or even be named – if the envelope is addressed to the defendant's proper address and directed to the attention of the officer's or agent's position or title.</p>	<p>(i) Service of Process by Title. This subdivision (i) applies to service on a domestic or foreign corporation or partnership or other unincorporated association under Rule 7004(b)(3), or on an officer of an insured depository institution under Rule 7004(h). The defendant's officer or agent need not be correctly named in the address – or even be named – if the envelope is addressed to the defendant's proper address and directed to the attention of the officer's or agent's position or title.</p>

Committee Note

The language of Rule 7004 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. The first clause of Rule 7004(b) and Rule 7004(h) have not been restyled because they were enacted by Congress, P.L. 103-394, 108 Stat. 361, Sec. 4118 (1994). The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, provides no authority to modify statutory language.

ORIGINAL	REVISION
Rule 7005. Service and Filing of Pleadings and Other Papers	Rule 7005. Serving and Filing Pleadings and Other Papers
Rule 5 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 5 applies in an adversary proceeding.

Committee Note

The language of Rule 7005 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7007. Pleadings Allowed	Rule 7007. Pleadings Allowed
Rule 7 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 7 applies in an adversary proceeding.

Committee Note

The language of Rule 7007 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7007.1. Corporate Ownership Statement	Rule 7007.1. Corporate Ownership Statement
(a) REQUIRED DISCLOSURE. Any nongovernmental corporation that is a party to an adversary proceeding, other than the debtor, shall 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.	(a) Required Disclosure. Any nongovernmental corporation that is a party to an adversary proceeding, other than the debtor, 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) TIME FOR FILING; SUPPLEMENTAL FILING. The corporate ownership statement shall: (1) be filed with the corporation's first appearance, pleading, motion, response, or other request addressed to the court; and (2) be supplemented whenever the information required by this rule changes.	(b) Time for Filing; Supplemental Filing. The statement must: (1) be filed with the corporation's first appearance, pleading, motion, response, or other request to the court; and (2) be supplemented whenever the information required by this rule changes.

Committee Note

The language of Rule 7007.1 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7008. General Rules of Pleading	Rule 7008. General Rules of Pleading
<p>Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court.</p>	<p>Fed. R. Civ. P. 8 applies in an adversary proceeding. The allegation of jurisdiction required by that rule must include a reference to the name, number, and Code chapter of the case that the adversary proceeding relates to and the district and division where it is pending. In an adversary proceeding before a bankruptcy court, a complaint, counterclaim, crossclaim, or third-party complaint must state whether the pleader does or does not consent to the entry of a final order or judgment by the bankruptcy court.</p>

Committee Note

The language of Rule 7008 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7009. Pleading Special Matters	Rule 7009. Pleading Special Matters
Rule 9 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 9 applies in an adversary proceeding.

Committee Note

The language of Rule 7009 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7010. Form of Pleadings	Rule 7010. Form of Pleadings in an Adversary Proceeding
Rule 10 F.R.Civ.P. applies in adversary proceedings, except that the caption of each pleading in such a proceeding shall conform substantially to the appropriate Official Form.	Fed. R. Civ. P. 10 applies in an adversary proceeding—except that a pleading’s caption must conform substantially to the appropriate version of Official Form 416.

Committee Note

The language of Rule 7010 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<p>Rule 7012. Defenses and Objections—When and How Presented— By Pleading or Motion—Motion for Judgment on the Pleadings</p>	<p>Rule 7012. Defenses; Effect of a Motion; Motion for Judgment on the Pleadings and Other Procedural Matters</p>
<p>(a) WHEN PRESENTED. If a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons, except when a different time is prescribed by the court. The court shall prescribe the time for service of the answer when service of a complaint is made by publication or upon a party in a foreign country. A party served with a pleading stating a cross-claim shall serve an answer thereto within 21 days after service. The plaintiff shall serve a reply to a counterclaim in the answer within 21 days after service of the answer or, if a reply is ordered by the court, within 21 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to a complaint within 35 days after the issuance of the summons, and shall serve an answer to a cross-claim, or a reply to a counterclaim, within 35 days after service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 14 days after notice of the court’s action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 14 days after the service of a more definite statement.</p>	<p>(a) Time to Serve. The time to serve a responsive pleading is as follows:</p> <ol style="list-style-type: none"> (1) <i>Answer to a Complaint in General.</i> A defendant must serve an answer to a complaint within 30 days after the summons was issued, unless the court sets a different time. (2) <i>Answer to a Complaint Served by Publication or on a Party in a Foreign Country.</i> The court must set the time to serve an answer to a complaint served by publication or served on a party in a foreign country. (3) <i>Answer to a Crossclaim.</i> A party served with a pleading that states a crossclaim must serve an answer to the crossclaim within 21 days after being served. (4) <i>Answer to a Counterclaim.</i> A plaintiff served with an answer that contains a counterclaim must answer the counterclaim within 21 days after service of: <ol style="list-style-type: none"> (A) the answer; or (B) a court order requiring an answer, unless the order states otherwise. (5) <i>Answer to a Complaint or Crossclaim—or Answer to a Counterclaim—Served on the United States or an Officer or Agency.</i> The United States or its officer or agency must serve: <ol style="list-style-type: none"> (A) an answer to a complaint within 35 days after the summons was issued; and

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	<p>(B) an answer to a crossclaim or an answer to a counterclaim within 35 days after the United States attorney is served with the pleading that asserts the claim.</p> <p>(6) <i>Effect of a Motion.</i> Unless the court sets a different time, serving a motion under this rule alters these times as follows:</p> <p>(A) if the court denies the motion or postpones disposition until trial, the responsive pleading must be served within 14 days after notice of the court’s action; or</p> <p>(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the statement is served.</p>
<p>(b) APPLICABILITY OF RULE 12(b)–(i) F.R.CIV.P. Rule 12(b)–(i) F.R.Civ.P. applies in adversary proceedings. A responsive pleading shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court.</p>	<p>(b) Applicability of Civil Rule 12(b)-(i). Fed. R. Civ. P. 12(b)-(i) applies in an adversary proceeding. A responsive pleading must state whether the party does or does not consent to the entry of a final order or judgment by the bankruptcy court.</p>

Committee Note

The language of Rule 7012 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7013. Counterclaim and Cross-Claim	Rule 7013. Counterclaim and Crossclaim
<p>Rule 13 F.R.Civ.P. applies in adversary proceedings, except that a party sued by a trustee or debtor in possession need not state as a counterclaim any claim that the party has against the debtor, the debtor's property, or the estate, unless the claim arose after the entry of an order for relief. A trustee or debtor in possession who fails to plead a counterclaim through oversight, inadvertence, or excusable neglect, or when justice so requires, may by leave of court amend the pleading, or commence a new adversary proceeding or separate action.</p>	<p>Fed. R. Civ. P. 13 applies in an adversary proceeding. But a party sued by a trustee or debtor in possession need not state as a counterclaim any claim the party has against the debtor, the debtor's property, or the estate, unless the claim arose after the order for relief. If, through oversight, inadvertence, or excusable neglect, a trustee or debtor in possession fails to plead a counterclaim—or when justice so requires—the court may permit the trustee or debtor in possession to:</p> <ul style="list-style-type: none"> (a) amend the pleading; or (b) commence a new adversary proceeding or separate action.

Committee Note

The language of Rule 7013 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7014. Third-Party Practice	Rule 7014. Third-Party Practice
Rule 14 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 14 applies in an adversary proceeding.

Committee Note

The language of Rule 7014 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7015. Amended and Supplemental Pleadings	Rule 7015. Amended and Supplemental Pleadings
Rule 15 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 15 applies in an adversary proceeding.

Committee Note

The language of Rule 7015 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7016. Pretrial Procedures	Rule 7016. Pretrial Procedures
(a) PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT. Rule 16 F.R.Civ.P. applies in adversary proceedings.	(a) Pretrial Conferences; Scheduling; Management. Fed. R. Civ. P. 16 applies in an adversary proceeding.
(b) DETERMINING PROCEDURE. The bankruptcy court shall decide, on its own motion or a party's timely motion, whether: <ul style="list-style-type: none"> (1) to hear and determine the proceeding; (2) to hear the proceeding and issue proposed findings of fact and conclusions of law; or (3) to take some other action. 	(b) Determining Procedure. On its own or a party's timely motion, the court must decide whether: <ul style="list-style-type: none"> (1) to hear and determine the proceeding; (2) to hear it and issue proposed findings of fact and conclusions of law; or (3) to take other action.

Committee Note

The language of Rule 7016 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7017. Parties Plaintiff and Defendant; Capacity	Rule 7017. Plaintiff and Defendant; Capacity; Public Officers
Rule 17 F.R.Civ.P. applies in adversary proceedings, except as provided in Rule 2010(b).	Fed. R. Civ. P. 17 applies in an adversary proceeding, except as provided in Rule 2010(b).

Committee Note

The language of Rule 7017 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7018. Joinder of Claims and Remedies	Rule 7018. Joinder of Claims
Rule 18 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 18 applies in an adversary proceeding.

Committee Note

The language of Rule 7018 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7019. Joinder of Persons Needed for Just Determination	Rule 7019. Required Joinder of Persons
<p>Rule 19 F.R.Civ.P. applies in adversary proceedings, except that (1) if an entity joined as a party raises the defense that the court lacks jurisdiction over the subject matter and the defense is sustained, the court shall dismiss such entity from the adversary proceedings and (2) if an entity joined as a party properly and timely raises the defense of improper venue, the court shall determine, as provided in 28 U.S.C. § 1412, whether that part of the proceeding involving the joined party shall be transferred to another district, or whether the entire adversary proceeding shall be transferred to another district.</p>	<p>Fed. R. Civ. P. 19 applies in an adversary proceeding. But these exceptions apply:</p> <ul style="list-style-type: none"> (a) if an entity joined as a party raises the defense that the court lacks subject-matter jurisdiction and the defense is sustained, the court must dismiss the party; and (b) if an entity joined as a party properly and timely raises the defense of improper venue, the court must determine under 28 U.S.C. § 1412 whether to transfer to another district the entire adversary proceeding or just that part involving the joined party.

Committee Note

The language of Rule 7019 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7020. Permissive Joinder of Parties	Rule 7020. Permissive Joinder of Parties
Rule 20 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 20 applies in an adversary proceeding.

Committee Note

The language of Rule 7020 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7021. Misjoinder and Non-Joinder of Parties	Rule 7021. Misjoinder and Nonjoinder of Parties
Rule 21 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 21 applies in an adversary proceeding.

Committee Note

The language of Rule 7021 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7022. Interpleader	Rule 7022. Interpleader
Rule 22(a) F.R.Civ.P. applies in adversary proceedings. This rule supplements—and does not limit—the joinder of parties allowed by Rule 7020.	Fed. R. Civ. P. 22(a) applies in an adversary proceeding. This rule supplements and does not limit the joinder of parties under Rule 7020.

Committee Note

The language of Rule 7022 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7023. Class Proceedings	Rule 7023. Class Actions
Rule 23 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 23 applies in an adversary proceeding.

Committee Note

The language of Rule 7023 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7023.1. Derivative Actions	Rule 7023.1. Derivative Actions
Rule 23.1 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 23.1 applies in an adversary proceeding.

Committee Note

The language of Rule 7023.1 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7023.2. Adversary Proceedings Relating to Unincorporated Associations	Rule 7023.2. Adversary Proceedings Relating to Unincorporated Associations
Rule 23.2 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 23.2 applies in an adversary proceeding.

Committee Note

The language of Rule 7023.2 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7024. Intervention	Rule 7024. Intervention
Rule 24 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 24 applies in an adversary proceeding.

Committee Note

The language of Rule 7024 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7025. Substitution of Parties	Rule 7025. Substitution of Parties
Subject to the provisions of Rule 2012, Rule 25 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 25 applies in an adversary proceeding—but is subject to Rule 2012.

Committee Note

The language of Rule 7025 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7026. General Provisions Governing Discovery	Rule 7026. Duty to Disclose; General Provisions Governing Discovery
Rule 26 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 26 applies in an adversary proceeding.

Committee Note

The language of Rule 7026 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7027. Depositions Before Adversary Proceedings or Pending Appeal	Rule 7027. Depositions to Perpetuate Testimony
Rule 27 F.R.Civ.P. applies to adversary proceedings.	Fed. R. Civ. P. 27 applies in an adversary proceeding.

Committee Note

The language of Rule 7027 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7028. Persons Before Whom Depositions May Be Taken	Rule 7028. Persons Before Whom Depositions May Be Taken
Rule 28 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 28 applies in an adversary proceeding.

Committee Note

The language of Rule 7028 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7029. Stipulations Regarding Discovery Procedure	Rule 7029. Stipulations About Discovery Procedure
Rule 29 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 29 applies in an adversary proceeding.

Committee Note

The language of Rule 7029 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7030. Depositions Upon Oral Examination	Rule 7030. Depositions by Oral Examination
Rule 30 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 30 applies in an adversary proceeding.

Committee Note

The language of Rule 7030 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7031. Deposition Upon Written Questions	Rule 7031. Depositions by Written Questions
Rule 31 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 31 applies in an adversary proceeding.

Committee Note

The language of Rule 7031 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7032. Use of Depositions in Adversary Proceedings	Rule 7032. Using Depositions in Court Proceedings
Rule 32 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 32 applies in an adversary proceeding.

Committee Note

The language of Rule 7032 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7033. Interrogatories to Parties	Rule 7033. Interrogatories to Parties
Rule 33 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 33 applies in an adversary proceeding.

Committee Note

The language of Rule 7033 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7034. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes	Rule 7034. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes
Rule 34 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 34 applies in an adversary proceeding.

Committee Note

The language of Rule 7034 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7035. Physical and Mental Examination of Persons	Rule 7035. Physical and Mental Examinations
Rule 35 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 35 applies in an adversary proceeding.

Committee Note

The language of Rule 7035 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7036. Requests for Admission	Rule 7036. Requests for Admission
Rule 36 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 36 applies in an adversary proceeding.

Committee Note

The language of Rule 7036 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7037. Failure to Make Discovery: Sanctions	Rule 7037. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
Rule 37 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 37 applies in an adversary proceeding.

Committee Note

The language of Rule 7037 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7040. Assignment of Cases for Trial	Rule 7040. Scheduling Cases for Trial
Rule 40 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 40 applies in an adversary proceeding.

Committee Note

The language of Rule 7040 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7041. Dismissal of Adversary Proceedings	Rule 7041. Dismissal of Adversary Proceedings
Rule 41 F.R.Civ.P. applies in adversary proceedings, except that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, the United States trustee, and such other persons as the court may direct, and only on order of the court containing terms and conditions which the court deems proper.	Fed. R. Civ. P. 41 applies in an adversary proceeding. But a complaint objecting to the debtor's discharge may be dismissed on the plaintiff's motion only: <ul style="list-style-type: none"> (a) with notice to the trustee, the United States trustee, and any other person as the court designates; and (b) by a court order that sets out any conditions for the dismissal.

Committee Note

The language of Rule 7041 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7042. Consolidation of Adversary Proceedings; Separate Trials	Rule 7042. Consolidating Adversary Proceedings; Separate Trials
Rule 42 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 42 applies in an adversary proceeding.

Committee Note

The language of Rule 7042 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7052. Findings by the Court	Rule 7052. Findings and Conclusions by the Court; Judgment on Partial Findings
Rule 52 F.R.Civ.P. applies in adversary proceedings, except that any motion under subdivision (b) of that rule for amended or additional findings shall be filed no later than 14 days after entry of judgment. In these proceedings, the reference in Rule 52 F.R.Civ.P. to the entry of judgment under Rule 58 F.R.Civ.P. shall be read as a reference to the entry of a judgment or order under Rule 5003(a).	Fed. R. Civ. P. 52 applies in an adversary proceeding—except that a motion under Fed. R. Civ. P. 52(b) to amend or add findings must be filed within 14 days after the judgment is entered. The reference in Fed. R. Civ. P. 52(a) to entering a judgment under Fed. R. Civ. P. 58 must be read as referring to entering a judgment or order under Rule 5003(a).

Committee Note

The language of Rule 7052 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7054. Judgments; Costs	Rule 7054. Judgments; Costs
(a) JUDGMENTS. Rule 54(a)–(c) F.R.Civ.P. applies in adversary proceedings.	(a) Judgment. Fed. R. Civ. P. 54(a)–(c) applies in an adversary proceeding.
(b) COSTS; ATTORNEY'S FEES. <p style="margin-left: 40px;">(1) <i>Costs Other Than Attorney's Fees.</i> The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court.</p> <p style="margin-left: 40px;">(2) <i>Attorney's Fees.</i></p> <p style="margin-left: 40px;">(A) Rule 54(d)(2)(A)–(C) and (E) F.R.Civ.P. applies in adversary proceedings except for the reference in Rule 54(d)(2)(C) to Rule 78.</p> <p style="margin-left: 40px;">(B) By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings.</p>	(b) Costs and Attorney's Fees. <p style="margin-left: 40px;">(1) <i>Costs Other Than Attorney's Fees.</i> The court may allow costs to the prevailing party, unless a federal statute or these rules provide otherwise. Costs against the United States, its officers, and its agencies may be imposed only to the extent permitted by law. The clerk, on 14 days' notice, may tax costs, and the court, on motion served within the next 7 days, may review the clerk's action.</p> <p style="margin-left: 40px;">(2) <i>Attorney's Fees.</i></p> <p style="margin-left: 80px;">(A) <i>In General.</i> Fed. R. Civ. P. 54(d)(2)(A)–(C) and (E) applies in an adversary proceeding—except for the reference in Rule 54(d)(2)(C) to Rule 78.</p> <p style="margin-left: 80px;">(B) <i>Local Rules for Resolving Issues.</i> By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings.</p>

Committee Note

The language of Rule 7054 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7055. Default	Rule 7055. Default; Default Judgment
Rule 55 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 55 applies in an adversary proceeding.

Committee Note

The language of Rule 7055 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7056. Summary Judgment	Rule 7056. Summary Judgment
Rule 56 F.R.Civ.P. applies in adversary proceedings, except that any motion for summary judgment must be made at least 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless a different time is set by local rule or the court orders otherwise.	Fed. R. Civ. P. 56 applies in an adversary proceeding. But a motion for summary judgment must be filed at least 30 days before the first date set for an evidentiary hearing on any issue that the motion addresses, unless a local rule sets a different time or the court orders otherwise.

Committee Note

The language of Rule 7056 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7058. Entering Judgment in Adversary Proceeding	Rule 7058. Entering Judgment
Rule 58 F.R.Civ.P. applies in adversary proceedings. In these proceedings, the reference in Rule 58 F.R.Civ.P. to the civil docket shall be read as a reference to the docket maintained by the clerk under Rule 5003(a).	Fed. R. Civ. P. 58 applies in an adversary proceeding. A reference in that rule to the civil docket must be read as referring to the docket maintained by the clerk under Rule 5003(a).

Committee Note

The language of Rule 7058 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7062. Stay of Proceedings to Enforce a Judgment	Rule 7062. Stay of Proceedings to Enforce a Judgment
Rule 62 F.R.Civ.P. applies in adversary proceedings, except that proceedings to enforce a judgment are stayed for 14 days after its entry.	Fed. R. Civ. P. 62 applies in an adversary proceeding—except that a proceeding to enforce a judgment is stayed for 14 days after its entry.

Committee Note

The language of Rule 7062 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7064. Seizure of Person or Property	Rule 7064. Seizing a Person or Property
Rule 64 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 64 applies in an adversary proceeding.

Committee Note

The language of Rule 7064 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7065. Injunctions	Rule 7065. Injunctions
Rule 65 F.R.Civ.P. applies in adversary proceedings, except that a temporary restraining order or preliminary injunction may be issued on application of a debtor, trustee, or debtor in possession without compliance with Rule 65(c).	Fed. R. Civ. P. 65 applies in an adversary proceeding. But on application of a debtor, trustee, or debtor in possession, the court may issue a temporary restraining order or preliminary injunction without complying with subdivision (c) of that rule.

Committee Note

The language of Rule 7065 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7067. Deposit in Court	Rule 7067. Deposit into Court
Rule 67 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 67 applies in an adversary proceeding.

Committee Note

The language of Rule 7067 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7068. Offer of Judgment	Rule 7068. Offer of Judgment
Rule 68 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 68 applies in an adversary proceeding.

Committee Note

The language of Rule 7068 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7069. Execution	Rule 7069. Execution
Rule 69 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 69 applies in an adversary proceeding.

Committee Note

The language of Rule 7069 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7070. Judgment for Specific Acts; Vesting Title	Rule 7070. Enforcing a Judgment for a Specific Act; Vesting Title
Rule 70 F.R.Civ.P. applies in adversary proceedings and the court may enter a judgment divesting the title of any party and vesting title in others whenever the real or personal property involved is within the jurisdiction of the court.	Fed. R. Civ. P. 70 applies in an adversary proceeding. When real or personal property is within the court's jurisdiction, the court may enter a judgment divesting a party's title and vesting it in another person.

Committee Note

The language of Rule 7070 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7071. Process in Behalf of and Against Persons Not Parties	Rule 7071. Enforcing Relief For or Against a Nonparty
Rule 71 F.R.Civ.P. applies in adversary proceedings.	Fed. R. Civ. P. 71 applies in an adversary proceeding.

Committee Note

The language of Rule 7071 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 7087. Transfer of Adversary Proceeding	Rule 7087. Transferring an Adversary Proceeding
On motion and after a hearing, the court may transfer an adversary proceeding or any part thereof to another district pursuant to 28 U.S.C. § 1412, except as provided in Rule 7019(2).	On motion and after a hearing, the court may transfer an adversary proceeding, or any part of it, to another district under 28 U.S.C. § 1412—except as provided in Rule 7019(b).

Committee Note

The language of Rule 7087 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Bankruptcy Rules Restyling

8000 Series

Preface

This revision is a restyling of the Federal Rules of Bankruptcy Procedure to provide greater clarity, consistency, and conciseness without changing practice and procedure.

ORIGINAL	REVISION
PART VIII—APPEALS TO DISTRICT COURT OR BANKRUPTCY APPELLATE PANEL	PART VIII. APPEAL TO A DISTRICT COURT OR A BANKRUPTCY APPELLATE PANEL
Rule 8001. Scope of Part VIII Rules; Definition of “BAP”; Method of Transmission	Rule 8001. Scope; Definition of “BAP”; Sending Documents Electronically
(a) GENERAL SCOPE. These Part VIII rules govern the procedure in a United States district court and a bankruptcy appellate panel on appeal from a judgment, order, or decree of a bankruptcy court. They also govern certain procedures on appeal to a United States court of appeals under 28 U.S.C. § 158(d).	(a) Scope. These Part VIII rules govern the procedure in a United States district court and a bankruptcy appellate panel on appeal from a bankruptcy court’s judgment, order, or decree. They also govern certain procedures on appeal to a United States court of appeals under 28 U.S.C. § 158(d).
(b) DEFINITION OF “BAP.” “BAP” means a bankruptcy appellate panel established by a circuit’s judicial council and authorized to hear appeals from a bankruptcy court under 28 U.S.C. § 158.	(b) Definition of “BAP.” “BAP” means a bankruptcy appellate panel established by a circuit judicial council and authorized to hear appeals from a bankruptcy court under 28 U.S.C. § 158.
(c) METHOD OF TRANSMITTING DOCUMENTS. A document must be sent electronically under these Part VIII rules, unless it is being sent by or to an individual who is not represented by counsel or the court’s governing rules permit or require mailing or other means of delivery.	(c) Requirement to Send Documents Electronically. Under these Part VIII rules, a document must be sent electronically, unless: <ul style="list-style-type: none"> (1) it is sent by or to an individual who is not represented by counsel; or (2) the court’s local rules permit or require mailing or delivery by other means.

Committee Note

The language of Rule 8001 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<p>Rule 8002. Time for Filing Notice of Appeal</p>	<p>Rule 8002. Time to File a Notice of Appeal</p>
<p>(a) IN GENERAL.</p> <p>(1) Fourteen-Day Period. Except as provided in subdivisions (b) and (c), a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.</p> <p>(2) Filing Before the Entry of Judgment. A notice of appeal filed after the bankruptcy court announces a decision or order—but before entry of the judgment, order, or decree—is treated as filed on the date of and after the entry.</p> <p>(3) Multiple Appeals. If one party files a timely notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise allowed by this rule, whichever period ends later.</p> <p>(4) Mistaken Filing in Another Court. If a notice of appeal is mistakenly filed in a district court, BAP, or court of appeals, the clerk of that court must state on the notice the date on which it was received and transmit it to the bankruptcy clerk. The notice of appeal is then considered filed in the bankruptcy court on the date so stated.</p> <p>(5) Entry Defined.</p> <p>(A) A judgment, order, or decree is entered for purposes of this Rule 8002(a):</p> <p>(i) when it is entered in the docket under Rule 5003(a), or</p>	<p>(a) In General.</p> <p>(1) <i>Time to File.</i> Except as (b) and (c) provide otherwise, a notice of appeal must be filed with the bankruptcy clerk within 14 days after the judgment, order, or decree to be appealed is entered.</p> <p>(2) <i>Filing Before the Entry of Judgment.</i> A notice of appeal filed after the bankruptcy court announces a decision or order—but before entry of the judgment, order, or decree—is treated as filed on the date of and after the entry.</p> <p>(3) <i>Multiple Appeals.</i> If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise allowed by this rule, whichever period ends later.</p> <p>(4) <i>Mistaken Filing in Another Court.</i> If a notice of appeal is mistakenly filed in a district court, BAP, or court of appeals, that court’s clerk must note on it the date when it was received and send it to the bankruptcy clerk. The notice is then considered filed in the bankruptcy court on the date noted.</p> <p>(5) <i>Entry Defined.</i></p> <p>(A) <i>In General.</i> A judgment, order, or decree is entered for purposes of this subdivision (a):</p> <p>(i) when it is entered in the docket under Rule 5003(a); or</p> <p>(ii) if Rule 7058 applies and Fed. R. Civ. P. 58(a) requires a separate document, when the judgment, order, or decree is</p>

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<p>(ii) if Rule 7058 applies and Rule 58(a) F.R.Civ.P. requires a separate document, when the judgment, order, or decree is entered in the docket under Rule 5003(a) and when the earlier of these events occurs:</p> <ul style="list-style-type: none"> • the judgment, order, or decree is set out in a separate document; or • 150 days have run from entry of the judgment, order, or decree in the docket under Rule 5003(a). <p>(B) A failure to set out a judgment, order, or decree in a separate document when required by Rule 58(a) F.R.Civ.P. does not affect the validity of an appeal from that judgment, order, or decree.</p>	<p>entered in the docket under Rule 5003(a) and when the earlier of these events occurs:</p> <ul style="list-style-type: none"> • the judgment, order, or decree is set out in a separate document; or • 150 days have run from entry of the judgment, order, or decree in the docket under Rule 5003(a). <p>(B) <i>Failure to Use a Separate Document.</i> A failure to set out a judgment, order, or decree in a separate document when required by Fed. R. Civ. P. 58(a) does not affect the validity of an appeal from that judgment, order, or decree.</p>
<p>(b) EFFECT OF A MOTION ON THE TIME TO APPEAL.</p> <p>(1) In General. If a party files in the bankruptcy court any of the following motions and does so within the time allowed by these rules, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:</p>	<p>(b) Effect of a Motion on the Time to Appeal.</p> <p>(1) <i>In General.</i> If a party files in the bankruptcy court any of the following motions—and does so within the time allowed by these rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:</p>

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<p>(A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;</p> <p>(B) to alter or amend the judgment under Rule 9023;</p> <p>(C) for a new trial under Rule 9023; or</p> <p>(D) for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered.</p> <p>(2) Filing an Appeal Before the Motion is Decided. If a party files a notice of appeal after the court announces or enters a judgment, order, or decree—but before it disposes of any motion listed in subdivision (b)(1)—the notice becomes effective when the order disposing of the last such remaining motion is entered.</p> <p>(3) Appealing the Ruling on the Motion. If a party intends to challenge an order disposing of any motion listed in subdivision (b)(1)—or the alteration or amendment of a judgment, order, or decree upon the motion—the party must file a notice of appeal or an amended notice of appeal. The notice or amended notice must comply with Rule 8003 or 8004 and be filed within the time prescribed by this rule, measured from the entry of the order disposing of the last such remaining motion.</p> <p>(4) No Additional Fee. No additional fee is required to file an amended notice of appeal.</p>	<p>(A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;</p> <p>(B) to alter or amend the judgment under Rule 9023;</p> <p>(C) for a new trial under Rule 9023; or</p> <p>(D) for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered.</p> <p>(2) <i>Notice of Appeal Filed Before a Motion Is Decided.</i> If a party files a notice of appeal after the court announces or enters a judgment, order, or decree—but before it disposes of any motion listed in (1)—the notice becomes effective when the order disposing of the last such remaining motion is entered.</p> <p>(3) <i>Appealing the Ruling on the Motion.</i> A party intending to challenge an order disposing of a motion listed in (1)—or an alteration or amendment of a judgment, order, or decree made by a decision on the motion—must file a notice of appeal or an amended notice of appeal. It must:</p> <p>(A) comply with Rule 8003 or 8004; and</p> <p>(B) be filed within the time prescribed by this rule, measured from the entry of the order disposing of the last such remaining motion.</p> <p>(4) <i>No Additional Fee for an Amended Notice.</i> No additional fee is required to file an amended notice of appeal.</p>

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<p>(c) APPEAL BY AN INMATE CONFINED IN AN INSTITUTION.</p> <p>(1) In General. If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8002(c)(1). If an inmate files a notice of appeal from a judgment, order, or decree of a bankruptcy court, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:</p> <p style="padding-left: 40px;">(A) it is accompanied by:</p> <p style="padding-left: 80px;">(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being pre-paid; or</p> <p style="padding-left: 80px;">(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or</p> <p style="padding-left: 40px;">(B) the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 8002(c)(1)(A)(i).</p> <p>(2) Multiple Appeals. If an inmate files under this subdivision the first notice of appeal, the 14-day period provided in subdivision (a)(3) for another party to file a notice of appeal runs from the date when the bankruptcy clerk docketed the first notice.</p>	<p>(c) Appeal by an Inmate Confined in an Institution.</p> <p>(1) <i>In General.</i> If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this paragraph (1). If an inmate files a notice of appeal from a judgment, order, or decree of a bankruptcy court, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:</p> <p style="padding-left: 40px;">(A) it is accompanied by:</p> <p style="padding-left: 80px;">(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or</p> <p style="padding-left: 80px;">(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or</p> <p style="padding-left: 40px;">(B) the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies (A)(i).</p> <p>(2) <i>Multiple Appeals.</i> If an inmate files under this subdivision (c) the first notice of appeal, the 14-day period provided in (a)(3) for another party to file a notice of appeal runs from the date when the bankruptcy clerk docketed the first notice.</p>

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<p>(d) EXTENDING THE TIME TO APPEAL.</p> <p>(1) When the Time May be Extended. Except as provided in subdivision (d)(2), the bankruptcy court may extend the time to file a notice of appeal upon a party's motion¹ that is filed:</p> <p>(A) within the time prescribed by this rule; or</p> <p>(B) within 21 days after that time, if the party shows excusable neglect.</p> <p>(2) When the Time May Not be Extended. The bankruptcy court may not extend the time to file a notice of appeal if the judgment, order, or decree appealed from:</p> <p>(A) grants relief from an automatic stay under § 362, 922, 1201, or 1301 of the Code;</p> <p>(B) authorizes the sale or lease of property or the use of cash collateral under § 363 of the Code;</p> <p>(C) authorizes the obtaining of credit under § 364 of the Code;</p> <p>(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code;</p> <p>(E) approves a disclosure statement under § 1125 of the Code; or</p> <p>(F) confirms a plan under § 943, 1129, 1225, or 1325 of the Code.</p>	<p>(d) Extending the Time to File a Notice of Appeal.</p> <p>(1) <i>When the Time May Be Extended.</i> Except as (2) provides otherwise, the bankruptcy court may, on motion, extend the time to file a notice of appeal² if the motion is filed:</p> <p>(A) within the time prescribed by this rule; or</p> <p>(B) within 21 days after that time expires if the party shows excusable neglect.</p> <p>(2) <i>When the Time May Not Be Extended.</i> The bankruptcy court may not extend the time to file the notice if the judgment, order, or decree being appealed:</p> <p>(A) grants relief from the automatic stay under § 362, 922, 1201, or 1301;</p> <p>(B) authorizes the sale or lease of property or the use of cash collateral under § 363;</p> <p>(C) authorizes obtaining credit under § 364;</p> <p>(D) authorizes assuming or assigning an executory contract or unexpired lease under § 365;</p> <p>(E) approves a disclosure statement under § 1125; or</p> <p>(F) confirms a plan under § 943, 1129, 1225, or 1325.</p>

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<p>(3) TIME LIMITS ON AN EXTENSION. No extension of time may exceed 21 days after the time prescribed by this rule, or 14 days after the order granting the motion to extend time is entered, whichever is later.</p>	<p>(3) <i>Limit on Extending Time.</i> An extension of time must not exceed 21 days after the time prescribed by this rule, or 14 days after the order granting the motion to extend time is entered—whichever is later.</p>

Committee Note

The language of Rule 8002 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<p>Rule 8003. Appeal as of Right—How Taken; Docketing the Appeal</p>	<p>Rule 8003. Appeal as of Right—How Taken; Docketing the Appeal</p>
<p>(a) FILING THE NOTICE OF APPEAL.</p> <p>(1) In General. An appeal from a judgment, order, or decree of a bankruptcy court to a district court or BAP under 28 U.S.C. § 158(a)(1) or (a)(2) may be taken only by filing a notice of appeal with the bankruptcy clerk within the time allowed by Rule 8002.</p> <p>(2) Effect of Not Taking Other Steps. An appellant’s failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the district court or BAP to act as it considers appropriate, including dismissing the appeal.</p> <p>(3) Contents. The notice of appeal must:</p> <p>(A) conform substantially to the appropriate Official Form;</p> <p>(B) be accompanied by the judgment, order, or decree, or the part of it, being appealed; and</p> <p>(C) be accompanied by the prescribed fee.</p> <p>(4) Additional Copies. If requested to do so, the appellant must furnish the bankruptcy clerk with enough copies of the notice to enable the clerk to comply with subdivision (c).</p>	<p>(a) Filing a Notice of Appeal.</p> <p>(1) <i>Time to File.</i> An appeal under 28 U.S.C. § 158(a)(1) or (2) from a judgment, order, or decree of a bankruptcy court to a district court or a BAP may be taken only by filing a notice of appeal with the bankruptcy clerk within the time allowed by Rule 8002.</p> <p>(2) <i>Failure to Take Any Other Step.</i> An appellant’s failure to take any other step does not affect the appeal’s validity, but is ground only for the district court or BAP to act as it considers appropriate, including dismissing the appeal.</p> <p>(3) <i>Content of the Notice of Appeal.</i> A notice of appeal must:</p> <p>(A) conform substantially to Form 417A;</p> <p>(B) be accompanied by the judgment, order, or decree, or the part of it, being appealed; and</p> <p>(C) be accompanied by the prescribed filing fee.</p> <p>(4) <i>Clerk’s Request for Additional Copies of the Notice of Appeal.</i> On the bankruptcy clerk’s request, the appellant must provide enough copies of the notice of appeal to enable the clerk to comply with (c).</p>

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<p>(b) JOINT OR CONSOLIDATED APPEALS.</p> <p>(1) Joint Notice of Appeal. When two or more parties are entitled to appeal from a judgment, order, or decree of a bankruptcy court and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.</p> <p>(2) Consolidating Appeals. When parties have separately filed timely notices of appeal, the district court or BAP may join or consolidate the appeals.</p>	<p>(b) Joint or Consolidated Appeals.</p> <p>(1) <i>Joint Notice of Appeal.</i> When two or more parties are entitled to appeal from a bankruptcy court’s judgment, order, or decree and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.</p> <p>(2) <i>Consolidating Appeals.</i> When parties have separately filed timely notices of appeal, the district court or BAP may join or consolidate the appeals.</p>
<p>(c) SERVING THE NOTICE OF APPEAL.</p> <p>(1) Serving Parties and Transmitting to the United States Trustee. The bankruptcy clerk must serve the notice of appeal on counsel of record for each party to the appeal, excluding the appellant, and transmit it to the United States trustee. If a party is proceeding pro se, the clerk must send the notice of appeal to the party’s last known address. The clerk must note, on each copy, the date when the notice of appeal was filed.</p> <p>(2) Effect of Failing to Serve or Transmit Notice. The bankruptcy clerk’s failure to serve notice on a party or transmit notice to the United States trustee does not affect the validity of the appeal.</p> <p>(3) Noting Service on the Docket. The clerk must note on the docket the names of the parties served and the date and method of the service.</p>	<p>(c) Serving the Notice of Appeal.</p> <p>(1) <i>Serving Parties; Sending to the United States Trustee.</i> The bankruptcy clerk must serve the notice of appeal by sending a copy to counsel of record for each party to the appeal—excluding the appellant’s—and send it to the United States trustee. If a party is proceeding pro se, the clerk must send the notice to the party’s last known address. The clerk must note, on each copy, the date when the notice of appeal was filed.</p> <p>(2) <i>Failure to Serve the Notice of Appeal.</i> The bankruptcy clerk’s failure to serve notice on a party or send notice to the United States trustee does not affect the validity of the appeal.</p> <p>(3) <i>Entry of Service on the Docket.</i> The clerk must note on the docket the names of the parties served and the date and method of service.</p>

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<p>(d) TRANSMITTING THE NOTICE OF APPEAL TO THE DISTRICT COURT OR BAP; DOCKETING THE APPEAL.</p> <p>(1) Transmitting the Notice. The bankruptcy clerk must promptly transmit the notice of appeal to the BAP clerk if a BAP has been established for appeals from that district and the appellant has not elected to have the district court hear the appeal. Otherwise, the bankruptcy clerk must promptly transmit the notice to the district clerk.</p> <p>(2) Docketing in the District Court or BAP. Upon receiving the notice of appeal, the district or BAP clerk must docket the appeal under the title of the bankruptcy case and the title of any adversary proceeding, and must identify the appellant, adding the appellant's name if necessary.</p>	<p>(d) Sending the Notice of Appeal to the District Court or BAP; Docketing the Appeal.</p> <p>(1) <i>Where to Send the Notice of Appeal.</i> If a BAP has been established to hear appeals from that district—and an appellant has not elected to have the appeal heard in the district court—the bankruptcy clerk must promptly send the notice of appeal to the BAP clerk. Otherwise, the bankruptcy clerk must promptly send it to the district clerk.</p> <p>(2) <i>Docketing the Appeal.</i> Upon receiving the notice of appeal, the BAP clerk or district clerk must:</p> <p>(A) docket the appeal under the title of the bankruptcy case and the title of any adversary proceeding; and</p> <p>(B) identify the appellant, adding the appellant's name if necessary.</p>

Committee Note

The language of Rule 8003 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 8004. Appeal by Leave—How Taken; Docketing the Appeal</p>	<p>Rule 8004. Appeal by Leave from an Interlocutory Order or Decree Under 28 U.S.C. § 158(a)(3)</p>
<p>(a) NOTICE OF APPEAL AND MOTION FOR LEAVE TO APPEAL. To appeal from an interlocutory order or decree of a bankruptcy court under 28 U.S.C. § 158(a)(3), a party must file with the bankruptcy clerk a notice of appeal as prescribed by Rule 8003(a). The notice must:</p> <ul style="list-style-type: none"> (1) be filed within the time allowed by Rule 8002; (2) be accompanied by a motion for leave to appeal prepared in accordance with subdivision (b); and (3) unless served electronically using the court’s transmission equipment, include proof of service in accordance with Rule 8011(d). 	<p>(a) Notice of Appeal and Accompanying Motion for Leave to Appeal. To appeal under 28 U.S.C. § 158(a)(3) from a bankruptcy court’s interlocutory order or decree, a party must file with the bankruptcy clerk a notice of appeal under Rule 8003(a). The notice must:</p> <ul style="list-style-type: none"> (1) be filed within the time allowed by Rule 8002; (2) be accompanied by a motion for leave to appeal prepared in accordance with (b); and (3) unless served electronically using the court’s electronic-filing system, include proof of service in accordance with Rule 8011(d).
<p>(b) CONTENTS OF THE MOTION; RESPONSE.</p> <ul style="list-style-type: none"> (1) Contents. A motion for leave to appeal under 28 U.S.C. § 158(a)(3) must include the following: <ul style="list-style-type: none"> (A) the facts necessary to understand the question presented; (B) the question itself; (C) the relief sought; (D) the reasons why leave to appeal should be granted; and (E) a copy of the interlocutory order or decree and any related opinion or memorandum. 	<p>(b) Content of the Motion for Leave to Appeal; Response.</p> <ul style="list-style-type: none"> (1) Content. A motion for leave to appeal under 28 U.S.C. § 158(a)(3) must include: <ul style="list-style-type: none"> (A) the facts needed to understand the question presented; (B) the question itself; (C) the relief sought; (D) the reasons why leave to appeal should be granted; and (E) a copy of the interlocutory order or decree and any related opinion or memorandum.

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<p>(2) Response. A party may file with the district or BAP clerk a response in opposition or a cross-motion within 14 days after the motion is served.</p>	<p>(2) <i>Response.</i> Within 14 days after the motion for leave has been served, a party may file with the district clerk or BAP clerk a response in opposition or a cross-motion.</p>
<p>(c) TRANSMITTING THE NOTICE OF APPEAL AND THE MOTION; DOCKETING THE APPEAL; DETERMINING THE MOTION.</p> <p>(1) Transmitting to the District Court or BAP. The bankruptcy clerk must promptly transmit the notice of appeal and the motion for leave to the BAP clerk if a BAP has been established for appeals from that district and the appellant has not elected to have the district court hear the appeal. Otherwise, the bankruptcy clerk must promptly transmit the notice and motion to the district clerk.</p> <p>(2) Docketing in the District Court or BAP. Upon receiving the notice and motion, the district or BAP clerk must docket the appeal under the title of the bankruptcy case and the title of any adversary proceeding, and must identify the appellant, adding the appellant's name if necessary.</p> <p>(3) Oral Argument Not Required. The motion and any response or cross-motion are submitted without oral argument unless the district court or BAP orders otherwise.</p>	<p>(c) Sending the Notice of Appeal and Motion for Leave to Appeal; Docketing the Appeal; Oral Argument Not Required.</p> <p>(1) <i>Sending to the District Court or BAP.</i> If a BAP has been established to hear appeals from that district—and an appellant has not elected to have the appeal heard in the district court—the bankruptcy clerk must promptly send the notice of appeal and the motion for leave to appeal to the BAP clerk. Otherwise, the bankruptcy clerk must promptly send the notice and motion to the district clerk.</p> <p>(2) <i>Docketing the Appeal.</i> Upon receiving the notice and motion, the district or BAP clerk must docket the appeal as prescribed by Rule 8003(d)(2).</p> <p>(3) <i>Oral Argument Not Required.</i> Unless the district court or BAP orders otherwise, a motion, <u>a</u> cross-motion, and any response will be submitted without oral argument.</p>
<p>(d) FAILURE TO FILE A MOTION WITH A NOTICE OF APPEAL. If an appellant timely files a notice of appeal under this rule but does not include a motion for leave, the district court or BAP may order the appellant to file a motion for leave, or treat the notice of appeal as a motion for leave and either</p>	<p>(d) Failure to File a Motion for Leave to Appeal. If an appellant files a timely notice of appeal under this rule but fails to include a motion for leave to appeal, the district court or BAP may:</p> <p>(1) treat the notice of appeal as a motion for leave to appeal and grant or deny it; or</p>

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grant or deny it. If the court orders that a motion for leave be filed, the appellant must do so within 14 days after the order is entered, unless the order provides otherwise.	(2) order the appellant to file a motion for leave to appeal within 14 days after the order has been entered—unless the order provides otherwise.
(e) DIRECT APPEAL TO A COURT OF APPEALS. If leave to appeal an interlocutory order or decree is required under 28 U.S.C. § 158(a)(3), an authorization of a direct appeal by the court of appeals under 28 U.S.C. § 158(d)(2) satisfies the requirement.	(e) Direct Appeal to a Court of Appeals. If leave to appeal an interlocutory order or decree is required under 28 U.S.C. § 158(a)(3), an authorization by a court of appeals for a direct appeal under 28 U.S.C. § 158(d)(2) satisfies the requirement.

Committee Note

The language of Rule 8004 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 8005. Election to Have an Appeal Heard by the District Court Instead of the BAP</p>	<p>Rule 8005. Election to Have an Appeal Heard in a District Court Instead of the BAP</p>
<p>(a) FILING OF A STATEMENT OF ELECTION. To elect to have an appeal heard by the district court, a party must:</p> <p style="padding-left: 40px;">(1) file a statement of election that conforms substantially to the appropriate Official Form; and</p> <p style="padding-left: 40px;">(2) do so within the time prescribed by 28 U.S.C. § 158(c)(1).</p>	<p>(a) Filing a Statement of Election. To elect to have an appeal heard in a district court, a party must file a statement of election within the time prescribed by 28 U.S.C. § 158(c)(1). The statement must conform substantially to Form 417A.</p>
<p>(b) TRANSMITTING THE DOCUMENTS RELATED TO THE APPEAL. Upon receiving an appellant's timely statement of election, the bankruptcy clerk must transmit to the district clerk all documents related to the appeal. Upon receiving a timely statement of election by a party other than the appellant, the BAP clerk must transmit to the district clerk all documents related to the appeal and notify the bankruptcy clerk of the transmission.</p>	<p>(b) Sending Documents Relating to the Appeal. Upon receiving an appellant's timely statement of election, the bankruptcy clerk must send all documents related to the appeal to the district clerk. A BAP clerk who receives a timely statement of election from a party other than the appellant must:</p> <p style="padding-left: 40px;">(1) send those documents to the district clerk; and</p> <p style="padding-left: 40px;">(2) notify the bankruptcy clerk that they have been sent.</p>
<p>(c) DETERMINING THE VALIDITY OF AN ELECTION. A party seeking a determination of the validity of an election must file a motion in the court where the appeal is then pending. The motion must be filed within 14 days after the statement of election is filed.</p>	<p>(c) Determining the Validity of an Election. Within 14 days after the statement of election has been filed, a party seeking to determine the election's validity must file a motion in the court where the appeal is pending.</p>
<p>(d) MOTION FOR LEAVE WITHOUT A NOTICE OF APPEAL—EFFECT ON THE TIMING OF AN ELECTION. If an appellant moves for leave to appeal under Rule 8004 but fails to file a separate notice of appeal with the</p>	<p>(d) Effect of Filing a Motion for Leave to Appeal Without Filing a Notice of Appeal. If an appellant moves for leave to appeal under Rule 8004 but fails to file a notice of appeal with the motion, it must be treated as a notice of appeal in determining</p>

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motion, the motion must be treated as a notice of appeal for purposes of determining the timeliness of a statement of election.	whether the statement of election has been timely filed.

Committee Note

The language of Rule 8005 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 8006. Certifying a Direct Appeal to the Court of Appeals</p>	<p>Rule 8006. Certifying a Direct Appeal to a Court of Appeals</p>
<p>(a) EFFECTIVE DATE OF A CERTIFICATION. A certification of a judgment, order, or decree of a bankruptcy court for direct review in a court of appeals under 28 U.S.C. § 158(d)(2) is effective when:</p> <p>(1) the certification has been filed;</p> <p>(2) a timely appeal has been taken under Rule 8003 or 8004; and</p> <p>(3) the notice of appeal has become effective under Rule 8002.</p>	<p>(a) Effective Date of a Certification. A certification of a bankruptcy court’s judgment, order, or decree to a court of appeals for direct review under 28 U.S.C. § 158(d)(2) becomes effective when:</p> <p>(1) it is filed;</p> <p>(2) a timely appeal is taken under Rule 8003 or Rule 8004; and</p> <p>(3) the notice of appeal becomes effective under Rule 8002.</p>
<p>(b) FILING THE CERTIFICATION. The certification must be filed with the clerk of the court where the matter is pending. For purposes of this rule, a matter remains pending in the bankruptcy court for 30 days after the effective date under Rule 8002 of the first notice of appeal from the judgment, order, or decree for which direct review is sought. A matter is pending in the district court or BAP thereafter.</p>	<p>(b) Filing the Certification. The certification must be filed with the clerk of the court where the matter is pending. For purposes of this rule, a matter remains pending in the bankruptcy court for 30 days after the first notice of appeal concerning that matter becomes effective under Rule 8002. After that time, the matter is pending in the district court or BAP.</p>
<p>(c) JOINT CERTIFICATION BY ALL APPELLANTS AND APPELLEES.</p> <p>(1) How Accomplished. A joint certification by all the appellants and appellees under 28 U.S.C. § 158(d)(2)(A) must be made by using the appropriate Official Form. The parties may supplement the certification with a short statement of the basis for the certification, which may include the information listed in subdivision (f)(2).</p>	<p>(c) Joint Certification by All Appellants and Appellees.</p> <p>(1) <i>In General.</i> A joint certification by all appellants and appellees under 28 U.S.C. § 158(d)(2)(A) must be made using Form 424. The parties may supplement the certification with a short statement about its basis. The statement may include the information required by (f)(2).</p>

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<p>(2) Supplemental Statement by the Court. Within 14 days after the parties' certification, the bankruptcy court or the court in which the matter is then pending may file a short supplemental statement about the merits of the certification.</p>	<p>(2) <i>Supplemental Statement by the Court.</i> Within 14 days after the parties file the certification, the bankruptcy court—or the court where the matter is pending—may file a short supplemental statement about the certification's merits.</p>
<p>(d) THE COURT THAT MAY MAKE THE CERTIFICATION. Only the court where the matter is pending, as provided in subdivision (b), may certify a direct review on request of parties or on its own motion.</p>	<p>(d) <i>Court's Authority to Certify a Direct Appeal.</i> On a party's request or on its own, the court where the matter is pending under (b) may certify a direct appeal to a court of appeals.</p>
<p>(e) CERTIFICATION ON THE COURT'S OWN MOTION.</p> <p>(1) How Accomplished. A certification on the court's own motion must be set forth in a separate document. The clerk of the certifying court must serve it on the parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1). The certification must be accompanied by an opinion or memorandum that contains the information required by subdivision (f)(2)(A)–(D).</p> <p>(2) Supplemental Statement by a Party. Within 14 days after the court's certification, a party may file with the clerk of the certifying court a short supplemental statement regarding the merits of certification.</p>	<p>(e) <i>Certification by the Court Acting on Its Own.</i></p> <p>(1) <i>Separate Document Required; Service; Content.</i> A certification by a court acting on its own must be set forth in a separate document. The clerk of the certifying court must serve the document on the parties to the appeal in the manner required for serving a notice of appeal under Rule 8003(c)(1). It must be accompanied by an opinion or memorandum that contains the information required by (f)(2)(A)–(D).</p> <p>(2) <i>Supplemental Statement by a Party.</i> Within 14 days after the court's certification, a party may file with the clerk of the certifying court a short supplemental statement about the merits of certification.</p>

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<p>(f) CERTIFICATION BY THE COURT ON REQUEST.</p> <p>(1) How Requested. A request by a party for certification that a circumstance specified in 28 U.S.C. §158(d)(2)(A)(i)–(iii) applies—or a request by a majority of the appellants and a majority of the appellees—must be filed with the clerk of the court where the matter is pending within 60 days after the entry of the judgment, order, or decree.</p> <p>(2) Service and Contents. The request must be served on all parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1), and it must include the following:</p> <p>(A) the facts necessary to understand the question presented;</p> <p>(B) the question itself;</p> <p>(C) the relief sought;</p> <p>(D) the reasons why the direct appeal should be allowed, including which circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)–(iii) applies; and</p> <p>(E) a copy of the judgment, order, or decree and any related opinion or memorandum.</p> <p>(3) Time to File a Response or a Cross-Request. A party may file a response to the request within 14 days after the request is served, or such other time as the court where the matter is pending allows. A party may file a cross-request for certification within 14 days after the request is served, or within 60 days after the entry of the judgment, order, or decree, whichever occurs first.</p>	<p>(f) Certification by the Court on Request.</p> <p>(1) How Requested. A party’s request for certification under 28 U.S.C. § 158(d)(2)(A)—or a request by a majority of the appellants and of the appellees—must be filed with the clerk of the court where the matter is pending. The request must be filed within 60 days after the judgment, order, or decree is entered.</p> <p>(2) Service; Content. The request must be served on all parties to the appeal in the manner required for serving a notice of appeal under Rule 8003(c)(1). The request must include:</p> <p>(A) the facts needed to understand the question presented;</p> <p>(B) the question itself;</p> <p>(C) the relief sought;</p> <p>(D) the reasons why a direct appeal should be allowed, including which circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)–(iii) applies; and</p> <p>(E) the judgment, order, or decree, and any related opinion or memorandum.</p> <p>(3) Time to File a Response or a Cross-Request.</p> <p>(A) Response. A party may file a response within 14 days after the request has been served, or within such other time as the court where the matter is pending allows.</p> <p>(B) Cross-Request. A party may file a cross-request for certification within 14 days after the request has been served or within 60 days after the judgment, order, or decree has been entered—whichever occurs first.</p>

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<p>(4) Oral Argument Not Required. The request, cross-request, and any response are submitted without oral argument unless the court where the matter is pending orders otherwise.</p> <p>(5) Form and Service of the Certification. If the court certifies a direct appeal in response to the request, it must do so in a separate document. The certification must be served on the parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1).</p>	<p>(4) <i>Oral Argument Not Required.</i> Unless the court where the matter is pending orders otherwise, a request, a cross-request, and any response will be submitted without oral argument.</p> <p>(5) <i>Form of a Certification; Service.</i> The court that certifies a direct appeal in response to a request must do so in a separate document served on all parties to the appeal in the manner required for serving a notice of appeal under Rule 8003(c)(1).</p>
<p>(g) PROCEEDING IN THE COURT OF APPEALS FOLLOWING A CERTIFICATION. Within 30 days after the date the certification becomes effective under subdivision (a), a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk in accordance with F.R.App.P. 6(c).</p>	<p>(g) Request for Leave to Take a Direct Appeal to a Court of Appeals After Certification. Within 30 days after the certification has become effective under (a), a request for leave to take a direct appeal to a court of appeals must be filed with the circuit clerk in accordance with Fed. R. App. P. 6(c).</p>

Committee Note

The language of Rule 8006 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings</p>	<p>Rule 8007. Stay Pending Appeal; Bond; Suspending Proceedings</p>
<p>(a) INITIAL MOTION IN THE BANKRUPTCY COURT.</p> <p>(1) In General. Ordinarily, a party must move first in the bankruptcy court for the following relief:</p> <p>(A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;</p> <p>(B) the approval of a bond or other security provided to obtain a stay of judgment;</p> <p>(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or</p> <p>(D) the suspension or continuation of proceedings in a case or other relief permitted by subdivision (e).</p> <p>(2) Time to File. The motion may be made either before or after the notice of appeal is filed.</p>	<p>(a) Initial Motion in the Bankruptcy Court.</p> <p>(1) <i>In General.</i> Ordinarily, a party must move first in the bankruptcy court for the following relief:</p> <p>(A) a stay of the bankruptcy court’s judgment, order, or decree pending appeal;</p> <p>(B) the approval of a bond or other security provided to obtain a stay of judgment;</p> <p>(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or</p> <p>(D) an order suspending or continuing proceedings or granting other relief permitted by (e).</p> <p>(2) <i>Time to File.</i> The motion may be filed either before or after the notice of appeal is filed.</p>
<p>(b) MOTION IN THE DISTRICT COURT, THE BAP, OR THE COURT OF APPEALS ON DIRECT APPEAL.</p> <p>(1) Request for Relief. A motion for the relief specified in subdivision (a)(1)—or to vacate or modify a bankruptcy court’s order granting such relief—may be made in the court where</p>	<p>(b) Motion in the District Court, BAP, or Court of Appeals on Direct Appeal.</p> <p>(1) <i>In General.</i> A motion for the relief specified in (a)(1)—or to vacate or modify a bankruptcy court’s order granting such relief—may be filed in the court where the appeal is pending.</p>

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<p>the appeal is pending.</p> <p>(2) Showing or Statement Required. The motion must:</p> <p>(A) show that moving first in the bankruptcy court would be impracticable; or</p> <p>(B) if a motion was made in the bankruptcy court, either state that the court has not yet ruled on the motion, or state that the court has ruled and set out any reasons given for the ruling.</p> <p>(3) Additional Content. The motion must also include:</p> <p>(A) the reasons for granting the relief requested and the facts relied upon;</p> <p>(B) affidavits or other sworn statements supporting facts subject to dispute; and</p> <p>(C) relevant parts of the record.</p> <p>(4) Serving Notice. The movant must give reasonable notice of the motion to all parties.</p>	<p>(2) Required Showing. The motion must:</p> <p>(A) show that moving first in the bankruptcy court would be impracticable; or</p> <p>(B) if a motion has already been made in the bankruptcy court, state whether the court has ruled on it, and if so, state any reasons given for the ruling.</p> <p>(3) Additional Requirements. The motion must also include:</p> <p>(A) the reasons for granting the relief requested and the facts relied on;</p> <p>(B) affidavits or other sworn statements supporting facts subject to dispute; and</p> <p>(C) relevant parts of the record.</p> <p>(4) Serving Notice. The movant must give reasonable notice of the motion to all parties.</p>
<p>(c) FILING A BOND OR OTHER SECURITY. The district court, BAP, or court of appeals may condition relief on filing a bond or other security with the bankruptcy court.</p>	<p>(c) Filing a Bond or Other Security as a Condition of Relief. The district court, BAP, or court of appeals may condition relief on filing a bond or other security with the bankruptcy court.</p>

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<p>(d) BOND OR OTHER SECURITY FOR A TRUSTEE OR THE UNITED STATES. The court may require a trustee to file a bond or other security when the trustee appeals. A bond or other security is not required when an appeal is taken by the United States, its officer, or its agency or by direction of any department of the federal government.</p>	<p>(d) Bond or Other Security for a Trustee; Not for the United States. The court may require a trustee who appeals to file a bond or other security. No bond or security is required when:</p> <ol style="list-style-type: none"> (1) the United States, its officer, or its agency appeals; or (2) an appeal is taken by direction of any federal governmental department.
<p>(e) CONTINUATION OF PROCEEDINGS IN THE BANKRUPTCY COURT. Despite Rule 7062 and subject to the authority of the district court, BAP, or court of appeals, the bankruptcy court may:</p> <ol style="list-style-type: none"> (1) suspend or order the continuation of other proceedings in the case; or (2) issue any other appropriate orders during the pendency of an appeal to protect the rights of all parties in interest. 	<p>(e) Continuing Proceedings in the Bankruptcy Court. Despite Rule 7062— but subject to the authority of the district court, BAP, or court of appeals—while the appeal is pending, the bankruptcy court may:</p> <ol style="list-style-type: none"> (1) suspend or order the continuation of other proceedings in the case, or (2) issue any appropriate order to protect the rights of all parties in interest.

Committee Note

The language of Rule 8007 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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Rule 8008. Indicative Rulings	Rule 8008. Indicative Rulings
<p>(a) RELIEF PENDING APPEAL. If a party files a timely motion in the bankruptcy court for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the bankruptcy court may:</p> <ol style="list-style-type: none"> (1) defer considering the motion; (2) deny the motion; or (3) state that the court would grant the motion if the court where the appeal is pending remands for that purpose, or state that the motion raises a substantial issue. 	<p>(a) Motion for Relief Filed When an Appeal Is Pending; Bankruptcy Court’s Options. If a party files a timely motion in the bankruptcy court for relief that the court lacks authority to grant because an appeal has been docketed and is pending, the bankruptcy court may:</p> <ol style="list-style-type: none"> (1) defer considering the motion; (2) deny the motion; (3) state that it would grant the motion if the court where the appeal is pending remands for that purpose; or (4) state that the motion raises a substantial issue.
<p>(b) NOTICE TO THE COURT WHERE THE APPEAL IS PENDING. The movant must promptly notify the clerk of the court where the appeal is pending if the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue.</p>	<p>(b) Notice to the Court Where the Appeal Is Pending. The movant must promptly notify the clerk of the court where the appeal is pending if the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue.</p>
<p>(c) REMAND AFTER AN INDICATIVE RULING. If the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue, the district court or BAP may remand for further proceedings, but it retains jurisdiction unless it expressly dismisses the appeal. If the district court or BAP remands but retains jurisdiction, the parties must promptly notify the clerk of that court when the bankruptcy court has decided the motion on remand.</p>	<p>(c) Remand After an Indicative Ruling. If the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue, the district court or BAP may remand for further proceedings, but it retains jurisdiction unless it expressly dismisses the appeal. If the district court or BAP remands but retains jurisdiction, the parties must promptly notify the clerk of that court when the bankruptcy court has decided the motion on remand.</p>

Committee Note

The language of Rule 8008 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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Rule 8009. Record on Appeal; Sealed Documents	Rule 8009. Record on Appeal; Sealed Documents
<p>(a) DESIGNATING THE RECORD ON APPEAL; STATEMENT OF THE ISSUES.</p> <p>(1) Appellant.</p> <p>(A) The appellant must file with the bankruptcy clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented.</p> <p>(B) The appellant must file and serve the designation and statement within 14 days after:</p> <p>(i) the appellant's notice of appeal as of right becomes effective under Rule 8002; or</p> <p>(ii) an order granting leave to appeal is entered. A designation and statement served prematurely must be treated as served on the first day on which filing is timely.</p> <p>(2) Appellee and Cross-Appellant. Within 14 days after being served, the appellee may file with the bankruptcy clerk and serve on the appellant a designation of additional items to be included in the record. An appellee who files a cross-appeal must file and serve a designation of additional items to be included in the record and a statement of the issues to be presented on the cross-appeal.</p> <p>(3) Cross-Appellee. Within 14 days after service of the cross-appellant's designation and statement, a cross-appellee may file with the</p>	<p>(a) Designating the Record on Appeal; Statement of the Issues; Content of the Record.</p> <p>(1) <i>Appellant's Designation.</i> The appellant must:</p> <p>(A) file with the bankruptcy clerk a designation of the items to be included in the record on appeal and a statement of the issues to be presented; and</p> <p>(B) file and serve the designation and statement on the appellee within 14 days after:</p> <ul style="list-style-type: none"> • the notice of appeal as of right has become effective under Rule 8002; or • an order granting leave to appeal has been entered. <p>Premature service is treated as service on the first day on which filing is timely.</p> <p>(2) <i>Appellee's and Cross-Appellant's Designation.</i></p> <p>(A) Appellee. Within 14 days after being served, the appellee may file with the bankruptcy clerk and serve on the appellant a designation of additional items to be included in the record.</p> <p>(B) Cross-Appellant. An appellee who files a cross-appeal must file and serve a designation of additional items to be included in the record and a statement of the issues to be presented on the cross-appeal.</p> <p>(3) <i>Cross-Appellee's Designation.</i> Within 14 days after the cross-</p>

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<p>bankruptcy clerk and serve on the cross-appellant a designation of additional items to be included in the record.</p> <p>(4) Record on Appeal. The record on appeal must include the following:</p> <ul style="list-style-type: none"> • docket entries kept by the bankruptcy clerk; • items designated by the parties; • the notice of appeal; • the judgment, order, or decree being appealed; • any order granting leave to appeal; • any certification required for a direct appeal to the court of appeals; • any opinion, findings of fact, and conclusions of law relating to the issues on appeal, including transcripts of all oral rulings; • any transcript ordered under subdivision (b); • any statement required by subdivision (c); and • any additional items from the record that the court where the appeal is pending orders. <p>(5) Copies for the Bankruptcy Clerk. If paper copies are needed, a party filing a designation of items must provide a copy of any of those items that the bankruptcy clerk requests. If the party fails to do so, the bankruptcy clerk must prepare the copy at the party's expense.</p>	<p>appellant's designation and statement have been served, the cross-appellee may file with the bankruptcy clerk and serve on the cross-appellant a designation of additional items to be included in the record.</p> <p>(4) <i>Record on Appeal.</i> The record on appeal must include:</p> <ul style="list-style-type: none"> • the docket entries; • items designated by the parties; • the notice of appeal; • the judgment, order, or decree being appealed; • any order granting leave to appeal; • any certification required for a direct appeal to the court of appeals; • any opinion, findings of fact and conclusions of law relating to the issues on appeal, and transcripts of all oral rulings; • any transcript ordered under (b); • any statement required by (c); and • any other items from the record that the court where the appeal is pending orders. <p>(5) <i>Copies for the Bankruptcy Clerk.</i> If paper copies are needed and the bankruptcy clerk requests copies of designated items, the party filing the designation must provide them. If the party fails to do so, the bankruptcy clerk must prepare them at that party's expense.</p>

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<p>(b) TRANSCRIPT OF PROCEEDINGS.</p> <p>(1) Appellant’s Duty to Order. Within the time period prescribed by subdivision (a)(1), the appellant must:</p> <p>(A) order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of such parts of the proceedings not already on file as the appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or</p> <p>(B) file with the bankruptcy clerk a certificate stating that the appellant is not ordering a transcript.</p> <p>(2) Cross-Appellant’s Duty to Order. Within 14 days after the appellant files a copy of the transcript order or a certificate of not ordering a transcript, the appellee as cross-appellant must:</p> <p>(A) order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of such additional parts of the proceedings as the cross-appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or</p> <p>(B) file with the bankruptcy clerk a certificate stating that the cross-appellant is not ordering a transcript.</p>	<p>(b) Transcript of Proceedings.</p> <p>(1) <i>Appellant’s Duty to Order.</i> Within the period prescribed by (a)(1), the appellant must:</p> <p>(A) order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of such parts of the proceedings not already on file as the appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or</p> <p>(B) file with the bankruptcy clerk a certificate stating that the appellant is not ordering a transcript.</p> <p>(2) <i>Appellee’s Duty to Order as a Cross-Appellant.</i> Within 14 days after the appellant has filed a copy of the transcript order—or a certificate stating that the appellant is not ordering a transcript—the appellee as cross-appellant must:</p> <p>(A) order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of such additional parts of the proceedings as the cross-appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or</p> <p>(B) file with the bankruptcy clerk a certificate stating that the cross-appellant is not ordering a transcript.</p>

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<p>(3) Appellee’s or Cross-Appellee’s Right to Order. Within 14 days after the appellant or cross-appellant files a copy of a transcript order or certificate of not ordering a transcript, the appellee or cross-appellee may order in writing from the reporter a transcript of such additional parts of the proceedings as the appellee or cross-appellee considers necessary for the appeal. A copy of the order must be filed with the bankruptcy clerk.</p> <p>(4) Payment. At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.</p> <p>(5) Unsupported Finding or Conclusion. If the appellant intends to argue on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all relevant testimony and copies of all relevant exhibits.</p>	<p>(3) <i>Appellee’s or Cross-Appellee’s Right to Order.</i> Within 14 days after the appellant or cross-appellant has filed a copy of a transcript order—or a certificate stating that the appellant or cross-appellant is not ordering a transcript—the appellee or cross-appellee:</p> <p>(A) may order in writing from the reporter (as defined in Rule 8010(a)(1)) a transcript of any additional parts of the proceeding that the appellee or cross-appellee considers necessary for the appeal; and</p> <p>(B) must file a copy of the order with the bankruptcy clerk.</p> <p>(4) <i>Payment.</i> At the time of ordering, a party must make satisfactory arrangements with the reporter to pay for the transcript.</p> <p>(5) <i>Unsupported Finding or Conclusion.</i> If the appellant intends to argue on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all relevant testimony and a copy of all relevant exhibits.</p>
<p>(c) STATEMENT OF THE EVIDENCE WHEN A TRANSCRIPT IS UNAVAILABLE. If a transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant’s recollection. The statement</p>	<p>(c) When a Transcript Is Unavailable.</p> <p>(1) <i>Statement of the Evidence.</i> If a transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant’s</p>

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<p>must be filed within the time prescribed by subdivision (a)(1) and served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the bankruptcy court for settlement and approval. As settled and approved, the statement must be included by the bankruptcy clerk in the record on appeal.</p>	<p>recollection. The statement must be filed within the time prescribed by (a)(1) and served on the appellee.</p> <p>(2) <i>Appellee’s Response.</i> The appellee may serve objections or proposed amendments within 14 days after being served.</p> <p>(3) <i>Court Approval.</i> The statement and any objections or proposed amendments must then be submitted to the bankruptcy court for settlement and approval. As settled and approved, the statement must be included by the bankruptcy clerk in the record on appeal.</p>
<p>(d) AGREED STATEMENT AS THE RECORD ON APPEAL. Instead of the record on appeal as defined in subdivision (a), the parties may prepare, sign, and submit to the bankruptcy court a statement of the case showing how the issues presented by the appeal arose and were decided in the bankruptcy court. The statement must set forth only those facts alleged and proved or sought to be proved that are essential to the court’s resolution of the issues. If the statement is accurate, it—together with any additions that the bankruptcy court may consider necessary to a full presentation of the issues on appeal—must be approved by the bankruptcy court and must then be certified to the court where the appeal is pending as the record on appeal. The bankruptcy clerk must then transmit it to the clerk of that court within the time provided by Rule 8010. A copy of the agreed statement may be filed in place of the appendix required by Rule 8018(b) or, in the case of a direct appeal to the court of appeals, by F.R.App.P. 30.</p>	<p>(d) Agreed Statement as the Record on Appeal.</p> <p>(1) <i>Agreed Statement.</i> Instead of the record on appeal as defined in (a), the parties may prepare, sign, and submit to the bankruptcy court a statement of the case showing how the issues presented by the appeal arose and were decided in the bankruptcy court.</p> <p>(2) <i>Content.</i> The statement must set forth only those facts alleged and proved or sought to be proved that are essential to the court’s resolution of the issues. If the statement is accurate, it—together with any additions that the bankruptcy court may consider necessary to a full presentation of the issues on appeal—must be:</p> <p>(A) approved by the bankruptcy court; and</p> <p>(B) certified to the court where the appeal is pending as the record on appeal.</p> <p>(3) <i>Time to Send the Agreed Statement to the Appellate Court.</i> The bankruptcy clerk must then send the</p>

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	<p>agreed statement to the clerk of the court where the appeal is pending within the time provided by Rule 8010. A copy may be filed in place of the appendix required by Rule 8018(b) or, in the case of a direct appeal to the court of appeals, by Fed. R. App. P. 30.</p>
<p>(e) CORRECTING OR MODIFYING THE RECORD.</p> <p>(1) Submitting to the Bankruptcy Court. If any difference arises about whether the record accurately discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike that item.</p> <p>(2) Correcting in Other Ways. If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected, and a supplemental record may be certified and transmitted:</p> <p style="padding-left: 40px;">(A) on stipulation of the parties;</p> <p style="padding-left: 40px;">(B) by the bankruptcy court before or after the record has been forwarded; or</p> <p style="padding-left: 40px;">(C) by the court where the appeal is pending.</p> <p>(3) Remaining Questions. All other questions as to the form and content of the record must be presented to the court where the appeal is pending.</p>	<p>(e) Correcting or Modifying the Record.</p> <p>(1) <i>Differences About Accuracy and Improper Designations.</i> If any difference arises about whether the record accurately discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike it.</p> <p>(2) <i>Omissions and Misstatements.</i> If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected, and a supplemental record may be certified and sent:</p> <p style="padding-left: 40px;">(A) on stipulation of the parties;</p> <p style="padding-left: 40px;">(B) by the bankruptcy court before or after the record has been sent; or</p> <p style="padding-left: 40px;">(C) by the court where the appeal is pending.</p> <p>(3) <i>Remaining Questions.</i> All other questions as to the form and content of the record must be presented to the court where the appeal is pending.</p>

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<p>(f) SEALED DOCUMENTS. A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In doing so, a party must identify it without revealing confidential or secret information, but the bankruptcy clerk must not transmit it to the clerk of the court where the appeal is pending as part of the record. Instead, a party must file a motion with the court where the appeal is pending to accept the document under seal. If the motion is granted, the movant must notify the bankruptcy court of the ruling, and the bankruptcy clerk must promptly transmit the sealed document to the clerk of the court where the appeal is pending.</p>	<p>(f) Sealed Documents.</p> <p>(1) <i>In General.</i> A document placed under seal by the bankruptcy court may be designated as a part of the record on appeal. But a document so designated:</p> <p>(A) must be identified without revealing confidential or secret information; and</p> <p>(B) may be sent only as (2) prescribes.</p> <p>(2) <i>When to Send a Sealed Document.</i> To have a sealed document sent as part of the record, a party must file in the court where the appeal is pending a motion to accept the document under seal. If the motion is granted, the movant must so notify the bankruptcy court, and the bankruptcy clerk must promptly send the sealed document to the clerk of the court where the appeal is pending.</p>
<p>(g) OTHER NECESSARY ACTIONS. All parties to an appeal must take any other action necessary to enable the bankruptcy clerk to assemble and transmit the record.</p>	<p>(g) Duty to Assist the Bankruptcy Clerk. All parties to an appeal must take any other action needed to enable the bankruptcy clerk to assemble and send the record.</p>

Committee Note

The language of Rule 8009 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 8010. Completing and Transmitting the Record</p>	<p>Rule 8010. Transcribing the Proceedings; Filing the Transcript; Sending the Record</p>
<p>(a) REPORTER'S DUTIES.</p> <p>(1) Proceedings Recorded Without a Reporter Present. If proceedings were recorded without a reporter being present, the person or service selected under bankruptcy court procedures to transcribe the recording is the reporter for purposes of this rule.</p> <p>(2) Preparing and Filing the Transcript. The reporter must prepare and file a transcript as follows:</p> <p>(A) Upon receiving an order for a transcript in accordance with Rule 8009(b), the reporter must file in the bankruptcy court an acknowledgment of the request that shows when it was received, and when the reporter expects to have the transcript completed.</p> <p>(B) After completing the transcript, the reporter must file it with the bankruptcy clerk, who will notify the district, BAP, or circuit clerk of its filing.</p> <p>(C) If the transcript cannot be completed within 30 days after receiving the order, the reporter must request an extension of time from the bankruptcy clerk. The clerk must enter on the docket and notify the parties whether the extension is granted.</p> <p>(D) If the reporter does not file the transcript on time, the bankruptcy clerk must notify the bankruptcy judge.</p>	<p>(a) Reporter's Duties.</p> <p>(1) <i>Proceedings Recorded Without a Court Reporter Present.</i> If proceedings were recorded without a reporter present, the person or service selected under bankruptcy court procedures to transcribe the recording is the reporter for purposes of this rule.</p> <p>(2) <i>Preparing and Filing the Transcript.</i> The reporter must prepare and file a transcript as follows:</p> <p>(A) <i>Initial Steps.</i> Upon receiving a transcript order under Rule 8009(b), the reporter must file in the bankruptcy court an acknowledgment showing when the order was received and when the reporter expects to have the transcript completed.</p> <p>(B) <i>Filing the Transcript.</i> After completing the transcript, the reporter must file it with the bankruptcy clerk, who will notify the district, BAP, or circuit clerk of its filing.</p> <p>(C) <i>Extending the Time to Complete a Transcript.</i> If the transcript cannot be completed within 30 days after the order has been received, the reporter must request an extension from the bankruptcy clerk. The clerk must enter on the docket and notify the parties whether the extension is granted.</p> <p>(D) <i>Failure to File on Time.</i> If the reporter fails to file the transcript on time, the bankruptcy clerk must notify the bankruptcy judge.</p>

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<p>(b) CLERK’S DUTIES.</p> <p>(1) Transmitting the Record—In General. Subject to Rule 8009(f) and subdivision (b)(5) of this rule, when the record is complete, the bankruptcy clerk must transmit to the clerk of the court where the appeal is pending either the record or a notice that the record is available electronically.</p> <p>(2) Multiple Appeals. If there are multiple appeals from a judgment, order, or decree, the bankruptcy clerk must transmit a single record.</p> <p>(3) Receiving the Record. Upon receiving the record or notice that it is available electronically, the district, BAP, or circuit clerk must enter that information on the docket and promptly notify all parties to the appeal.</p> <p>(4) If Paper Copies Are Ordered. If the court where the appeal is pending directs that paper copies of the record be provided, the clerk of that court must so notify the appellant. If the appellant fails to provide them, the bankruptcy clerk must prepare them at the appellant’s expense.</p> <p>(5) When Leave to Appeal is Requested. Subject to subdivision (c), if a motion for leave to appeal has been filed under Rule 8004, the bankruptcy clerk must prepare and transmit the record only after the district court, BAP, or court of appeals grants leave.</p>	<p>(b) Clerk’s Duties.</p> <p>(1) <i>Sending the Record.</i> Subject to Rule 8009(f) and paragraph (5) below, when the record is complete, the bankruptcy clerk must send to the clerk of the court where the appeal is pending either the record or a notice that the record is available electronically.</p> <p>(2) <i>Multiple Appeals.</i> When there are multiple appeals from a judgment, order, or decree, the bankruptcy clerk must send a single record.</p> <p>(3) <i>Docketing the Record in the Appellate Court.</i> Upon receiving the record—or a notice that it is available electronically—the district, BAP, or circuit clerk must enter that information on the docket and promptly notify all parties to the appeal.</p> <p>(4) <i>If the Court Orders Paper Copies.</i> If the court where the appeal is pending orders that paper copies of the record be provided, the clerk of that court must so notify the appellant. If the appellant fails to provide them, the bankruptcy clerk must prepare them at the appellant’s expense.</p> <p>(5) <i>Motion for Leave to Appeal.</i> Subject to (c), if a motion for leave to appeal is filed under Rule 8004, the bankruptcy clerk must prepare and send the record only after the motion is granted.</p>

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<p>(c) RECORD FOR A PRELIMINARY MOTION IN THE DISTRICT COURT, BAP, OR COURT OF APPEALS. This subdivision (c) applies if, before the record is transmitted, a party moves in the district court, BAP, or court of appeals for any of the following relief:</p> <ul style="list-style-type: none"> • leave to appeal; • dismissal; • a stay pending appeal; • approval of a bond or other security provided to obtain a stay of judgment; or • any other intermediate order. <p>The bankruptcy clerk must then transmit to the clerk of the court where the relief is sought any parts of the record designated by a party to the appeal or a notice that those parts are available electronically.</p>	<p>(c) When a Preliminary Motion Is Filed in the District Court, BAP, or Court of Appeals.</p> <p>(1) <i>In General.</i> This subdivision (c) applies if, before the record is sent, a party moves in the district court, BAP, or court of appeals for:</p> <ul style="list-style-type: none"> • leave to appeal; • dismissal; • a stay pending appeal; • approval of a bond or other security provided to obtain a stay of judgment; or • any other intermediate order. <p>(2) <i>Sending the Record.</i> The bankruptcy clerk must send to the clerk of the court where the relief is sought any parts of the record designated by a party to the appeal—or send a notice that they are available electronically.</p>

Committee Note

The language of Rule 8010 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 8011. Filing and Service; Signature</p>	<p>Rule 8011. Filing and Service; Signature</p>
<p>(a) FILING.</p> <p>(1) With the Clerk. A document required or permitted to be filed in a district court or BAP must be filed with the clerk of that court.</p> <p>(2) Method and Timeliness.</p> <p>(A) Nonelectronic Filing.</p> <p>(i) In General. For a document not filed electronically, filing may be accomplished by mail addressed to the clerk of the district court or BAP. Except as provided in subdivision (a)(2)(A)(ii) and (iii), filing is timely only if the clerk receives the document within the time fixed for filing.</p> <p>(ii) Brief or Appendix. A brief or appendix not filed electronically is also timely filed if, on or before the last day for filing, it is:</p> <ul style="list-style-type: none"> • mailed to the clerk by first-class mail—or other class of mail that is at least as expeditious—postage prepaid; or • dispatched to a third-party commercial carrier for delivery within 3 days to the clerk. <p>(iii) Inmate Filing. If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8011(a)(2)(A)(iii). A document not filed electronically by an inmate confined in an institution is timely if it is deposited in the institution's internal mailing system on or before the last day for filing and:</p>	<p>(a) Filing.</p> <p>(1) <i>With the Clerk.</i> A document required or permitted to be filed in a district court or BAP must be filed with the clerk of that court.</p> <p>(2) <i>Method and Timeliness.</i></p> <p>(A) <i>Nonelectronic Filing.</i></p> <p>(i) In General. For a document not filed electronically, filing may be accomplished by mail addressed to the clerk of the district court or BAP. Except as provided in (ii) and (iii), filing is timely only if the clerk receives the document within the time set for filing.</p> <p>(ii) Brief or Appendix. A brief or appendix not filed electronically is also timely filed if, on or before the last day for filing, it is:</p> <ul style="list-style-type: none"> • mailed to the clerk by first-class mail—or other class of mail that is at least as expeditious—postage prepaid; or • dispatched to a third-party commercial carrier for delivery to the clerk within 3 days. <p>(iii) Inmate Filing. If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this item (iii). A document not filed electronically by an inmate</p>

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<ul style="list-style-type: none"> • it is accompanied by a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or • the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies this Rule 8011(a)(2)(A)(iii). <p style="text-align: center;">(B) Electronic Filing.</p> <p>g) By a Represented Person—Generally Required; Exceptions. An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.</p> <p>f) By an Unrepresented Individual—When Allowed or Required. An individual not represented by an attorney:</p> <ul style="list-style-type: none"> • may file electronically only if allowed by court order or by local rule; and • may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions. <p style="text-align: center;">(iii) Same as a Written Paper. A document filed electronically is a written paper for purposes of these rules.</p>	<p>confined in an institution is timely if it is deposited in the institution’s internal mailing system on or before the last day for filing and:</p> <ul style="list-style-type: none"> • it is accompanied by a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or by evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or • the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies this item (iii). <p>(B) <i>Electronic Filing.</i></p> <p>(i) By a Represented Person—Generally Required; Exceptions. An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for cause or is allowed or required by local rule.</p> <p>(ii) By an Unrepresented Individual—When Allowed or Required. An individual not represented by an attorney:</p> <ul style="list-style-type: none"> • may file electronically only if allowed by court order or by local rule; and

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<p>(C) Copies. If a document is filed electronically, no paper copy is required. If a document is filed by mail or delivery to the district court or BAP, no additional copies are required. But the district court or BAP may require by local rule or by order in a particular case the filing or furnishing of a specified number of paper copies.</p> <p>(3) Clerk’s Refusal of Documents. The court’s clerk must not refuse to accept for filing any document transmitted for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.</p>	<ul style="list-style-type: none"> • may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions. <p>(iii) Same as a Written Paper. A document filed electronically is a written paper for purposes of these rules.</p> <p>(C) <i>When Paper Copies Are Required.</i> No paper copies are required when a document is filed electronically. If a document is filed by mail or delivery to the district court or BAP, no additional copies are required. But the district court or BAP may, by local rule or order in a particular case, require that a specific number of paper copies be filed or furnished.</p> <p>(3) <i>Clerk’s Refusal of Documents.</i> The court’s clerk must not refuse to accept for filing any document presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.</p>
<p>(b) SERVICE OF ALL DOCUMENTS REQUIRED. Unless a rule requires service by the clerk, a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal. Service on a party represented by counsel must be made on the party’s counsel.</p>	<p>(b) Service of All Documents Required. Unless a rule requires service by the clerk, a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal. Service on a party represented by counsel must be made on the party’s counsel.</p>

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<p>(c) MANNER OF SERVICE.</p> <p>(1) Nonelectronic Service. Nonelectronic service may be by any of the following:</p> <p>(A) personal delivery;</p> <p>(B) mail; or</p> <p>(C) third-party commercial carrier for delivery within 3 days.</p> <p>(2) Electronic Service. Electronic service may be made by sending a document to a registered user by filing it with the court’s electronic-filing system or by using other electronic means that the person served consented to in writing.</p> <p>(3) When Service Is Complete. Service by electronic means is complete on filing or sending, unless the person making service receives notice that the document was not received by the person served. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.</p>	<p>(c) Manner of Service.</p> <p>(1) <i>Nonelectronic Service.</i> Nonelectronic service may be by any of the following:</p> <p>(A) personal delivery;</p> <p>(B) mail; or</p> <p>(C) third-party commercial carrier for delivery within 3 days.</p> <p>(2) <i>Service By Electronic Means.</i> Electronic service may be made by:</p> <p>(A) sending a document to a registered user by filing it with the court’s electronic-filing system; or</p> <p>(B) using other electronic means that the person served consented to in writing.</p> <p>(3) <i>When Service Is Complete.</i> Service by mail or by third-party commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on filing or sending, unless the person making service receives notice that the document was not received by the person served.</p>
<p>(d) PROOF OF SERVICE.</p> <p>(1) What Is Required. A document presented for filing must contain either of the following if it was served other than through the court’s electronic-filing system:</p>	<p>(d) Proof of Service.</p> <p>(1) <i>Requirements.</i> A document presented for filing must contain either of the following if it was served other</p>

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<p>(A) an acknowledgment of service by the person served; or</p> <p>(B) proof of service consisting of a statement by the person who made service certifying:</p> <p style="padding-left: 40px;">(i) the date and manner of service;</p> <p style="padding-left: 40px;">(ii) the names of the persons served; and</p> <p style="padding-left: 40px;">(iii) the mail or electronic address, the fax number, or the address of the place of delivery, as appropriate for the manner of service, for each person served.</p> <p>(2) Delayed Proof. The district or BAP clerk may permit documents to be filed without acknowledgment or proof of service, but must require the acknowledgment or proof to be filed promptly thereafter.</p> <p>(3) Brief or Appendix. When a brief or appendix is filed, the proof of service must also state the date and manner by which it was filed.</p>	<p>than through the court’s electronic-filing system:</p> <p>(A) an acknowledgement of service by the person served; or</p> <p>(B) proof of service consisting of a statement by the person who made service certifying:</p> <p style="padding-left: 40px;">(i) the date and manner of service;</p> <p style="padding-left: 40px;">(ii) the names of the persons served; and</p> <p style="padding-left: 40px;">(iii) the mail or electronic address, the fax number, or the address of the place of delivery—as appropriate for the manner of service—for each person served.</p> <p>(2) <i>Delayed Proof of Service.</i> A district or BAP clerk may accept a document for filing without an acknowledgement or proof of service, but must require the acknowledgment or proof of service to be filed promptly thereafter.</p> <p>(3) <i>For a Brief or Appendix.</i> When a brief or appendix is filed, the proof of service must also state the date and manner by which it was filed.</p>
<p>(e) SIGNATURE. Every document filed electronically must include the electronic signature of the person filing it or, if the person is represented, the electronic signature of counsel. A filing made through a person’s electronic-filing account and authorized by that person, together with that person’s name on a</p>	<p>(e) Signature Always Required.</p> <p>(1) <i>Electronic Filing.</i> Every document filed electronically must include the electronic signature of the person filing it or, if the person is represented, the counsel’s electronic signature. A filing made through a person’s electronic-filing account and authorized by that</p>

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<p>signature block, constitutes the person’s signature. Every document filed in paper form must be signed by the person filing the document or, if the person is represented, by counsel.</p>	<p>person—together with that person’s name on a signature block—constitutes the person’s signature.</p> <p>(2) <i>Paper Filing.</i> Every document filed in paper form must be signed by the person filing it or, if the person is represented, by the person’s counsel.</p>

Committee Note

The language of Rule 8011 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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Rule 8012. Disclosure Statement	Rule 8012. Disclosure Statement
<p>(a) NONGOVERNMENTAL CORPORATIONS. Any nongovernmental corporation that is a party to a proceeding in the district court or BAP must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.</p>	<p>(a) Disclosure by a Nongovernmental Corporation. Any nongovernmental corporation that is a party to a proceeding in the district court or BAP must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.</p>
<p>(b) DISCLOSURE ABOUT THE DEBTOR. The debtor, the trustee, or, if neither is a party, the appellant must file a statement that:</p> <p style="padding-left: 40px;">(1) identifies each debtor not named in the caption; and</p> <p style="padding-left: 40px;">(2) for each debtor that is a corporation, discloses the information required by Rule 8012(a).</p>	<p>(b) Disclosure About the Debtor. The debtor, the trustee, or, if neither is a party, the appellant must file a statement that:</p> <p style="padding-left: 40px;">(1) identifies each debtor not named in the caption; and</p> <p style="padding-left: 40px;">(2) for each debtor that is a corporation, discloses the information required by (a).</p>
<p>(c) TIME TO FILE; SUPPLEMENTAL FILING. A Rule 8012 statement must:</p> <p style="padding-left: 40px;">(1) be filed with the principal brief or upon filing a motion, response, petition, or answer in the district court or BAP, whichever occurs first, unless a local rule requires earlier filing;</p> <p style="padding-left: 40px;">(2) be included before the table of contents in the principal brief; and</p> <p style="padding-left: 40px;">(3) be supplemented whenever the information required by Rule 8012 changes.</p>	<p>(c) Time to File; Supplemental Filing. A Rule 8012 statement must:</p> <p style="padding-left: 40px;">(1) be filed with the principal brief or upon filing a motion, response, petition, or answer in the district court or BAP, whichever occurs first, unless a local rule requires earlier filing;</p> <p style="padding-left: 40px;">(2) be included before the table of contents in the principal brief; and</p> <p style="padding-left: 40px;">(3) be supplemented whenever the information required by this rule changes.</p>

Committee Note

The language of Rule 8012 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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Rule 8013. Motions; Intervention	Rule 8013. Motions; Interventions
<p>(a) CONTENTS OF A MOTION; RESPONSE; REPLY.</p> <p>(1) Request for Relief. A request for an order or other relief is made by filing a motion with the district or BAP clerk.</p> <p>(2) Contents of a Motion.</p> <p>(A) Grounds and the Relief Sought. A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.</p> <p>(B) Motion to Expedite an Appeal. A motion to expedite an appeal must explain what justifies considering the appeal ahead of other matters. If the district court or BAP grants the motion, it may accelerate the time to transmit the record, the deadline for filing briefs and other documents, oral argument, and the resolution of the appeal. A motion to expedite an appeal may be filed as an emergency motion under subdivision (d).</p> <p>(C) Accompanying Documents.</p> <p>(i) Any affidavit or other document necessary to support a motion must be served and filed with the motion.</p> <p>(ii) An affidavit must contain only factual information, not legal argument.</p>	<p>(a) Content of a Motion; Response; Reply.</p> <p>(1) <i>Request for Relief.</i> A request for an order or other relief is made by filing a motion with the district or BAP clerk.</p> <p>(2) <i>Content of a Motion.</i></p> <p>(A) <i>Grounds and the Relief Sought.</i> A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.</p> <p>(B) <i>Motion to Expedite an Appeal.</i> A motion to expedite an appeal must explain what justifies considering the appeal ahead of other matters. The motion may be filed as an emergency motion under (d). If it is granted, the district court or BAP may accelerate the time to:</p> <p>(i) send the record;</p> <p>(ii) file briefs and other documents;</p> <p>(iii) conduct oral argument; and</p> <p>(iv) resolve the appeal.</p> <p>(C) <i>Accompanying Documents.</i></p> <p>(i) Supporting Document. Any affidavit or other document necessary to support a motion must be served and filed with the motion.</p> <p>(ii) Content of Affidavit. An affidavit must contain only factual information, not legal argument.</p> <p>(iii) Motion Seeking Substantive Relief. A motion seeking substantive relief must include a copy of the</p>

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<p>(ii) A motion seeking substantive relief must include a copy of the bankruptcy court’s judgment, order, or decree, and any accompanying opinion as a separate exhibit.</p> <p>(D) Documents Barred or Not Required.</p> <p>(i) A separate brief supporting or responding to a motion must not be filed.</p> <p>(ii) Unless the court orders otherwise, a notice of motion or a proposed order is not required.</p> <p>(3) Response and Reply; Time to File. Unless the district court or BAP orders otherwise,</p> <p>(A) any party to the appeal may file a response to the motion within 7 days after service of the motion; and</p> <p>(B) the movant may file a reply to a response within 7 days after service of the response, but may only address matters raised in the response.</p>	<p>bankruptcy court’s judgment, order, or decree, and any accompanying opinion as a separate exhibit.</p> <p>(D) <i>Documents Barred or Not Required.</i></p> <p>(i) No Separate Brief. A separate brief supporting or responding to a motion must not be filed.</p> <p>(ii) Notice and Proposed Order Not Required. Unless the court orders otherwise, a notice of motion or a proposed order is not required.</p> <p>(3) <i>Response and Reply; Time to File.</i> Unless the district court or BAP orders otherwise:</p> <p>(A) any party to the appeal may—within 7 days after the motion is served—file a response to the motion; and</p> <p>(B) the movant may—within 7 days after the response is served—file a reply that addresses only matters raised in the response.</p>
<p>(b) DISPOSITION OF A MOTION FOR A PROCEDURAL ORDER. The district court or BAP may rule on a motion for a procedural order—including a motion under Rule 9006(b) or (c)—at any time without awaiting a response. A party adversely affected by the ruling may move to reconsider, vacate, or modify it within 7 days after the procedural order is served.</p>	<p>(b) Disposition of a Motion for a Procedural Order. The district court or BAP may rule on a motion for a procedural order—including a motion under Rule 9006(b) or (c)—at any time without awaiting a response. A party adversely affected by the ruling may move to reconsider, vacate, or modify it within 7 days after the order is served.</p>
<p>(c) ORAL ARGUMENT. A motion will be decided without oral argument unless the district court or BAP orders otherwise.</p>	<p>(c) Oral Argument. A motion will be decided without oral argument unless the district court or BAP orders otherwise.</p>

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<p>(d) EMERGENCY MOTION.</p> <p>(1) Noting the Emergency. When a movant requests expedited action on a motion because irreparable harm would occur during the time needed to consider a response, the movant must insert the word “Emergency” before the title of the motion.</p> <p>(2) Contents of the Motion. The emergency motion must</p> <p>(A) be accompanied by an affidavit setting out the nature of the emergency;</p> <p>(B) state whether all grounds for it were submitted to the bankruptcy court and, if not, why the motion should not be remanded for the bankruptcy court to consider;</p> <p>(C) include the e-mail addresses, office addresses, and telephone numbers of moving counsel and, when known, of opposing counsel and any unrepresented parties to the appeal; and</p> <p>(D) be served as prescribed by Rule 8011.</p> <p>(3) Notifying Opposing Parties. Before filing an emergency motion, the movant must make every practicable effort to notify opposing counsel and any unrepresented parties in time for them to respond. The affidavit accompanying the emergency motion must state when and how notice was given or state why giving it was impracticable.</p>	<p>(d) Emergency Motion.</p> <p>(1) <i>Noting the Emergency.</i> A movant who requests expedited action—because irreparable harm would occur during the time needed to consider a response—must insert “Emergency” before the motion’s title.</p> <p>(2) <i>Content.</i> An emergency motion must:</p> <p>(A) be accompanied by an affidavit setting forth the nature of the emergency;</p> <p>(B) state whether all grounds for it were previously submitted to the bankruptcy court and, if not, why the motion should not be remanded;</p> <p>(C) include:</p> <p>(i) the email address, office address, and telephone number of the moving counsel; and</p> <p>(ii) when known, the same information as in (i) for opposing counsel and any unrepresented party to the appeal; and</p> <p>(D) be served as Rule 8011 prescribes.</p> <p>(3) <i>Notifying Opposing Parties.</i> Before filing an emergency motion, the movant must make every practicable effort to notify opposing counsel and any unrepresented party in time for them to respond. The affidavit accompanying the motion must state:</p> <p>(A) when and how notice was given; or</p> <p>(B) why giving notice was impracticable.</p>

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<p>(e) POWER OF A SINGLE BAP JUDGE TO ENTERTAIN A MOTION.</p> <p>(1) Single Judge’s Authority. A BAP judge may act alone on any motion, but may not dismiss or otherwise determine an appeal, deny a motion for leave to appeal, or deny a motion for a stay pending appeal if denial would make the appeal moot.</p> <p>(2) Reviewing a Single Judge’s Action. The BAP may review a single judge’s action, either on its own motion or on a party’s motion.</p>	<p>(e) Motion Considered by a Single BAP Judge.</p> <p>(1) <i>Judge’s Authority.</i> A BAP judge may act alone on any motion but may not:</p> <p>(A) dismiss or otherwise determine an appeal;</p> <p>(B) deny a motion for leave to appeal; or</p> <p>(C) deny a motion for a stay pending appeal if denial would make the appeal moot.</p> <p>(2) <i>Reviewing a Single Judge’s Action.</i> The BAP, on its own or on a party’s motion, may review a single judge’s action.</p>
<p>(f) FORM OF DOCUMENTS; LENGTH LIMITS; NUMBER OF COPIES.</p> <p>(1) Format of a Paper Document. Rule 27(d)(1) F.R.App.P. applies in the district court or BAP to a paper version of a motion, response, or reply.</p> <p>(2) Format of an Electronically Filed Document. A motion, response, or reply filed electronically must comply with the requirements for a paper version regarding covers, line spacing, margins, typeface, and type style. It must also comply with the length limits under paragraph (3).</p> <p>(3) Length Limits. Except by the district court’s or BAP’s permission, and excluding the accompanying documents authorized by subdivision (a)(2)(C):</p>	<p>(f) Form of Documents; Length Limits; Number of Copies.</p> <p>(1) <i>Document Filed in Paper Form.</i> Fed. R. App. P. 27(d)(1) applies to a motion, response, or reply filed in paper form in the district court or BAP.</p> <p>(2) <i>Document Filed Electronically.</i> A motion, response, or reply filed electronically must comply with the requirements in (1) for covers, line spacing, margins, typeface, and type style. It must also comply with the length limits in (3).</p> <p>(3) <i>Length Limits.</i> Except by the district court’s or BAP’s permission, and excluding the accompanying documents authorized by (a)(2)(C):</p>

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<p>(A) a motion or a response to a motion produced using a computer must include a certificate under Rule 8015(h) and not exceed 5,200 words;</p> <p>(B) a handwritten or typewritten motion or a response to a motion must not exceed 20 pages;</p> <p>(C) a reply produced using a computer must include a certificate under Rule 8015(h) and not exceed 2,600 words; and</p> <p>(D) a handwritten or typewritten reply must not exceed 10 pages.</p> <p>(4) Paper Copies. Paper copies must be provided only if required by local rule or by an order in a particular case.</p>	<p>(A) a motion or a response to a motion produced using a computer must include a certificate under Rule 8015(h) and not exceed 5,200 words;</p> <p>(B) a handwritten or typewritten motion or a response to a motion must not exceed 20 pages;</p> <p>(C) a reply produced using a computer must include a certificate under Rule 8015(h) and not exceed 2,600 words; and</p> <p>(D) a handwritten or typewritten reply must not exceed 10 pages.</p> <p>(4) <i>Providing Paper Copies.</i> Paper copies must be provided only if required by a local rule or by an order in a particular case.</p>
<p>(g) INTERVENING IN AN APPEAL. Unless a statute provides otherwise, an entity that seeks to intervene in an appeal pending in the district court or BAP must move for leave to intervene and serve a copy of the motion on the parties to the appeal. The motion or other notice of intervention authorized by statute must be filed within 30 days after the appeal is docketed. It must concisely state the movant's interest, the grounds for</p>	<p>(g) Motion for Leave to Intervene.</p> <p>(1) <i>Time to File.</i> Unless a statute provides otherwise, an entity seeking to intervene in an appeal in the district court or BAP must move for leave to intervene and serve a copy of the motion on all parties to the appeal. The motion—or other notice of intervention authorized by statute— must be filed within 30 days after the appeal is docketed.</p>

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<p>intervention, whether intervention was sought in the bankruptcy court, why intervention is being sought at this stage of the proceeding, and why participating as an amicus curiae would not be adequate.</p>	<p>(2) <i>Content.</i> The motion must concisely state:</p> <ul style="list-style-type: none"> (A) the movant’s interest; (B) the grounds for intervention; (C) whether intervention was sought in the bankruptcy court; (D) why intervention is being sought at this stage of the proceedings; and why participating as an amicus curiae—rather than intervening—would not be adequate.

Committee Note

The language of Rule 8013 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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Rule 8014. Briefs	Rule 8014. Briefs
<p>(a) APPELLANT’S BRIEF. The appellant’s brief must contain the following under appropriate headings and in the order indicated:</p> <p style="padding-left: 40px;">(1) a corporate disclosure statement, if required by Rule 8012;</p> <p style="padding-left: 40px;">(2) a table of contents, with page references;</p> <p style="padding-left: 40px;">(3) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;</p> <p style="padding-left: 40px;">(4) a jurisdictional statement, including:</p> <p style="padding-left: 80px;">(A) the basis for the bankruptcy court’s subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;</p> <p style="padding-left: 80px;">(B) the basis for the district court’s or BAP’s jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;</p> <p style="padding-left: 40px;">(C) the filing dates establishing the timeliness of the appeal; and</p> <p style="padding-left: 40px;">(D) an assertion that the appeal is from a final judgment, order, or decree, or information establishing the district court’s or BAP’s jurisdiction on another basis;</p>	<p>(a) Appellant’s Brief. The appellant’s brief must contain the following under appropriate headings and in the order indicated:</p> <p style="padding-left: 40px;">(1) a disclosure statement, if required by Rule 8012;</p> <p style="padding-left: 40px;">(2) a table of contents, with page references;</p> <p style="padding-left: 40px;">(3) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;</p> <p style="padding-left: 40px;">(4) a jurisdictional statement, including:</p> <p style="padding-left: 80px;">(A) the basis for the bankruptcy court’s subject-matter jurisdiction, citing applicable statutory provisions and stating relevant facts establishing jurisdiction;</p> <p style="padding-left: 80px;">(B) the basis for the district court’s or BAP’s jurisdiction, citing applicable statutory provisions and stating relevant facts establishing jurisdiction;</p> <p style="padding-left: 80px;">(C) the filing dates establishing the timeliness of the appeal; and</p> <p style="padding-left: 80px;">(D) an assertion that the appeal is from a final judgment, order, or decree, or information establishing the district court’s or BAP’s jurisdiction on another basis;</p> <p style="padding-left: 40px;">(5) a statement of the issues presented and, for each one, a concise statement of the applicable standard of appellate review;</p> <p style="padding-left: 40px;">(6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and</p>

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<p>(5) a statement of the issues presented and, for each one, a concise statement of the applicable standard of appellate review;</p> <p>(6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record;</p> <p>(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;</p> <p>(8) the argument, which must contain the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies;</p> <p>(9) a short conclusion stating the precise relief sought; and</p> <p>(10) the certificate of compliance, if required by Rule 8015(a)(7) or (b).</p>	<p>identifying the rulings presented for review, with appropriate references to the record;</p> <p>(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;</p> <p>(8) the argument, which must contain the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies;</p> <p>(9) a short conclusion stating the precise relief sought; and</p> <p>(10) the certificate of compliance, if required by Rule 8015(a)(7) or (b).</p>

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<p>(b) APPELLEE’S BRIEF. The appellee’s brief must conform to the requirements of subdivision (a)(1)–(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant’s statement:</p> <p>(1) the jurisdictional statement;</p> <p>(2) the statement of the issues and the applicable standard of appellate review; and</p> <p>(3) the statement of the case.</p>	<p>(b) Appellee’s Brief. The appellee’s brief must conform to the requirements of (a)(1)–(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant’s statement:</p> <p>(1) the jurisdictional statement;</p> <p>(2) the statement of the issues and the applicable standard of appellate review; and</p> <p>(3) the statement of the case.</p>
<p>(c) REPLY BRIEF. The appellant may file a brief in reply to the appellee’s brief. A reply brief must comply with the requirements of subdivision (a)(2)–(3).</p>	<p>(c) Reply Brief. The appellant may file a brief in reply to the appellee’s brief. A reply brief must comply with (a)(2)–(3).</p>
<p>(d) STATUTES, RULES, REGULATIONS, OR SIMILAR AUTHORITY. If the court’s determination of the issues presented requires the study of the Code or other statutes, rules, regulations, or similar authority, the relevant parts must be set out in the brief or in an addendum.</p>	<p>(d) Setting Out Statutes, Rules, Regulations, or Similar Authorities. If the court’s determination of the issues presented requires the study of the Code or other statutes, rules, regulations, or similar authority, the relevant parts must be set out in the brief or in an addendum.</p>
<p>(e) BRIEFS IN A CASE INVOLVING MULTIPLE APPELLANTS OR APPELLEES. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another’s brief. Parties may also join in reply briefs.</p>	<p>(e) Briefs in a Case Involving Multiple Appellants or Appellees. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another’s brief. Parties may also join in reply briefs.</p>
<p>(f) CITATION OF SUPPLEMENTAL AUTHORITIES. If pertinent and significant authorities come to a party’s</p>	<p>(f) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party’s attention after the party’s brief</p>

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<p>attention after the party's brief has been filed—or after oral argument but before a decision— a party may promptly advise the district or BAP clerk by a signed submission setting forth the citations. The submission, which must be served on the other parties to the appeal, must state the reasons for the supplemental citations, referring either to the pertinent page of a brief or to a point argued orally. The body of the submission must not exceed 350 words. Any response must be made within 7 days after the party is served, unless the court orders otherwise, and must be similarly limited.</p>	<p>has been filed—or after oral argument but before a decision—a party may promptly advise the district or BAP clerk by a signed submission, with a copy to all other parties, setting forth the citations. The submission must state the reasons for the supplemental citations, referring either to the pertinent page of a brief or to a point argued orally. The body of the submission must not exceed 350 words. Any response must be made within 7 days after service, unless the court orders otherwise, and must be similarly limited.</p>

Committee Note

The language of Rule 8014 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers</p>	<p>Rule 8015. Form and Length of a Brief; Form of an Appendix or Other Paper</p>
<p>(a) PAPER COPIES OF A BRIEF. If a paper copy of a brief may or must be filed, the following provisions apply:</p> <p>(1) Reproduction.</p> <p>(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.</p> <p>(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.</p> <p>(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original. A glossy finish is acceptable if the original is glossy.</p> <p>(2) Cover. The front cover of a brief must contain:</p> <p>(A) the number of the case centered at the top;</p> <p>(B) the name of the court;</p> <p>(C) the title of the case as prescribed by Rule 8003(d)(2) or 8004(c)(2);</p> <p>(D) the nature of the proceeding and the name of the court below;</p> <p>(E) the title of the brief, identifying the party or parties for whom the brief is filed; and</p>	<p>(a) Paper Copies of a Brief. If a paper copy of a brief may or must be filed, the following provisions apply:</p> <p>(1) Reproduction.</p> <p>(A) <i>Printing.</i> The brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.</p> <p>(B) <i>Text.</i> Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.</p> <p>(C) <i>Other Reproductions.</i> Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original. A glossy finish is acceptable if the original is glossy.</p> <p>(2) Cover. The front cover of the brief must contain:</p> <p>(A) the number of the case centered at the top;</p> <p>(B) the name of the court;</p> <p>(C) the title of the case as prescribed by Rule 8003(d)(2) or 8004(c)(2);</p> <p>(D) the nature of the proceeding and the name of the court below;</p> <p>(E) the title of the brief, identifying the party or parties for whom the brief is filed; and</p> <p>(F) the name, office address, telephone number, and e-mail address of counsel representing the party for whom the brief is filed.</p>

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<p>(F) the name, office address, telephone number, and e-mailaddress of counsel representing the party for whom the brief is filed.</p> <p>(3) Binding. The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.</p> <p>(4) Paper Size, Line Spacing, and Margins. The brief must be on 8 1/2-by-11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.</p> <p>(5) Typeface. Either a proportionally spaced or monospaced face may be used.</p> <p>(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.</p> <p>(B) A monospaced face may not contain more than 10 1/2 characters per inch.</p> <p>(6) Type Styles. A brief must be set in plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.</p>	<p>(3) Binding. The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.</p> <p>(4) Paper Size, Line Spacing, and Margins. The brief must be on 8 1/2"-by-11" paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.</p> <p>(5) Typeface. Either a proportionally spaced or monospaced face may be used.</p> <p>(A) Proportional Spacing. A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.</p> <p>(B) Monospacing. A monospaced face may not contain more than 10 1/2 characters per inch.</p> <p>(6) Type Styles. The brief must be set in plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.</p> <p>(7) Length.</p> <p>(A) <i>Page Limitation.</i> A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with (B).</p> <p>(B) <i>Type-Volume Limitation.</i></p> <p>(i) Principal Brief. A principal brief is acceptable if it</p>

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<p>(7) Length.</p> <p>(A) Page Limitation. A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with subparagraph (B).</p> <p>(B) Type-volume Limitation.</p> <p>(i) A principal brief is acceptable if it contains a certificate under Rule 8015(h) and:</p> <ul style="list-style-type: none"> • contains no more than 13,000 words; or • uses a monospaced face and contains no more than 1,300 lines of text. <p>(ii) A reply brief is acceptable if it includes a certificate under Rule 8015(h) and contains no more than half of the type volume specified in item (i).</p>	<p>contains a certificate under (h) and:</p> <ul style="list-style-type: none"> • contains no more than 13,000 words; or • uses a monospaced face and contains no more than 1,300 lines of text. <p>(ii) Reply Brief. A reply brief is acceptable if it includes a certificate under (h) and contains no more than half the type volume specified in item (i).</p>

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<p>(b) ELECTRONICALLY FILED BRIEFS. A brief filed electronically must comply with subdivision (a), except for (a)(1), (a)(3), and the paper requirement of (a)(4).</p>	<p>(b) Brief Filed Electronically. A brief filed electronically must comply with (a)—except for (a)(1), (a)(3), and the paper requirement of (a)(4).</p>
<p>(c) PAPER COPIES OF APPENDICES. A paper copy of an appendix must comply with subdivision (a)(1), (2), (3), and (4), with the following exceptions:</p> <p>(1) An appendix may include a legible photocopy of any document found in the record or of a printed decision.</p> <p>(2) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½-by-11 inches, and need not lie reasonably flat when opened.</p>	<p>(c) Paper Copies of an Appendix. A paper copy of an appendix must comply with (a)(1), (2), (3), and (4), with the following exceptions:</p> <p>(1) Photocopy of Court Document. An appendix may include a legible photocopy of any document found in the record or of a printed decision.</p> <p>(2) Odd-Sized Document. When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½” by 11”, and need not lie reasonably flat when opened.</p>
<p>(d) ELECTRONICALLY FILED APPENDICES. An appendix filed electronically must comply with subdivision (a)(2) and (4), except for the paper requirement of (a)(4).</p>	<p>(d) Appendix Filed Electronically. An appendix filed electronically must comply with (a)(2) and (4)—except for the paper requirement of (a)(4).</p>
<p>(e) OTHER DOCUMENTS.</p> <p>(1) Motion. Rule 8013(f) governs the form of a motion, response, or reply.</p> <p>(2) Paper Copies of Other Documents. A paper copy of any other document, other than a submission under Rule 8014(f), must comply with</p>	<p>(e) Other Documents.</p> <p>(1) Motion. Rule 8013(f) governs the form of a motion, response, or reply.</p> <p>(2) Paper Copies of Other Documents. A paper copy of any other document—except one submitted</p>

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<p>subdivision (a), with the following exceptions:</p> <p style="padding-left: 40px;">(A) A cover is not necessary if the caption and signature page together contain the information required by subdivision (a)(2).</p> <p style="padding-left: 40px;">(B) Subdivision (a)(7) does not apply.</p> <p style="padding-left: 40px;">(3) Other Documents Filed Electronically. Any other document filed electronically, other than a submission under Rule 8014(f), must comply with the appearance requirements of paragraph (2).</p>	<p>under Rule 8014(f)—must comply with (a), with the following exceptions:</p> <p style="padding-left: 40px;">(A) a cover is not necessary if the caption and signature page together contain the information required by (a)(2); and</p> <p style="padding-left: 40px;">(B) the length limits of (a)(7) do not apply.</p> <p style="padding-left: 20px;">(3) <i>Document Filed Electronically.</i> Any other document filed electronically—except a document submitted under Rule 8014(f)—must comply with the requirements of (2).</p>
<p>(f) LOCAL VARIATION. A district court or BAP must accept documents that comply with the form requirements of this rule and the length limits set by Part VIII of these rules. By local rule or order in a particular case, a district court or BAP may accept documents that do not meet all the form requirements of this rule or the length limits set by Part VIII of these rules.</p>	<p>(f) Local Variation. A district court or BAP must accept documents that comply with the form requirements of this rule and the length limits set by this Part VIII. By local rule or order in a particular case, a district court or BAP may accept documents that do not meet all the form requirements of this rule or the length limits set by this Part VIII.</p>
<p>(g) ITEMS EXCLUDED FROM LENGTH. In computing any length limit, headings, footnotes, and quotations count toward the limit, but the following items do not:</p> <ul style="list-style-type: none"> • the cover page; • disclosure statement under Rule 8012; • table of contents; • table of citations; • statement regarding oral argument; 	<p>(g) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit, but the following items do not:</p> <ul style="list-style-type: none"> • cover page; • disclosure statement under Rule 8012; • table of contents; • table of citations; • statement regarding oral argument;

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<ul style="list-style-type: none"> • addendum containing statutes, rules, or regulations; • certificates of counsel; • signature block; • proof of service; and • any item specifically excluded by these rules or by local rule. 	<ul style="list-style-type: none"> • addendum containing statutes, rules, or regulations; • certificate of counsel; • signature block; • proof of service; and • any item specifically excluded by these rules or by local rule.
<p>(h) CERTIFICATE OF COMPLIANCE.</p> <p>(1) Briefs and Documents That Require a Certificate. A brief submitted under Rule 8015(a)(7)(B), 8016(d)(2), or 8017(b)(4)—and a document submitted under Rule 8013(f)(3)(A), 8013(f)(3)(C), or 8022(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The individual preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of mono-spaced type—in the document.</p> <p>(2) Acceptable Form. The certificate requirement is satisfied by a certificate of compliance that conforms substantially to the appropriate Official Form.</p>	<p>(h) Certificate of Compliance.</p> <p>(1) <i>Briefs and Documents That Require a Certificate.</i> A brief submitted under Rule 8015(a)(7)(B), 8016(d)(2), or 8017(b)(4)—and a document submitted under Rule 8013(f)(3)(A), 8013(f)(3)(C), or 8022(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The individual preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.</p> <p>(2) <i>Using the Official Form.</i> A certificate of compliance that conforms substantially to Form 417C satisfies the certificate requirement.</p>

Committee Note

The language of Rule 8015 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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Rule 8016. Cross-Appeals	Rule 8016. Cross-Appeals
(a) APPLICABILITY. This rule applies to a case in which a cross- appeal is filed. Rules 8014(a)–(c), 8015(a)(7)(A)–(B), and 8018(a)(1)–(3) do not apply to such a case, except as otherwise provided in this rule.	(a) Applicability. This rule applies to a case in which a cross-appeal is filed. Rules 8014(a)–(c), 8015(a)(7)(A)–(B), and 8018(a)(1)–(3) do not apply to such a case, unless this rule states otherwise.
(b) DESIGNATION OF APPELLANT. The party who files a notice of appeal first is the appellant for purposes of this rule and Rule 8018(a)(4) and (b) and Rule 8019. If notices are filed on the same day, the plaintiff, petitioner, applicant, or movant in the proceeding below is the appellant. These designations may be modified by the parties’ agreement or by court order.	(b) Designation of Appellant. The party who files a notice of appeal first is the appellant for purposes of this rule and Rule 8018(a)(4) and (b) and Rule 8019. If notices are filed on the same day, the plaintiff, petitioner, applicant, or movant in the proceeding below is the appellant. These designations may be modified by the parties’ agreement or by court order.
(c) BRIEFS. In a case involving a cross-appeal: <p style="margin-left: 40px;">(1) Appellant’s Principal Brief. The appellant must file a principal brief in the appeal. That brief must comply with Rule 8014(a).</p> <p style="margin-left: 40px;">(2) Appellee’s Principal and Response Brief. The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That brief must comply with Rule 8014(a), except that the brief need not include a statement of the case unless the appellee is dissatisfied with the appellant’s statement.</p> <p style="margin-left: 40px;">(3) Appellant’s Response and Reply Brief. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same</p>	(c) Briefs. In a case involving a cross-appeal: <p style="margin-left: 40px;">(1) <i>Appellant’s Principal Brief.</i> The appellant must file a principal brief in the appeal. That brief must comply with Rule 8014(a).</p> <p style="margin-left: 40px;">(2) <i>Appellee’s Principal and Response Brief.</i> The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That brief must comply with Rule 8014(a), but the brief need not include a statement of the case unless the appellee is dissatisfied with the appellant’s statement.</p> <p style="margin-left: 40px;">(3) <i>Appellant’s Response and Reply Brief.</i> The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 8014(a)(2)–(8) and (10), but none of the following need appear unless the appellant is dissatisfied with the</p>

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<p>brief, reply to the response in the appeal. That brief must comply with Rule 8014(a)(2)–(8) and (10), except that none of the following need appear unless the appellant is dissatisfied with the appellee’s statement in the cross-appeal:</p> <p>(A) the jurisdictional statement;</p> <p>(B) the statement of the issues and the applicable standard of appellate review; and</p> <p>(C) the statement of the case.</p> <p>(4) Appellee’s Reply Brief. The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 8014(a)(2)–(3) and (10) and must be limited to the issues presented by the cross-appeal.</p>	<p>appellee’s statement in the cross-appeal:</p> <p>(A) the jurisdictional statement;</p> <p>(B) the statement of the issues;</p> <p>(C) the statement of the case; and</p> <p>(D) the statement of the applicable standard of appellate review.</p> <p>(4) <i>Appellee’s Reply Brief.</i> The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 8014(a)(2)–(3) and (10) and must be limited to the issues presented by the cross-appeal.</p>
<p>(d) LENGTH.</p> <p>(1) Page Limitation. Unless it complies with paragraph (2), the appellant’s principal brief must not exceed 30 pages; the appellee’s principal and response brief, 35 pages; the appellant’s response and reply brief, 30 pages; and the appellee’s reply brief, 15 pages.</p> <p>(2) Type-volume Limitation.</p> <p>(A) The appellant’s</p>	<p>(d) Length.</p> <p>(1) <i>Page Limitation.</i> Unless it complies with (2), the appellant’s principal brief must not exceed 30 pages; the appellee’s principal and response brief, 35 pages; the appellant’s response and reply brief, 30 pages; and the appellee’s reply brief, 15 pages.</p> <p>(2) <i>Type-Volume Limitation.</i></p> <p>(A) <i>Appellant’s Brief.</i> The appellant’s principal brief or the appellant’s response and reply brief is</p>

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<p>principal brief or the appellant's response and reply brief is acceptable if it includes a certificate under Rule 8015(h) and:</p> <p style="padding-left: 40px;">(i) contains no more than 13,000 words; or</p> <p style="padding-left: 40px;">(ii) uses a monospaced face and contains no more than 1,300 lines of text.</p> <p>(B) The appellee's principal and response brief is acceptable if it includes a certificate under Rule 8015(h) and:</p> <p style="padding-left: 40px;">(i) contains no more than 15,300 words; or</p> <p style="padding-left: 40px;">(ii) uses a monospaced face and contains no more than 1,500 lines of text.</p> <p>(C) The appellee's reply brief is acceptable if it includes a certificate under Rule 8015(h) and contains no more than half of the type volume specified in subparagraph (A).</p>	<p>acceptable if it includes a certificate under Rule 8015(h) and:</p> <p style="padding-left: 20px;">(i) contains no more than 13,000 words; or</p> <p style="padding-left: 20px;">(ii) uses a monospaced face and contains no more than 1,300 lines of text.</p> <p>(B) <i>Appellee's Principal and Response Brief.</i> The appellee's principal and response brief is acceptable if it includes a certificate under Rule 8015(h) and:</p> <p style="padding-left: 20px;">(i) contains no more than 15,300 words; or</p> <p style="padding-left: 20px;">(ii) uses a monospaced face and contains no more than 1,500 lines of text.</p> <p>(C) <i>Appellee's Reply Brief.</i> The appellee's reply brief is acceptable if it includes a certificate under Rule 8015(h) and contains no more than half the type volume specified in (A).</p>
<p>(e) TIME TO SERVE AND FILE A BRIEF. Briefs must be served and filed as follows, unless the district court or BAP by order in a particular case excuses the filing of briefs or specifies different time limits:</p> <p style="padding-left: 40px;">(1) the appellant's principal brief,</p>	<p>(e) Time to Serve and File a Brief. Briefs must be served and filed as follows, unless the district court or BAP by order in a particular case excuses the filing of briefs or sets different time limits:</p> <p style="padding-left: 20px;">(1) the appellant's principal brief, within 30 days after the docketing of a notice</p>

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<p>within 30 days after the docketing of notice that the record has been transmitted or is available electronically;</p> <p>(2) the appellee’s principal and response brief, within 30 days after the appellant’s principal brief is served;</p> <p>(3) the appellant’s response and reply brief, within 30 days after the appellee’s principal and response brief is served; and</p> <p>(4) the appellee’s reply brief, within 14 days after the appellant’s response and reply brief is served, but at least 7 days before scheduled argument unless the district court or BAP, for good cause, allows a later filing.</p>	<p>that the record has been sent or is available electronically;</p> <p>(2) the appellee’s principal and response brief, within 30 days after the appellant’s principal brief is served;</p> <p>(3) the appellant’s response and reply brief, within 30 days after the appellee’s principal and response brief is served; and</p> <p>(4) the appellee’s reply brief, within 14 days after the appellant’s response and reply brief is served, but at least 7 days before scheduled argument unless the district court or BAP, for good cause, allows a later filing.</p>

Committee Note

The language of Rule 8016 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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Rule 8017. Brief of an Amicus Curiae	Rule 8017. Brief of an Amicus Curiae
<p>(a) DURING INITIAL CONSIDERATION OF A CASE ON THE MERITS.</p> <p>(1) <i>Applicability.</i> This Rule 8017(a) governs amicus filings during a court’s initial consideration of a case on the merits.</p> <p>(2) <i>When Permitted.</i> The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a district court or BAP may prohibit the filing of or may strike an amicus brief that would result in a judge’s disqualification. On its own motion, and with notice to all parties to an appeal, the district court or BAP may request a brief by an amicus curiae.</p> <p>(3) <i>Motion for Leave to File.</i> The motion must be accompanied by the proposed brief and state:</p> <p>(A) the movant’s interest; and</p> <p>(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the appeal.</p> <p>(4) <i>Contents and Form.</i> An amicus brief must comply with Rule 8015. In addition to the requirements of Rule 8015, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief</p>	<p>(a) During the Initial Consideration of a Case on the Merits.</p> <p>(1) <i>Applicability.</i> This subdivision (a) governs amicus filings during a court’s initial consideration of a case on the merits.</p> <p>(2) <i>When Permitted.</i> The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a district court or BAP may prohibit the filing of or may strike an amicus brief that would result in a judge’s disqualification. On its own, and with notice to all parties to an appeal, the district court or BAP may request a brief by an amicus curiae.</p> <p>(3) <i>Motion for Leave to File.</i> The motion for leave must be accompanied by the proposed brief and state:</p> <p>(A) the movant’s interest; and</p> <p>(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the appeal.</p> <p>(4) <i>Content and Form.</i> An amicus brief must comply with Rule 8015. In addition, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 8012. An amicus</p>

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<p>must include a disclosure statement like that required of parties by Rule 8012. An amicus brief need not comply with Rule 8014, but must include the following:</p> <p>(A) a table of contents, with page references;</p> <p>(B) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;</p> <p>(C) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;</p> <p>(D) unless the amicus curiae is one listed in the first sentence of subdivision (a)(2), a statement that indicates whether:</p> <p>(i) a party’s counsel authored the brief in whole or in part;</p> <p>(ii) a party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief; and</p> <p>(iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;</p> <p>(E) an argument, which may be preceded by a summary and need not include a statement of the applicable standard of review; and</p>	<p>brief need not comply with Rule 8014, but must include the following:</p> <p>(A) a table of contents, with page references;</p> <p>(B) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;</p> <p>(C) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;</p> <p>(D) unless the amicus curiae is one listed in the first sentence of (2), a statement that indicates whether:</p> <p>(i) a party’s counsel authored the brief in whole or in part;</p> <p>(ii) a party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief; and</p> <p>(iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;</p> <p>(E) an argument, which may be preceded by a summary and need not include a statement of the applicable standard of review; and</p> <p>(F) a certificate of compliance, if required by Rule 8015(h).</p> <p>(5) Length. Except by the district court’s or BAP’s permission, an amicus brief must be no more than one-half the maximum length authorized by these rules for a party’s principal brief. If the</p>

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<p>(F) a certificate of compliance, if required by Rule 8015(h).</p> <p>(5) Length. Except by the district court's or BAP's permission, an amicus brief must be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.</p> <p>(6) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's principal brief is filed. The district court or BAP may grant leave for later filing, specifying the time within which an opposing party may answer.</p> <p>(7) Reply Brief. Except by the district court's or BAP's permission, an amicus curiae may not file a reply brief.</p> <p>(8) Oral Argument. An amicus curiae may participate in oral argument only with the district court's or BAP's permission.</p>	<p>court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.</p> <p>(6) Time for Filing. An amicus curiae must file its brief—accompanied by a motion for leave to file when required—within 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief within 7 days after the appellant's principal brief is filed. The district court or BAP may grant leave for later filing, specifying the time within which an opposing party may answer.</p> <p>(7) Reply Brief. Except by the district court's or BAP's permission, an amicus curiae may not file a reply brief.</p> <p>(8) Oral Argument. An amicus curiae may participate in oral argument only with the district court's or BAP's permission.</p>

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<p>(b) DURING CONSIDERATION OF WHETHER TO GRANT REHEARING.</p> <p>(1) <i>Applicability.</i> This Rule 8017(b) governs amicus filings during a district court’s or BAP’s consideration of whether to grant rehearing, unless a local rule or order in a case provides otherwise.</p> <p>(2) <i>When Permitted.</i> The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.</p> <p>(3) <i>Motion for Leave to File.</i> Rule 8017(a)(3) applies to a motion for leave.</p> <p>(4) <i>Contents, Form, and Length.</i> Rule 8017(a)(4) applies to the amicus brief. The brief must include a certificate under Rule 8015(h) and not exceed 2,600 words.</p> <p>(5) <i>Time for Filing.</i> An amicus curiae supporting the motion for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the motion is filed. An amicus curiae opposing the motion for rehearing must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.</p>	<p>(b) During Consideration of Whether to Grant Rehearing.</p> <p>(1) <i>Applicability.</i> This subdivision (b) governs amicus filings during a district court’s or BAP’s consideration of whether to grant rehearing, unless a local rule or order in a particular case provides otherwise.</p> <p>(2) <i>When Permitted.</i> The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.</p> <p>(3) <i>Motion for Leave to File.</i> Paragraph (a)(3) applies to a motion for leave to file.</p> <p>(4) <i>Content, Form, and Length.</i> Paragraph (a)(4) applies to the amicus brief. The brief must include a certificate under Rule 8015(h) and not exceed 2,600 words.</p> <p>(5) <i>Time for Filing.</i> An amicus curiae supporting a motion for rehearing or supporting neither party must file its brief—accompanied by a motion for leave to file when required—within 7 days after the motion is filed. An amicus curiae opposing the motion for rehearing must file its brief—accompanied by a motion for leave to file when required—no later than the date set by the court for the response.</p>

Committee Note

The language of Rule 8017 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 8018. Serving and Filing Briefs; Appendices</p>	<p>Rule 8018. Serving and Filing Briefs and Appendices</p>
<p>(a) TIME TO SERVE AND FILE A BRIEF. The following rules apply unless the district court or BAP by order in a particular case excuses the filing of briefs or specifies different time limits:</p> <p>(1) The appellant must serve and file a brief within 30 days after the docketing of notice that the record has been transmitted or is available electronically.</p> <p>(2) The appellee must serve and file a brief within 30 days after service of the appellant’s brief.</p> <p>(3) The appellant may serve and file a reply brief within 14 days after service of the appellee’s brief, but a reply brief must be filed at least 7 days before scheduled argument unless the district court or BAP, for good cause, allows a later filing.</p> <p>(4) If an appellant fails to file a brief on time or within an extended time authorized by the district court or BAP, an appellee may move to dismiss the appeal—or the district court or BAP, after notice, may dismiss the appeal on its own motion. An appellee who fails to file a brief will not be heard at oral argument unless the district court or BAP grants permission.</p>	<p>(a) Time to Serve and File a Brief. Unless the district court or BAP by order in a particular case excuses the filing of briefs or sets a different time, the following time limits apply:</p> <p>(1) <i>Appellant’s Brief.</i> The appellant must serve and file a brief within 30 days after the docketing of notice that the record has been sent or that it is available electronically.</p> <p>(2) <i>Appellee’s Brief.</i> The appellee must serve and file a brief within 30 days after the appellant’s brief is served.</p> <p>(3) <i>Appellant’s Reply Brief.</i> The appellant may serve and file a reply brief within 14 days after service of the appellee’s brief but at least 7 days before scheduled argument—unless the district court or BAP, for good cause, allows a later filing.</p> <p>(4) <i>Consequence of Failure to File.</i> If an appellant fails to file a brief on time or within an extended time authorized under (a)(3), the district court or BAP may—on its own after notice or on the appellee’s motion—dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the district court or BAP grants permission.</p>
<p>(b) DUTY TO SERVE AND FILE AN APPENDIX TO THE BRIEF.</p>	<p>(b) Duty to Serve and File an Appendix.</p> <p>(1) <i>Appellant’s Duty.</i> Subject to (c) and Rule 8009(d), the appellant must serve</p>

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<p>(1) Appellant. Subject to subdivision (e) and Rule 8009(d), the appellant must serve and file with its principal brief excerpts of the record as an appendix. It must contain the following:</p> <p>(A) the relevant entries in the bankruptcy docket;</p> <p>(B) the complaint and answer, or other equivalent filings;</p> <p>(C) the judgment, order, or decree from which the appeal is taken;</p> <p>(D) any other orders, pleadings, jury instructions, findings, conclusions, or opinions relevant to the appeal;</p> <p>(E) the notice of appeal; and</p> <p>(F) any relevant transcript or portion of it.</p> <p>(2) Appellee. The appellee may also serve and file with its brief an appendix that contains material required to be included by the appellant or relevant to the appeal or cross-appeal, but omitted by the appellant.</p> <p>(3) Cross-Appellee. The appellant as cross-appellee may also serve and file with its response an appendix that contains material relevant to matters raised initially by the principal brief in the cross-appeal, but omitted by the cross-appellant.</p>	<p>and file with its principal brief an appendix containing excerpts from the record. It must contain:</p> <p>(A) the relevant docket entries;</p> <p>(B) the complaint and answer or equivalent filings;</p> <p>(C) the judgment, order, or decree from which the appeal is taken;</p> <p>(D) any other orders, pleadings, jury instructions, findings, conclusions, or opinions relevant to the appeal;</p> <p>(E) the notice of appeal; and</p> <p>(F) any relevant transcript or portion of it.</p> <p>(2) <i>Appellee's Duty.</i> The appellee may serve and file with its brief an appendix containing any material that is required to be included or is relevant to the appeal or cross-appeal but that is omitted from the appellant's appendix.</p> <p>(3) <i>Appellant's Duty as Cross-Appellee.</i> The appellant—as cross-appellee—may also serve and file with its response an appendix containing material that is relevant to matters raised initially by the cross-appeal, but that is omitted by the cross-appellant.</p>

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<p>(c) FORMAT OF THE APPENDIX. The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of documents or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, and the like) should be omitted.</p>	<p>(c) Format of the Appendix. The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. These provisions apply:</p> <ol style="list-style-type: none"> (1) Page Numbers. When transcript pages are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. (2) Omissions. Omissions from the text of a document or of the transcript must be indicated by asterisks. (3) Immaterial Formal Matters. Immaterial formal matters (captions, subscriptions, acknowledgments, and the like) should be omitted.
<p>(d) EXHIBITS. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume or volumes, suitably indexed.</p>	<p>(d) Reproduction of Exhibits. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume or volumes, suitably indexed.</p>
<p>(e) APPEAL ON THE ORIGINAL RECORD WITHOUT AN APPENDIX. The district court or BAP may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record, with the submission of any relevant parts of the record that the district court or BAP orders the parties to file.</p>	<p>(e) Appeal on the Original Record Without an Appendix. The district court or BAP may, either by rule for all cases or classes of cases or by order in a particular case:</p> <ol style="list-style-type: none"> (1) dispense with the appendix, and (2) permit an appeal to proceed on the original record with the submission of any relevant parts that the district court or BAP orders the parties to file.

Committee Note

The language of Rule 8018 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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Rule 8018.1. District-Court Review of a Judgment that the Bankruptcy Court Lacked the Constitutional Authority to Enter	Rule 8018.1. Reviewing a Judgment That the Bankruptcy Court Lacked Authority to Enter
If, on appeal, a district court determines that the bankruptcy court did not have the power under Article III of the Constitution to enter the judgment, order, or decree appealed from, the district court may treat it as proposed findings of fact and conclusions of law.	If, on appeal, a district court determines that the bankruptcy court did not have authority under Article III of the Constitution to enter the judgment, order, or decree being appealed, the district court may treat it as proposed findings of fact and conclusions of law.

Committee Note

The language of Rule 8018.1 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 8019. Oral Argument	Rule 8019. Oral Argument
(a) PARTY'S STATEMENT. Any party may file, or a district court or BAP may require, a statement explaining why oral argument should, or need not, be permitted.	(a) Party's Statement. Any party may file, or a district court or BAP may require, a statement explaining why oral argument should, or need not, be permitted.
(b) PRESUMPTION OF ORAL ARGUMENT AND EXCEPTIONS. Oral argument must be allowed in every case unless the district judge—or all the BAP judges assigned to hear the appeal—examine the briefs and record and determine that oral argument is unnecessary because <p style="margin-left: 40px;">(1) the appeal is frivolous;</p> <p style="margin-left: 40px;">(2) the dispositive issue or issues have been authoritatively decided; or</p> <p style="margin-left: 40px;">(3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.</p>	(b) Presumption of Oral Argument; Exceptions. Oral argument must be allowed in every case unless the district judge—or all the BAP judges assigned to hear the appeal—examines the briefs and record and determines that oral argument is unnecessary because: <p style="margin-left: 40px;">(1) the appeal is frivolous;</p> <p style="margin-left: 40px;">(2) the dispositive issue or issues have been authoritatively decided; or</p> <p style="margin-left: 40px;">(3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.</p>
(c) NOTICE OF ARGUMENT; POSTPONEMENT. The district court or BAP must advise all parties of the date, time, and place for oral argument, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.	(c) Notice of Oral Argument; Motion to Postpone. The district court or BAP must advise all parties of the date, time, and place for oral argument, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably before the hearing date.
(d) ORDER AND CONTENTS OF ARGUMENT. The appellant opens and concludes the argument. Counsel must not read at length from briefs, the record, or authorities.	(d) Order and Content of Argument. The appellant opens and concludes the argument. Counsel must not read at length from briefs, the record, or authorities.

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<p>(e) CROSS-APPEALS AND SEPARATE APPEALS. If there is a cross-appeal, Rule 8016(b) determines which party is the appellant and which is the appellee for the purposes of oral argument. Unless the district court or BAP directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.</p>	<p>(e) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule 8016(b) determines which party is the appellant and which is the appellee for the purposes of oral argument. Unless the district court or BAP orders otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.</p>
<p>(f) NONAPPEARANCE OF A PARTY. If the appellee fails to appear for argument, the district court or BAP may hear the appellant's argument. If the appellant fails to appear for argument, the district court or BAP may hear the appellee's argument. If neither party appears, the case will be decided on the briefs unless the district court or BAP orders otherwise.</p>	<p>(f) Nonappearance of a Party. If the appellee fails to appear for argument, the district court or BAP may hear the appellant's argument. If the appellant fails to appear for argument, the district court or BAP may hear the appellee's argument. If neither party appears, the case will be decided on the briefs unless the district court or BAP orders otherwise.</p>
<p>(g) SUBMISSION ON BRIEFS. The parties may agree to submit a case for decision on the briefs, but the district court or BAP may direct that the case be argued.</p>	<p>(g) Submission on Briefs. The parties may agree to submit a case for decision on the briefs, but the district court or BAP may order that the case be argued.</p>
<p>(h) USE OF PHYSICAL EXHIBITS AT ARGUMENT; REMOVAL. Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom unless the district court or BAP directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.</p>	<p>(h) Use of Physical Exhibits at Argument; Removal. Any attorney intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom unless the district court or BAP orders otherwise. The clerk may destroy or dispose of them if counsel does not reclaim them within a reasonable time after the clerk gives notice to do so.</p>

Committee Note

The language of Rule 8019 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 8020. Frivolous Appeal and Other Misconduct	Rule 8020. Frivolous Appeal; Other Misconduct
(a) FRIVOLOUS APPEAL— DAMAGES AND COSTS. If the district court or BAP determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.	(a) Frivolous Appeal—Damages and Costs. If the district court or BAP determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.
(b) OTHER MISCONDUCT. The district court or BAP may discipline or sanction an attorney or party appearing before it for other misconduct, including failure to comply with any court order. First, however, the court must afford the attorney or party reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.	(b) Other Misconduct; Sanctions. The district court or BAP may discipline or sanction an attorney or party appearing before it for other misconduct, including a failure to comply with a court order. But the court must first give the attorney or party reasonable notice and an opportunity to show cause to the contrary—and if requested, grant a hearing.

Committee Note

The language of Rule 8020 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 8021. Costs	Rule 8021. Costs
<p>(a) AGAINST WHOM ASSESSED. The following rules apply unless the law provides or the district court or BAP orders otherwise:</p> <p style="padding-left: 40px;">(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;</p> <p style="padding-left: 40px;">(2) if a judgment, order, or decree is affirmed, costs are taxed against the appellant;</p> <p style="padding-left: 40px;">(3) if a judgment, order, or decree is reversed, costs are taxed against the appellee;</p> <p style="padding-left: 40px;">(4) if a judgment, order, or decree is affirmed or reversed in part, modified, or vacated, costs are taxed only as the district court or BAP orders.</p>	<p>(a) Against Whom Assessed. The following rules apply unless the law provides or the district court or BAP orders otherwise:</p> <p style="padding-left: 40px;">(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;</p> <p style="padding-left: 40px;">(2) if a judgment, order, or decree is affirmed, costs are taxed against the appellant;</p> <p style="padding-left: 40px;">(3) if a judgment, order, or decree is reversed, costs are taxed against the appellee;</p> <p style="padding-left: 40px;">(4) if a judgment, order, or decree is affirmed or reversed in part, modified, or vacated, costs are taxed only as the district court or BAP orders.</p>
<p>(b) COSTS FOR AND AGAINST THE UNITED STATES. Costs for or against the United States, its agency, or its officer may be assessed under subdivision (a) only if authorized by law.</p>	<p>(b) Costs For and Against the United States. Costs for or against the United States, its agency, or its officer may be assessed under (a) only if authorized by law.</p>
<p>(c) COSTS ON APPEAL TAXABLE IN THE BANKRUPTCY COURT. The following costs on appeal are taxable in the bankruptcy court for the benefit of the party entitled to costs under this rule:</p> <p style="padding-left: 40px;">(1) the production of any required copies of a brief, appendix, exhibit, or the record;</p>	<p>(c) Costs on Appeal Taxable in the Bankruptcy Court. The following costs on appeal are taxable in the bankruptcy court for the benefit of the party entitled to costs under this rule:</p> <p style="padding-left: 40px;">(1) producing any required copies of a brief, appendix, exhibit, or the record;</p> <p style="padding-left: 40px;">(2) preparing and sending the record;</p> <p style="padding-left: 40px;">(3) the reporter's transcript, if needed to determine the appeal;</p>

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<p>(2) the preparation and transmission of the record;</p> <p>(3) the reporter's transcript, if needed to determine the appeal;</p> <p>(4) premiums paid for a bond or other security to preserve rights pending appeal; and</p> <p>(5) the fee for filing the notice of appeal.</p>	<p>(4) premiums paid for a bond or other security to preserve rights pending appeal; and</p> <p>(5) the fee for filing the notice of appeal.</p>
<p>(d) BILL OF COSTS; OBJECTIONS. A party who wants costs taxed must, within 14 days after entry of judgment on appeal, file with the bankruptcy clerk and serve an itemized and verified bill of costs. Objections must be filed within 14 days after service of the bill of costs, unless the bankruptcy court extends the time.</p>	<p>(d) Bill of Costs; Objections. A party who wants costs taxed must, within 14 days after entry of judgment on appeal, file with the bankruptcy clerk and serve an itemized and verified bill of costs. Objections must be filed within 14 days after the bill of costs is served, unless the bankruptcy court extends the time.</p>

Committee Note

The language of Rule 8021 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 8022. Motion for Rehearing	Rule 8022. Motion for Rehearing
<p>(a) TIME TO FILE; CONTENTS; RESPONSE; ACTION BY THE DISTRICT COURT OR BAP IF GRANTED.</p> <p>(1) Time. Unless the time is shortened or extended by order or local rule, any motion for rehearing by the district court or BAP must be filed within 14 days after entry of judgment on appeal.</p> <p>(2) Contents. The motion must state with particularity each point of law or fact that the movant believes the district court or BAP has overlooked or misapprehended and must argue in support of the motion. Oral argument is not permitted.</p> <p>(3) Response. Unless the district court or BAP requests, no response to a motion for rehearing is permitted. But ordinarily, rehearing will not be granted in the absence of such a request.</p> <p>(4) Action by the District Court or BAP. If a motion for rehearing is granted, the district court or BAP may do any of the following:</p> <p style="padding-left: 40px;">(A) make a final disposition of the appeal without reargument;</p> <p style="padding-left: 40px;">(B) restore the case to the calendar for reargument or resubmission; or</p> <p style="padding-left: 40px;">(C) issue any other appropriate order.</p>	<p>(a) Time to File; Content; Response; Action by the District Court or BAP if Granted.</p> <p>(1) Time. Unless the time is shortened or extended by order or local rule, any motion for rehearing by the district court or BAP must be filed within 14 days after judgment on appeal is entered.</p> <p>(2) Content. The motion must state with particularity each point of law or fact that the movant believes the district court or BAP has overlooked or misapprehended and must argue in support of the motion. Oral argument is not permitted.</p> <p>(3) Response. Unless the district court or BAP requests, no response to a motion for rehearing is permitted. But ordinarily, rehearing will not be granted in the absence of such a request.</p> <p>(4) Action by the District Court or BAP. If a motion for rehearing is granted, the district court or BAP may do any of the following:</p> <p style="padding-left: 40px;">(A) make a final disposition of the appeal without reargument;</p> <p style="padding-left: 40px;">(B) restore the case to the calendar for reargument or resubmission; or</p> <p style="padding-left: 40px;">(C) issue any other appropriate order.</p>

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<p>(b) FORM OF THE MOTION; LENGTH. The motion must comply in form with Rule 8013(f)(1) and (2). Copies must be served and filed as provided by Rule 8011. Except by the district court's or BAP's permission:</p> <p style="padding-left: 40px;">(1) a motion for rehearing produced using a computer must include a certificate under Rule 8015(h) and not exceed 3,900 words; and</p> <p style="padding-left: 40px;">(2) a handwritten or typewritten motion must not exceed 15 pages.</p>	<p>(b) Form; Length. The motion for rehearing must comply in form with Rule 8013(f)(1) and (2). Copies must be served and filed as Rule 8011 provides. Except by the district court's or BAP's permission:</p> <p style="padding-left: 40px;">(1) a motion produced using a computer must include a certificate under Rule 8015(h) and not exceed 3,900 words; and</p> <p style="padding-left: 40px;">(2) a handwritten or typewritten motion must not exceed 15 pages.</p>

Committee Note

The language of Rule 8022 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 8023. Voluntary Dismissal	Rule 8023. Voluntary Dismissal
(a) STIPULATED DISMISSAL. The clerk of the district court or BAP must dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due.	(a) Stipulated Dismissal. The clerk of the district court or BAP must dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due.
(b) APPELLANT’S MOTION TO DISMISS. An appeal may be dismissed on the appellant’s motion on terms agreed to by the parties or fixed by the district court or BAP.	(b) Appellant’s Motion to Dismiss. An appeal may be dismissed on the appellant’s motion on terms agreed to by the parties or fixed by the district court or BAP.
(c) OTHER RELIEF. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the bankruptcy court, or remanding the case to it.	(c) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the bankruptcy court, or remanding the case to it.
(d) COURT APPROVAL. This rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.	(d) Court Approval. This rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

Committee Note

The language of Rule 8023 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 8024. Clerk’s Duties on Disposition of the Appeal	Rule 8024. Clerk’s Duties on Disposition of the Appeal
(a) JUDGMENT ON APPEAL. The district or BAP clerk must prepare, sign, and enter the judgment after receiving the court’s opinion or, if there is no opinion, as the court instructs. Noting the judgment on the docket constitutes entry of judgment.	(a) Preparing the Judgment. After receiving the court’s opinion—or instructions if there is no opinion—the district or BAP clerk must: <ol style="list-style-type: none"> (1) prepare and sign the judgment; and (2) note it on the docket, which act constitutes entry of judgment.
(b) NOTICE OF A JUDGMENT. Immediately upon the entry of a judgment, the district or BAP clerk must: <ol style="list-style-type: none"> (1) transmit a notice of the entry to each party to the appeal, to the United States trustee, and to the bankruptcy clerk, together with a copy of any opinion; and (2) note the date of the transmission on the docket. 	(b) Giving Notice of the Judgment. Immediately after entering a judgment, the district or BAP clerk must: <ol style="list-style-type: none"> (1) send notice of its entry, together with a copy of any opinion, to: <ul style="list-style-type: none"> • the parties to the appeal; • the United States trustee; and • the bankruptcy clerk; and (2) note on the docket the date the notice was sent.
(c) RETURNING PHYSICAL ITEMS. If any physical items were transmitted as the record on appeal, they must be returned to the bankruptcy clerk on disposition of the appeal.	(c) Returning Physical Items. On disposition of the appeal, the district or BAP clerk must return to the bankruptcy clerk any physical items sent as the record on appeal.

Committee Note

The language of Rule 8024 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 8025. Stay of a District Court or BAP Judgment	Rule 8025. Staying a District Court or BAP Judgment
(a) AUTOMATIC STAY OF JUDGMENT ON APPEAL. Unless the district court or BAP orders otherwise, its judgment is stayed for 14 days after entry.	(a) Automatic Stay of a Judgment on Appeal. Unless the district court or BAP orders otherwise, its judgment is stayed for 14 days after its entry.
(b) STAY PENDING APPEAL TO THE COURT OF APPEALS. <p>(1) In General. On a party's motion and notice to all other parties to the appeal, the district court or BAP may stay its judgment pending an appeal to the court of appeals.</p> <p>(2) Time Limit. The stay must not exceed 30 days after the judgment is entered, except for cause shown.</p> <p>(3) Stay Continued. If, before a stay expires, the party who obtained the stay appeals to the court of appeals, the stay continues until final disposition by the court of appeals.</p> <p>(4) Bond or Other Security. A bond or other security may be required as a condition for granting or continuing a stay of the judgment. A bond or other security may be required if a trustee obtains a stay, but not if a stay is obtained by the United States or its officer or agency or at the direction of any department of the United States government.</p>	(b) Stay Pending an Appeal to a United States Court of Appeals. <p>(1) <i>In General.</i> The district court or BAP may—on a party's motion with notice to all other parties to the appeal—stay its judgment pending an appeal to the court of appeals.</p> <p>(2) <i>Time Limit.</i> Except for cause shown, the stay must not exceed 30 days after the judgment is entered.</p> <p>(3) <i>Stay Continued When an Appeal Is Filed.</i> If, before a stay expires, the party who obtained it appeals to a court of appeals, the stay continues until final disposition by the court of appeals.</p> <p>(4) <i>Bond or Other Security.</i> A bond or other security may be required as a condition for granting or continuing a stay. If a trustee obtains a stay, a bond or other security may be required, but not if a stay is obtained by the United States or its officer or agency, or by direction of any department of the United States government.</p>
(c) AUTOMATIC STAY OF AN ORDER, JUDGMENT, OR DECREE OF A BANKRUPTCY COURT. If the	(c) Automatic Stay of a Bankruptcy Court's Order, Judgment, or Decree. If a district court or BAP enters a judgment affirming a

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<p>district court or BAP enters a judgment affirming an order, judgment, or decree of the bankruptcy court, a stay of the district court's or BAP's judgment automatically stays the bankruptcy court's order, judgment, or decree for the duration of the appellate stay.</p>	<p>bankruptcy court's order, judgment, or decree, a stay of the district court's or BAP's judgment automatically stays the bankruptcy court's order, judgment, or decree for the duration of the appellate stay.</p>
<p>(d) POWER OF A COURT OF APPEALS NOT LIMITED. This rule does not limit the power of a court of appeals or any of its judges to do the following:</p> <ul style="list-style-type: none"> (1) stay a judgment pending appeal; (2) stay proceedings while an appeal is pending; (3) suspend, modify, restore, vacate, or grant a stay or an injunction while an appeal is pending; or (4) issue any order appropriate to preserve the status quo or the effectiveness of any judgment to be entered. 	<p>(d) Power of a Court of Appeals or One of Its Judges Not Limited. This rule does not limit the power of a court of appeals or one of its judges to:</p> <ul style="list-style-type: none"> (1) stay a judgment pending appeal; (2) stay proceedings while an appeal is pending; (3) suspend, modify, restore, vacate, or grant a stay or injunction while an appeal is pending; or (4) issue any order appropriate to preserve the status quo or the effectiveness of any judgment that might be entered.

Committee Note

The language of Rule 8025 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<p>Rule 8026. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law</p>	<p>Rule 8026. Making and Amending Local Rules; Procedure When There Is No Controlling Law</p>
<p>(a) LOCAL RULES BY CIRCUIT COUNCILS AND DISTRICT COURTS.</p> <p>(1) Adopting Local Rules. A circuit council that has authorized a BAP under 28 U.S.C. § 158(b) may make and amend rules governing the practice and procedure on appeal from a judgment, order, or decree of a bankruptcy court to the BAP. A district court may make and amend rules governing the practice and procedure on appeal from a judgment, order, or decree of a bankruptcy court to the district court. Local rules must be consistent with, but not duplicative of, Acts of Congress and these Part VIII rules. Rule 83 F.R.Civ.P. governs the procedure for making and amending rules to govern appeals.</p> <p>(2) Numbering. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.</p> <p>(3) Limitation on Imposing Requirements of Form. A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.</p>	<p>(a) Local Rules.</p> <p>(1) <i>Making and Amending Local Rules.</i></p> <p>(A) <i>BAP Local Rules.</i> A circuit council that has authorized a BAP under 28 U.S.C. § 158(b) may make and amend local rules governing the practice and procedure on appeal to the BAP from a bankruptcy court’s judgment, order, or decree.</p> <p>(B) <i>District-Court Local Rules.</i> A district court may make and amend local rules governing the practice and procedure on appeal to the district court from a bankruptcy court’s judgment, order, or decree.</p> <p>(C) <i>Procedure.</i> Fed. R. Civ. P. 83 governs the procedure for making and amending local rules. A local rule must be consistent with—but not duplicate—an Act of Congress and these Part VIII rules.</p> <p>(2) <i>Numbering.</i> Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.</p> <p>(3) <i>Limit on Enforcing a Local Rule Relating to Form.</i> A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.</p>
<p>(b) PROCEDURE WHEN THERE IS NO CONTROLLING LAW.</p> <p>(1) In General. A district court</p>	<p>(b) Procedure When There Is No Controlling Law.</p> <p>(1) <i>In General.</i> A district court or BAP may regulate practice in any manner</p>

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<p>or BAP may regulate practice in any manner consistent with federal law, applicable federal rules, the Official Forms, and local rules.</p> <p>(2) Limitation on Sanctions. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, applicable federal rules, the Official Forms, or local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.</p>	<p>consistent with federal law, applicable federal rules, the official forms, and local rules.</p> <p>(2) <i>Limit on Imposing Sanctions.</i> Unless an alleged violator has been given actual notice of a requirement in the particular case, no sanction or other disadvantage may be imposed for failing to comply with any requirement not in federal law, applicable federal rules, the official forms, or local rules.</p>

Committee Note

The language of Rule 8026 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 8027. Notice of a Mediation Procedure	Rule 8027. Notice of a Mediation Procedure
<p>If the district court or BAP has a mediation procedure applicable to bankruptcy appeals, the clerk must notify the parties promptly after docketing the appeal of:</p> <p style="padding-left: 40px;">(a) the requirements of the mediation procedure; and</p> <p style="padding-left: 40px;">(b) any effect the mediation procedure has on the time to file briefs.</p>	<p>If a district court or BAP has a mediation procedure applicable to bankruptcy appeals, the clerk must notify the parties promptly after docketing the appeal of:</p> <p style="padding-left: 40px;">(a) the requirements of the mediation procedure; and</p> <p style="padding-left: 40px;">(b) any effect the mediation procedure has on the time to file briefs.</p>

Committee Note

The language of Rule 8027 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 8028. Suspension of Rules in Part VIII	Rule 8028. Suspending These Part VIII Rules
In the interest of expediting decision or for other cause in a particular case, the district court or BAP, or where appropriate the court of appeals, may suspend the requirements or provisions of the rules in Part VIII, except Rules 8001, 8002, 8003, 8004, 8005, 8006, 8007, 8012, 8020, 8024, 8025, 8026, and 8028.	To expedite a decision or for other cause, a district court or BAP—or when appropriate, the court of appeals—may, in a particular case, suspend the requirements of these Part VIII rules—except Rules 8001–8007, 8012, 8020, 8024–8026, and 8028.

Committee Note

The language of Rule 8028 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Bankruptcy Rules Restyling

9000 Series

Preface

This revision is a restyling of the Federal Rules of Bankruptcy Procedure to provide greater clarity, consistency, and conciseness without changing practice and procedure.

ORIGINAL	REVISION
PART IX—GENERAL PROVISIONS	PART IX. GENERAL PROVISIONS
Rule 9001. General Definitions	Rule 9001. Definitions
<p>The definitions of words and phrases in §§ 101, 902, 1101, and 1502 of the Code, and the rules of construction in § 102, govern their use in these rules. In addition, the following words and phrases used in these rules have the meanings indicated:</p> <p>(1) “Bankruptcy clerk” means a clerk appointed pursuant to 28 U.S.C. § 156(b).</p> <p>(2) “Bankruptcy Code” or “Code” means title 11 of the United States Code.</p> <p>(3) “Clerk” means bankruptcy clerk, if one has been appointed, otherwise clerk of the district court.</p> <p>(4) “Court” or “judge” means the judicial officer before whom a case or proceeding is pending.</p> <p>(5) “Debtor.” When any act is required by these rules to be performed by a debtor or when it is necessary to compel attendance of a debtor for examination and the debtor is not a natural person: (A) if the debtor is a corporation, “debtor” includes, if designated by the court, any or all of its officers, members of its board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control; (B) if the debtor is a partnership, “debtor” includes any or all of its general partners or, if designated by the court, any other person in control.</p> <p>(6) “Firm” includes a partnership or professional corporation of attorneys or accountants.</p>	<p>(a) In the Code. The definitions of words and phrases in §§ 101, 902, 1101, and 1502 and the rules of construction in § 102 apply in these rules.</p> <p>(b) In These Rules. In these rules, the following words and phrases have these meanings:</p> <p>(1) “Bankruptcy clerk” means a clerk appointed under 28 U.S.C. § 156(b).</p> <p>(2) “Bankruptcy Code” or “Code” means Title 11 U.S.C.</p> <p>(3) “Clerk” means a bankruptcy clerk if one has been appointed; otherwise, it means the district clerk.</p> <p>(4) “Court” or “judge” means the judicial officer who presides over the case or proceeding.</p> <p>(5) “Debtor,” when the debtor is not a natural person and either is required by these rules to perform an act or must be compelled to appear for examination, includes any or all of the following:</p> <p>(A) if the debtor is a corporation and if the court so designates:</p> <ul style="list-style-type: none"> • any or all of its officers, directors, trustees, or members of a similar controlling body; • a controlling stockholder or member; or • any other person in control; or <p>(B) if the debtor is a partnership:</p> <ul style="list-style-type: none"> • any or all of its general partners; or • if the court so designates, any

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<p>(7) “Judgment” means any appealable order.</p> <p>(8) “Mail” means first class, postage prepaid.</p> <p>(9) “Notice provider” means any entity approved by the Administrative Office of the United States Courts to give notice to creditors under Rule 2002(g)(4).</p> <p>(10) “Regular associate” means any attorney regularly employed by, associated with, or counsel to an individual or firm.</p> <p>(11) “Trustee” includes a debtor in possession in a chapter 11 case.</p> <p>(12) “United States trustee” includes an assistant United States trustee and any designee of the United States trustee.</p>	<p>other person in control.</p> <p>(6) “Firm” includes a partnership or professional corporation of attorneys or accountants.</p> <p>(7) “Judgment” means any appealable order.</p> <p>(8) “Mail” means first-class mail, postage prepaid.</p> <p>(9) “Notice provider” means an entity approved by the Administrative Office of the United States Courts to give notice to creditors under Rule 2002(g)(4).</p> <p>(10) “Regular associate” means an attorney regularly employed by, associated with, or counsel to an individual or firm.</p> <p>(11) “Trustee” includes a debtor in possession in a Chapter 11 case.</p> <p>(12) “United States trustee” includes any assistant United States trustee and United States trustee’s designee.</p>

Committee Note

The language of Rule 9001 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<p>Rule 9002. Meanings of Words in the Federal Rules of Civil Procedure When Applicable to Cases Under the Code</p>	<p>Rule 9002. Meaning of Words in the Federal Rules of Civil Procedure</p>
<p>The following words and phrases used in the Federal Rules of Civil Procedure made applicable to cases under the Code by these rules have the meanings indicated unless they are inconsistent with the context:</p> <p>(1) “Action” or “civil action” means an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter.</p> <p>(2) “Appeal” means an appeal as provided by 28 U.S.C. § 158.</p> <p>(3) “Clerk” or “clerk of the district court” means the court officer responsible for the bankruptcy records in the district.</p> <p>(4) “District Court,” “trial court,” “court,” “district judge,” or “judge” means bankruptcy judge if the case or proceeding is pending before a bankruptcy judge.</p> <p>(5) “Judgment” includes any order appealable to an appellate court.</p>	<p>Unless they are inconsistent with the context, the following words and phrases in the Federal Rules of Civil Procedure—when made applicable by these rules—have these meanings:</p> <p>(a) “Action” or “civil action” means an adversary proceeding or, when appropriate:</p> <p>(1) a contested petition;</p> <p>(2) a proceeding to vacate an order for relief; or</p> <p>(3) a proceeding to determine any other contested matter.</p> <p>(b) “Appeal” means an appeal under 28 U.S.C. § 158.</p> <p>(c) “Clerk” or “clerk of the district court” means the officer responsible for maintaining the district’s bankruptcy records.</p> <p>(d) “District court,” “trial court,” “court,” “district judge,” or “judge” means “bankruptcy judge” if the case or proceeding is pending before a bankruptcy judge.</p> <p>(e) “Judgment” includes an appealable order.</p>

Committee Note

The language of Rule 9002 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9003. Prohibition of Ex Parte Contacts	Rule 9003. Ex Parte Contacts Prohibited
<p>(a) GENERAL PROHIBITION. Except as otherwise permitted by applicable law, any examiner, any party in interest, and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.</p>	<p>(a) In General. Unless permitted by applicable law, the following persons must refrain from ex parte meetings and communications with the court about matters affecting a particular case or proceeding:</p> <ul style="list-style-type: none"> • an examiner; • a party in interest; • a party in interest’s attorney, accountant, or employee; and • the United States trustee and any of its assistants, agents, or employees.
<p>(b) UNITED STATES TRUSTEE. Except as otherwise permitted by applicable law, the United States trustee and assistants to and employees or agents of the United States trustee shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding. This rule does not preclude communications with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system.</p>	<p>(b) Exception for a United States Trustee. A United States trustee and any of its assistants, agents, or employees are not prohibited from communicating with the court about general problems of bankruptcy administration and how to improve it—including the operation of the United States trustee system.</p>

Committee Note

The language of Rule 9003 has been amended as part of the general restyling of the BankruptcyRules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9004. General Requirements of Form	Rule 9004. General Requirements of Form
(a) LEGIBILITY; ABBREVIATIONS. All petitions, pleadings, schedules and other papers shall be clearly legible. Abbreviations in common use in the English language may be used.	(a) Legibility; Abbreviations. A petition, pleading, schedule, or other document must be clearly legible. An abbreviation commonly used in English is acceptable.
(b) CAPTION. Each paper filed shall contain a caption setting forth the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper.	(b) Caption. To be filed, a document must contain a caption that sets forth: <ol style="list-style-type: none"> (1) the court's name; (2) the case's title; (3) the case number and, if appropriate, adversary-proceeding number; and (4) a brief designation of the document's character.

Committee Note

The language of Rule 9004 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9005. Harmless Error	Rule 9005. Harmless Error
Rule 61 F.R.Civ.P. applies in cases under the Code. When appropriate, the court may order the correction of any error or defect or the cure of any omission which does not affect substantial rights.	Fed. R. Civ. P. 61 applies in a bankruptcy case. When appropriate, the court may order the correction of any error or defect—or the cure of any omission—that does not affect substantial rights.

Committee Note

The language of Rule 9005 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9005.1. Constitutional Challenge to a Statute—Notice, Certification, and Intervention	Rule 9005.1. Constitutional Challenge to a Statute—Notice, Certification, and Intervention
Rule 5.1 F.R.Civ.P. applies in cases under the Code.	Fed. R. Civ. P. 5.1 applies in a bankruptcy case.

Committee Note

The language of Rule 9005.1 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 9006. Computing and Extending Time; Time for Motion Papers</p>	<p>Rule 9006. Computing and Extending Time; Motions</p>
<p>(a) COMPUTING TIME. The following rules apply in computing any time period specified in these rules, in the Federal Rules of Civil Procedure, in any local rule or court order, or in any statute that does not specify a method of computing time.</p> <p>(1) <i>Period Stated in Days or a Longer Unit.</i> When the period is stated in days or a longer unit of time:</p> <p>(A) exclude the day of the event that triggers the period;</p> <p>(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and</p> <p>(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.</p> <p>(2) <i>Period Stated in Hours.</i> When the period is stated in hours:</p> <p>(A) begin counting immediately on the occurrence of the event that triggers the period;</p> <p>(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and</p> <p>(C) if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.</p> <p>(3) <i>Inaccessibility of Clerk's Office.</i> Unless the court orders otherwise, if the</p>	<p>(a) Computing Time. The following rules apply in computing any time period specified in these rules, in the Federal Rules of Civil Procedure, in any local rule or court order, or in any statute that does not specify a method of computing time.</p> <p>(1) <i>Period Stated in Days or a Longer Unit.</i> When the period is stated in days or a longer unit of time:</p> <p>(A) exclude the day of the event that triggers the period;</p> <p>(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and</p> <p>(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.</p> <p>(2) <i>Period Stated in Hours.</i> When the period is stated in hours:</p> <p>(A) begin counting immediately on the occurrence of the event that triggers the period;</p> <p>(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and</p> <p>(C) if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same hour on the next day that is not a Saturday, Sunday, or legal holiday.</p> <p>(3) <i>Inaccessibility of the Clerk's Office When a Filing Is Due.</i> Unless the court orders otherwise, if the clerk's</p>

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<p>clerk's office is inaccessible:</p> <p>(A) on the last day for filing under Rule 9006(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or</p> <p>(B) during the last hour for filing under Rule 9006(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.</p> <p>(4) <i>“Last Day” Defined.</i> Unless a different time is set by a statute, local rule, or order in the case, the last day ends:</p> <p>(A) for electronic filing, at midnight in the court's time zone; and</p> <p>(B) for filing by other means, when the clerk's office is scheduled to close.</p> <p>(5) <i>“Next Day” Defined.</i> The “next day” is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.</p> <p>(6) <i>“Legal Holiday” Defined.</i> “Legal holiday” means:</p> <p>(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;</p> <p>(B) any day declared a holiday by the President or Congress; and</p> <p>(C) for periods that are measured after an event, any other day declared a holiday by the state where the</p>	<p>office is inaccessible:</p> <p>(A) on the last day for filing under (1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or</p> <p>(B) during the last hour for filing under (2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.</p> <p>(4) <i>“Last Day” Defined.</i> Unless a different time is set by statute, local rule, or order in a case, the last day ends:</p> <p>(A) for electronic filing, at midnight in the court's time zone; and</p> <p>(B) for filing by other means, when the clerk's office is scheduled to close.</p> <p>(5) <i>“Next Day” Defined.</i> The “next day” is determined by continuing to count forward when the period is measured after an event, and backward when measured before an event.</p> <p>(6) <i>“Legal Holiday” Defined.</i> “Legal holiday” means:</p> <p>(A) the day set aside by statute for observing New Year's Day, Birthday of Martin Luther King Jr., Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Independence Day, Columbus Day, Veteran's Day, Thanksgiving Day, and Christmas Day;</p> <p>(B) any day declared a holiday by the President or Congress; and</p> <p>(C) for periods that are measured after an event, any other day declared a holiday by the State where the</p>

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<p>district court is located. (In this rule, “state” includes the District of Columbia and any United States commonwealth or territory.)</p>	<p>district court is located. (In this rule, “State” includes the District of Columbia and any United States commonwealth or territory.)</p>
<p>(b) ENLARGEMENT.</p> <p>(1) <i>In General.</i> Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.</p> <p>(2) <i>Enlargement Not Permitted.</i> The court may not enlarge the time for taking action under Rules 1007(d), 2003(a) and (d), 7052, 9023, and 9024.</p> <p>(3) <i>Enlargement Governed By Other Rules.</i> The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 4008(a), 8002, and 9033, only to the extent and under the conditions stated in those rules. In addition, the court may enlarge the time to file the statement required under Rule 1007(b)(7), and to file schedules and statements in a small business case under § 1116(3) of the Code, only to the extent and under the conditions stated in Rule 1007(c).</p>	<p>(b) Extending Time.</p> <p>(1) <i>In General.</i> This paragraph (1) applies when these rules, a notice given under these rules, or a court order requires or allows an act to be performed at or within a specified period. Except as provided in (2) and (3), the court may—at any time and for cause shown—extend the time to act if:</p> <p>(A) with or without a motion or notice, the request is made before the period (or a previously extended period) expires; or</p> <p>(B) on motion made after the specified period expires, the failure to act within that period resulted from excusable neglect.</p> <p>(2) <i>Exceptions.</i> The court must not extend the time to act under Rules 1007(d), 2003(a) and (d), 7052, 9023, and 9024.</p> <p>(3) <i>Extensions Governed by Other Rules.</i> The court may extend the time to:</p> <p>(A) act under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 4008(a), 8002, and 9033—but only to the extent and under the conditions stated in those rules; and</p> <p>(B) file the statement required by Rule 1007(b)(7), and the schedules and statements in a small business case under § 1116(3)—but only as permitted by Rule 1007(c).</p>

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<p>(c) REDUCTION.</p> <p>(1) <i>In General.</i> Except as provided in paragraph (2) of this subdivision, when an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder or by order of court, the court for cause shown may in its discretion with or without motion or notice order the period reduced.</p> <p>(2) <i>Reduction Not Permitted.</i> The court may not reduce the time for taking action under Rules 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 4008(a), 8002, and 9033(b). In addition, the court may not reduce the time under Rule 1007(c) to file the statement required by Rule 1007(b)(7).</p>	<p>(c) Reducing Time Limits.</p> <p>(1) <i>When Permitted.</i> When a rule, notice given under a rule, or court order requires or allows an act to be done within a specified time, the court may—for cause shown and with or without a motion or notice—reduce the period to act.</p> <p>(2) <i>When Not Permitted.</i> The court may not reduce the time to act under Rule 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2) or (c)(2), 4003(a), 4004(a), 4007(c), 4008(a), 8002, or 9033(b). Also, the court may not, under Rule 1007(c), reduce the time to file the statement required by Rule 1007(b)(7).</p>
<p>(d) MOTION PAPERS. A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than seven days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. Except as otherwise provided in Rule 9023, any written response shall be served not later than one day before the hearing, unless the court permits otherwise.</p>	<p>(d) Time to Serve a Motion.</p> <p>(1) <i>In General.</i> A motion (other than one that may be heard ex parte) and notice of any hearing must be served at least 7 days before the hearing date, unless the court or these rules set a different period. Any affidavit supporting the motion must be served with it. An application to change the period for service may be made ex parte for cause shown.</p> <p>(2) <i>Response.</i> Except as provided in Rule 9023, any response must be served at least 1 day before the hearing—unless the court allows otherwise.</p>
<p>(e) TIME OF SERVICE. Service of process and service of any paper other than process or of notice by mail is complete on mailing.</p>	<p>(e) Service Complete on Mailing. Service by mail of process, any other document, or notice is complete upon mailing.</p>

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<p>(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D) OR (F) F.R.CIV.P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after being served and that service is by mail or under Rule 5(b)(2)(D) (leaving with the clerk) or (F) (other means consented to) F.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).</p>	<p>(f) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made by mail or under Fed. R. Civ. P. 5(b)(2)(D) (leaving with the clerk) or (F) (other means consented to), 3 days are added after the period would otherwise expire under (a).</p>
<p>(g) GRAIN STORAGE FACILITY CASES. This rule shall not limit the court's authority under § 557 of the Code to enter orders governing procedures in cases in which the debtor is an owner or operator of a grain storage facility.</p>	<p>(g) Grain-Storage Facility. This rule does not limit the court's authority under § 557 to issue an order governing procedures in a case in which the debtor owns or operates a grain-storage facility.</p>

Committee Note

The language of Rule 9006 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<p>Rule 9007. General Authority to Regulate Notices</p>	<p>Rule 9007. Authority to Regulate Notices.</p>
<p>When notice is to be given under these rules, the court shall designate, if not otherwise specified herein, the time within which, the entities to whom, and the form and manner in which the notice shall be given. When feasible, the court may order any notices under these rules to be combined.</p>	<p>(a) In General. Unless these rules provide otherwise, when notice is to be given, the court must designate:</p> <ul style="list-style-type: none"> (1) the deadline for giving it; (2) the entities to whom it must be given; and (3) the form and manner of giving it. <p>(b) Combined Notices. When feasible, the court may order any notices under these rules to be combined.</p>

Committee Note

The language of Rule 9007 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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Rule 9008. Service or Notice by Publication	Rule 9008. Service or Notice by Publication
Whenever these rules require or authorize service or notice by publication, the court shall, to the extent not otherwise specified in these rules, determine the form and manner thereof, including the newspaper or other medium to be used and the number of publications.	When these rules require or authorize service or notice by publication, and to the extent that they do not provide otherwise, the court must determine the form and manner of publication—including the newspaper or other medium to be used and the number of publications.

Committee Note

The language of Rule 9008 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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Rule 9009. Forms	Rule 9009. Using Official Forms; Director’s Forms
<p>(a) OFFICIAL FORMS. The Official Forms prescribed by the Judicial Conference of the United States shall be used without alteration, except as otherwise provided in these rules, in a particular Official Form, or in the national instructions for a particular Official Form. Official Forms may be modified to permit minor changes not affecting wording or the order of presenting information, including changes that:</p> <p style="padding-left: 40px;">(1) expand the prescribed areas for responses in order to permit complete responses;</p> <p style="padding-left: 40px;">(2) delete space not needed for responses; or</p> <p style="padding-left: 40px;">(3) delete items requiring detail in a question or category if the filer indicates—either by checking “no” or “none” or by stating in words—that there is nothing to report on that question or category.</p>	<p>(a) Official Forms. The Official Forms prescribed by the Judicial Conference of the United States must be used without alteration—unless alteration is authorized by these rules, the form itself, or the national instructions for a particular official form. An Official Form may be modified to permit minor changes not affecting wording or the order of presentation, including a change that:</p> <p style="padding-left: 40px;">(1) expands the prescribed response area to permit a complete response;</p> <p style="padding-left: 40px;">(2) deletes space not needed for a response; or</p> <p style="padding-left: 40px;">(3) deletes items requiring detail in a question or category if the filer indicates—either by checking “no” or “none,” or by stating in words—that there is nothing to report on that item.</p>
(b) DIRECTOR’S FORMS. The Director of the Administrative Office of the United States Courts may issue additional forms for use under the Code.	(b) Director’s Forms. The Director of the Administrative Office of the United States Courts may issue additional forms.
(c) CONSTRUCTION. The forms shall be construed to be consistent with these rules and the Code.	(c) Construing Forms. The forms must be construed to be consistent with these rules and the Code.

Committee Note

The language of Rule 9009 has been amended as part of the general restyling of the BankruptcyRules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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Rule 9010. Representation and Appearances; Powers of Attorney	Rule 9010. Authority to Act Personally or by an Attorney; Power of Attorney
(a) AUTHORITY TO ACT PERSONALLY OR BY ATTORNEY. A debtor, creditor, equity security holder, indenture trustee, committee or other party may (1) appear in a case under the Code and act either in the entity's own behalf or by an attorney authorized to practice in the court, and (2) perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.	(a) In General. A debtor, creditor, equity security holder, indenture trustee, committee, or other party may: <ol style="list-style-type: none"> (1) appear in a case and act either on the entity's own behalf or through an attorney authorized to practice in the court; and (2) perform—through an authorized agent, attorney-in-fact, or proxy—any act not constituting the practice of law.
(b) NOTICE OF APPEARANCE. An attorney appearing for a party in a case under the Code shall file a notice of appearance with the attorney's name, office address and telephone number, unless the attorney's appearance is otherwise noted in the record.	(b) Attorney's Notice of Appearance. An attorney appearing for a party in a case must file a notice of appearance that contains the attorney's name, office address, and telephone number—unless the appearance is already noted in the record.
(c) POWER OF ATTORNEY. The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and filing of a proof of claim or the acceptance or rejection of a plan shall be evidenced by a power of attorney conforming substantially to the appropriate Official Form. The execution of any such power of attorney shall be acknowledged before one of the officers enumerated in 28 U.S.C. § 459, § 953, Rule 9012, or a person authorized to administer oaths under the laws of the state where the oath is administered.	(c) Power of Attorney to Represent a Creditor. The authority of an agent, attorney-in-fact, or proxy to represent a creditor—for any purpose other than executing and filing a proof of claim or accepting or rejecting a plan—must be evidenced by a power of attorney that conforms substantially to the appropriate version of Form 411. A power of attorney must be acknowledged before: <ol style="list-style-type: none"> (1) an officer listed in 28 U.S.C. § 459 or § 953 or in Rule 9012; or (2) a person authorized to administer oaths under the state law where the oath is administered.

Committee Note

The language of Rule 9010 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers</p>	<p>Rule 9011. Signing Documents; Representations to the Court; Sanctions; Verifying and Providing Copies</p>
<p>(a) SIGNATURE. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.</p>	<p>(a) Signature. Every petition, pleading, written motion, and other document—except a list, schedule, or statement, or any amendment to one—must be signed by at least one attorney of record in the attorney's individual name. A party not represented by an attorney must sign all documents. Each document must state the signer's address and telephone number, if any. The court must strike an unsigned document unless the omission is promptly corrected after being called to the attorney's or party's attention.</p>
<p>(b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—¹</p> <p>(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;</p> <p>(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;</p> <p>(3) the allegations and other</p>	<p>(b) Representations to the Court. By presenting to the court a petition, pleading, written motion, or other document—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that, to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances:</p> <p>(1) it is not presented for any improper purpose, such as to harass or to cause unnecessary delay, or needlessly increase litigation costs;</p> <p>(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument to extend, modify, or reverse existing law, or to establish new law;</p> <p>(3) the allegations and factual contentions have evidentiary support—or if specifically so identified, are likely to have evidentiary support after a</p>

¹ So in original. The comma probably should not appear.

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<p>factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and</p> <p>(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.</p>	<p>reasonable opportunity for further investigation or discovery; and</p> <p>(4) the denials of factual contentions are warranted on the evidence—or if specifically so identified, are reasonably based on a lack of information or belief.</p>
<p>(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.</p> <p>(1) <i>How Initiated.</i></p> <p>(A) <i>By Motion.</i> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney’s fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held</p>	<p>(c) Sanctions.</p> <p>(1) <i>In General.</i> If, after notice and a reasonable opportunity to respond, the court determines that (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction on any attorney, law firm, or party that committed the violation or is responsible for it. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.</p> <p>(2) <i>By Motion.</i></p> <p>(A) <i>In General.</i> A motion for sanctions must be made separately from any other motion or request, describe the specific conduct alleged to violate (b), and be served under Rule 7004.</p> <p>(B) <i>When to File.</i> The motion for sanctions must not be filed or presented to the court if the challenged document, claim, defense, contention, allegation, or denial is withdrawn or appropriately corrected within 21 days after the motion was served (or within another period as the court may order). This limitation does not apply if the conduct alleged is filing a petition</p>

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<p>jointly responsible for violations committed by its partners, associates, and employees.</p> <p style="text-align: center;"><i>(B) On Court's Initiative.</i></p> <p>On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.</p> <p style="text-align: center;"><i>(2) Nature of Sanction; Limitations.</i></p> <p>A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in sub-paragraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.</p> <p style="text-align: center;"><i>(A) Monetary sanctions</i> may not be awarded against a represented party for a violation of subdivision (b)(2).</p> <p style="text-align: center;"><i>(B) Monetary sanctions</i> may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.</p> <p style="text-align: center;"><i>(3) Order.</i> When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the</p>	<p>in violation of (b).</p> <p><i>(C) Awarding Damages.</i> If warranted, the court may award to the prevailing party reasonable expenses and attorney's fees incurred in presenting or opposing the motion.</p> <p>(3) <i>By the Court.</i> On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated (b).</p> <p>(4) <i>Nature of a Sanction; Limitations.</i></p> <p><i>(A) In General.</i> A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or deter comparable conduct by others similarly situated. The sanction may include:</p> <ul style="list-style-type: none"> <i>(i)</i> a nonmonetary directive; <i>(ii)</i> an order to pay a penalty into court; or <i>(iii)</i> if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of all or part of the reasonable attorney's fees and other expenses directly resulting from the violation. <p><i>(B) Limitations on a Monetary Sanction.</i> The court must not impose a monetary sanction:</p> <ul style="list-style-type: none"> <i>(i)</i> against a represented party for violating (b)(2); or <i>(ii)</i> on its own, unless it issued the show-cause order under (c)(3) before voluntary dismissal or settlement of the claims made by or against the

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basis for the sanction imposed.	<p style="text-align: center;">party that is, or whose attorneys are, to be sanctioned.</p> <p>(5) <i>Content of a Court Order.</i> An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.</p>
(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.	(d) Inapplicability to Discovery. Subdivisions (a)–(c) do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to Rules 7026–7037.
(e) VERIFICATION. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.	(e) Verification. A document filed in a bankruptcy case need not be verified unless these rules provide otherwise. When these rules require verification, an unsworn declaration under 28 U.S.C. § 1746 suffices.
(f) COPIES OF SIGNED OR VERIFIED PAPERS. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.	(f) Copies of Signed or Verified Documents. When these rules require copies of a signed or verified document, if the original is signed or verified, a copy that conforms to the original suffices.

Committee Note

The language of Rule 9011 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9012. Oaths and Affirmations	Rule 9012. Oaths and Affirmations
(a) PERSONS AUTHORIZED TO ADMINISTER OATHS. The following persons may administer oaths and affirmations and take acknowledgments: a bankruptcy judge, clerk, deputy clerk, United States trustee, officer authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the oath is to be taken, or a diplomatic or consular officer of the United States in any foreign country.	(a) Who May Administer an Oath. These persons may administer an oath or affirmation or take an acknowledgment: <ul style="list-style-type: none"> • a bankruptcy judge; • a clerk; • a deputy clerk; • a United States trustee; • an officer authorized to do so in a proceeding before a federal court or by state law in the state where the oath is taken; or • a United States diplomatic or consular officer in a foreign country.
(b) AFFIRMATION IN LIEU OF OATH. When in a case under the Code an oath is required to be taken a solemn affirmation may be accepted in lieu thereof.	(b) Affirmation as an Alternative. If an oath is required, a solemn affirmation suffices.

Committee Note

The language of Rule 9012 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9013. Motions: Form and Service	Rule 9013. Motions; Form and Service
<p>A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion, other than one which may be considered ex parte, shall be served by the moving party within the time determined under Rule 9006(d). The moving party shall serve the motion on:</p> <p style="padding-left: 40px;">(a) the trustee or debtor in possession and on those entities specified by these rules; or</p> <p style="padding-left: 40px;">(b) the entities the court directs if these rules do not require service or specify the entities to be served.</p>	<p>(a) Request for an Order. A request for an order must be made by written motion unless:</p> <p style="padding-left: 40px;">(1) an application is authorized by these rules; or</p> <p style="padding-left: 40px;">(2) the request is made during a hearing.</p> <p>(b) Form and Service of the Motion. The motion must state its grounds with particularity and set forth the relief or order sought. Unless a written motion may be considered ex parte, the movant must, within the time prescribed by Rule 9006(d), serve the motion on:</p> <ul style="list-style-type: none"> • the trustee or debtor in possession and those entities specified by these rules; or • if these rules do not require service or specify the entities to be served, the entities designated by the court.

Committee Note

The language of Rule 9013 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9014. Contested Matters	Rule 9014. Contested Matters
(a) MOTION. In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.	(a) Motion Required. In a contested matter not otherwise governed by these rules, relief must be requested by motion. Reasonable notice and an opportunity to be heard must be given to the party against whom relief is sought. No response is required unless the court orders otherwise.
(b) SERVICE. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004 and within the time determined under Rule 9006(d). Any written response to the motion shall be served within the time determined under Rule 9006(d). Any paper served after the motion shall be served in the manner provided by Rule 5(b) F.R. Civ. P.	(b) Service. <ol style="list-style-type: none"> (1) Motion. The motion must be served within the time prescribed by Rule 9006(d) and in the manner for serving a summons and complaint provided by Rule 7004. (2) Response. Any written response must be served within the time prescribed by Rule 9006(d). (3) Later Filing. After a motion is served, any other document must be served in the manner prescribed by Fed. R. Civ. P. 5(b).
(c) APPLICATION OF PART VII RULES. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pretrial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a	(c) Applying Part VII Rules. <ol style="list-style-type: none"> (1) In General. Unless this rule or a court order provides otherwise, the following rules apply in a contested matter: 7009, 7017, 7021, 7025–7026, 7028–7037, 7041–7042, 7052, 7054–7056, 7064, 7069, and 7071. At any stage of a matter, the court may order that one or more other Part VII rules apply. (2) Exception. Unless the court orders otherwise, the following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, do not apply in a contested matter: <ul style="list-style-type: none"> • (a)(1), mandatory disclosure; • (a)(2), disclosures about expert

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<p>deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.</p>	<p>testimony;</p> <ul style="list-style-type: none"> • (a)(3), other pretrial disclosures; and • (f), mandatory meeting before a scheduling conference/discovery plan. <p>(3) Procedural Order. In issuing any procedural order under this subdivision (c), the court must give the parties notice and a reasonable opportunity to comply.</p> <p>(4) Perpetuating Testimony. An entity desiring to perpetuate testimony may do so in the manner provided by Rule 7027 for taking a deposition before an adversary proceeding.</p>
<p>(d) TESTIMONY OF WITNESSES. Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding.</p>	<p>(d) Taking Testimony. A witness's testimony on a disputed material factual issue must be taken in the same manner as testimony in an adversary proceeding.</p>
<p>(e) ATTENDANCE OF WITNESSES. The court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify.</p>	<p>(e) Evidentiary Hearing. The court must provide procedures that allow parties— at a reasonable time before a scheduled hearing—to determine whether it will be an evidentiary hearing at which witnesses may testify.</p>

Committee Note

The language of Rule 9014 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9015. Jury Trials	Rule 9015. Jury Trial.
(a) APPLICABILITY OF CERTAIN FEDERAL RULES OF CIVIL PROCEDURE. Rules 38, 39, 47–49, and 51, F.R.Civ.P., and Rule 81(c) F.R.Civ.P. insofar as it applies to jury trials, apply in cases and proceedings, except that a demand made under Rule 38(b) F.R.Civ.P. shall be filed in accordance with Rule 5005.	(a) In General. In a bankruptcy case or proceeding, Fed. R. Civ. P. 38–39, 47–49, 51, and 81(c) (insofar as it applies to jury trials) apply, but a demand for a jury trial under Fed. R. Civ. P. 38(b) must be filed in accordance with Rule 5005.
(b) CONSENT TO HAVE TRIAL CONDUCTED BY BANKRUPTCY JUDGE. If the right to a jury trial applies, a timely demand has been filed pursuant to Rule 38(b) F.R.Civ.P., and the bankruptcy judge has been specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) by jointly or separately filing a statement of consent within any applicable time limits specified by local rule.	(b) Jury Trial Before a Bankruptcy Judge. The parties may—jointly or separately—file a statement consenting to a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) if: <ol style="list-style-type: none"> (1) the right to a jury trial applies; (2) a timely demand has been filed under Fed. R. Civ. P. 38(b); (3) the bankruptcy judge has been specially designated to conduct the jury trial; and (4) the statement is filed within any time specified by local rule.
(c) APPLICABILITY OF RULE 50 F.R.CIV.P. Rule 50 F.R.Civ.P. applies in cases and proceedings, except that any renewed motion for judgment or request for a new trial shall be filed no later than 14 days after the entry of judgment.	(c) Judgment as a Matter of Law; Motion for a New Trial. Fed. R. Civ. P. 50 applies in a bankruptcy case or proceeding—except that a renewed motion for judgment, or a request for a new trial, must be filed within 14 days after the judgment is entered.

Committee Note

The language of Rule 9015 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9016. Subpoena	Rule 9016. Subpoena
Rule 45 F.R.Civ.P. applies in cases under the Code.	Fed. R. Civ. P. 45 applies in a bankruptcy case.

Committee Note

The language of Rule 9016 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9017. Evidence	Rule 9017. Evidence
The Federal Rules of Evidence and Rules 43, 44 and 44.1 F.R.Civ.P. apply in cases under the Code.	The Federal Rules of Evidence and Fed. R. Civ. P. 43, 44, and 44.1 apply in a bankruptcy case.

Committee Note

The language of Rule 9017 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9018. Secret, Confidential, Scandalous, or Defamatory Matter	Rule 9018. Secret, Confidential, Scandalous, or Defamatory Matter
<p>On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made confidential by statute or regulation. If an order is entered under this rule without notice, any entity affected thereby may move to vacate or modify the order, and after a hearing on notice the court shall determine the motion.</p>	<p>(a) In General. On motion or on its own, the court may—with or without notice—issue any order that justice requires to:</p> <ol style="list-style-type: none"> (1) protect the estate or any entity regarding a trade secret or other confidential research, development, or commercial information; (2) protect an entity from scandalous or defamatory matter in any document filed in a bankruptcy case; or (3) protect governmental matters made confidential by statute or regulation. <p>(b) Motion to Vacate or Modify an Order Issued Without Notice. An entity affected by an order issued under (a) without notice may move to vacate or modify it. After notice and a hearing, the court must rule on the motion.</p>

Committee Note

The language of Rule 9018 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9019. Compromise and Arbitration	Rule 9019. Compromise; Arbitration
(a) COMPROMISE. On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.	(a) Approving a Compromise. On the trustee's motion and after notice and a hearing, the court may approve a compromise or settlement. Notice must be given to: <ul style="list-style-type: none"> • the creditors; • the United States trustee; • the debtor; • indenture trustees as provided in Rule 2002; and • any other entity the court designates.
(b) AUTHORITY TO COMPROMISE OR SETTLE CONTROVERSIES WITHIN CLASSES. After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.	(b) Compromising or Settling Controversies in Classes. After a hearing on such notice as the court may direct, the court may: <ol style="list-style-type: none"> (1) fix a class or classes of controversies; and (2) authorize the trustee to compromise or settle controversies within the class or classes without further hearing or notice.
(c) ARBITRATION. On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.	(c) Arbitration of Controversies Affecting an Estate. If the parties so stipulate, the court may authorize a controversy affecting an estate to be submitted to final and binding arbitration.

Committee Note

The language of Rule 9019 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9020. Contempt Proceedings	Rule 9020. Contempt Proceedings
Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest.	Rule 9014 governs a motion for a contempt order made by the United States trustee or a party in interest.

Committee Note

The language of Rule 9020 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9021. Entry of Judgment	Rule 9021. When a Judgment or Order Becomes Effective
A judgment or order is effective when entered under Rule 5003.	A judgment or order becomes effective when it is entered under Rule 5003.

Committee Note

The language of Rule 9021 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9022. Notice of Judgment or Order	Rule 9022. Notice of a Judgment or Order
<p>(a) JUDGMENT OR ORDER OF BANKRUPTCY JUDGE. Immediately on the entry of a judgment or order the clerk shall serve a notice of entry in the manner provided in Rule 5(b) F.R.Civ.P. on the contesting parties and on other entities as the court directs. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of the judgment or order. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.</p>	<p>(a) Issued by a Bankruptcy Judge.</p> <p>(1) <i>In General.</i> Upon entering a judgment or order, the clerk must:</p> <p>(A) promptly serve notice of the entry on the contesting parties and other entities the court designates;</p> <p>(B) do so in the manner provided by Fed. R. Civ. P. 5(b);</p> <p>(C) except in a Chapter 9 case, promptly send a copy of the judgment or order to the United States trustee; and</p> <p>(D) note service on the docket.</p> <p>(2) <i>Lack of Notice; Time to Appeal.</i> Except as permitted by Rule 8002, lack of notice of the entry does not affect the time to appeal or relieve—or authorize the court to relieve—a party for failing to appeal within the time allowed.</p>
<p>(b) JUDGMENT OR ORDER OF DISTRICT JUDGE. Notice of a judgment or order entered by a district judge is governed by Rule 77(d) F.R.Civ.P. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of a judgment or order entered by a district judge.</p>	<p>(b) Issued by a District Judge. Notice of a district judge’s judgment or order is governed by Fed. R. Civ. P. 77(d). Except in a Chapter 9 case, the clerk must promptly send a copy to the United States trustee.</p>

Committee Note

The language of Rule 9022 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9023. New Trials; Amendment of Judgments	Rule 9023. New Trial; Amending a Judgment
<p>Except as provided in this rule and Rule 3008, Rule 59 F.R.Civ.P. applies in cases under the Code. A motion for a new trial or to alter or amend a judgment shall be filed, and a court may on its own order a new trial, no later than 14 days after entry of judgment. In some circumstances, Rule 8008 governs post-judgment motion practice after an appeal has been docketed and is pending.</p>	<p>(a) By Motion. Except as this rule and Rule 3008 provide otherwise, Fed. R. Civ. P. 59 applies in a bankruptcy case. A motion for a new trial or to alter or amend a judgment must be filed within 14 days after the judgment is entered. In some instances, Rule 8008 governs postjudgment motion practice after an appeal has been docketed and is pending.</p> <p>(b) By the Court. Within 14 days after judgment is entered, the court may, on its own, order a new trial.</p>

Committee Note

The language of Rule 9023 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9024. Relief from Judgment or Order	Rule 9024. Relief from a Judgment or Order
<p>Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(c), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330. In some circumstances, Rule 8008 governs post-judgment motion practice after an appeal has been docketed and is pending.</p>	<p>(a) In General. Fed. R. Civ. P. 60 applies in a bankruptcy case—except that:</p> <ol style="list-style-type: none"> (1) the one-year limitation in Fed. R. Civ. P. 60(c) does not apply to a motion to reopen a case or to reconsider an uncontested order allowing or disallowing a claim; (2) a complaint to revoke a discharge in a Chapter 7 case must be filed within the time allowed by § 727(e); and (3) a complaint to revoke an order confirming a plan must be filed within the time allowed by § 1144, 1230, or 1330. <p>(b) Indicative Ruling. In some instances, Rule 8008 governs postjudgment motion practice after an appeal has been docketed and is pending.</p>

Committee Note

The language of Rule 9024 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9025. Security: Proceedings Against Security Providers	Rule 9025. Security; Proceeding Against a Security Provider
Whenever the Code or these rules require or permit a party to give security, and security is given with one or more security providers, each provider submits to the jurisdiction of the court, and liability may be determined in an adversary proceeding governed by the rules in Part VII.	When the Code or these rules require or permit a party to give security, and the party gives security with one or more security providers, each provider submits to the court’s jurisdiction. Liability may be determined in an adversary proceeding governed by the Part VII rules.

Committee Note

The language of Rule 9025 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9026. Exceptions Unnecessary	Rule 9026. Objecting to a Ruling or Order
Rule 46 F.R.Civ.P. applies in cases under the Code.	Fed. R. Civ. P. 46 applies in a bankruptcy case.

Committee Note

The language of Rule 9026 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9027. Removal	Rule 9027. Removing a Claim or Cause of Action from Another Court
<p>(a) NOTICE OF REMOVAL.</p> <p>(1) <i>Where Filed; Form and Content.</i> A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action, the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy court, and be accompanied by a copy of all process and pleadings.</p> <p>(2) <i>Time for Filing; Civil Action Initiated Before Commencement of the Case Under the Code.</i> If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.</p> <p>(3) <i>Time for filing; civil action initiated after commencement of the case under the Code.</i> If a claim or cause of action is asserted in another court after the commencement of a case under the Code, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial</p>	<p>(a) Notice of Removal.</p> <p>(1) <i>Where Filed; Form and Content.</i> A notice of removal must be filed with the clerk for the district and division where the state or federal civil action is pending. The notice must be signed—under Rule 9011—and must:</p> <p>(A) contain a short and plain statement of the facts that entitle the party to remove;</p> <p>(B) contain a statement that the party filing the notice does or does not consent to the bankruptcy court’s entry of a final judgment or order; and</p> <p>(C) be accompanied by a copy of all process and pleadings.</p> <p>(2) <i>Time to File When the Claim Was Filed Before the Bankruptcy Case Was Commenced.</i> If the claim or cause of action in a civil action is pending when a bankruptcy case is commenced, the notice of removal must be filed within the longest of these periods:</p> <p>(A) 90 days after the order for relief in the bankruptcy case;</p> <p>(B) if the claim or cause of action has been stayed under § 362, 30 days after an order terminating the stay is entered; or</p> <p>(C) in a Chapter 11 case, 30 days after a trustee qualifies—but no later than 180 days after the order for relief.</p> <p>(3) <i>Time to File When the Claim Is Filed After the Bankruptcy Case Was Commenced.</i> If a claim or cause</p>

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<p>pleading setting forth the claim or cause of action sought to be removed, or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.</p>	<p>of action is asserted in another court after the bankruptcy case was commenced, a party filing a notice of removal must do so within the shorter of these periods:</p> <p>(A) 30 days after receiving (by service or otherwise) the initial pleading setting forth the claim or cause of action sought to be removed; or</p> <p>(B) 30 days after receiving the summons if the initial pleading has been filed but not served with the summons.</p>
<p>(b) NOTICE. Promptly after filing the notice of removal, the party filing the notice shall serve a copy of it on all parties to the removed claim or cause of action.</p>	<p>(b) Notice to Other Parties and to the Court from Which the Claim Was Removed. A party filing a notice of removal must promptly:</p> <p>(1) serve a copy on all other parties to the removed claim or cause of action; and</p> <p>(2) file a copy with the clerk of the court from which it was removed.</p>
<p>(c) FILING IN NON-BANKRUPTCY COURT. Promptly after filing the notice of removal, the party filing the notice shall file a copy of it with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of a copy of the notice of removal. The parties shall proceed no further in that court unless and until the claim or cause of action is remanded.</p>	<p>(c) Effective Date of Removal. Removal becomes effective when the notice is filed under (b)(2). The parties must proceed no further in the court from which the claim or cause of action was removed unless the claim or cause of action is remanded.</p>
<p>(d) REMAND. A motion for remand of the removed claim or cause of action shall be governed by Rule 9014 and served on the parties to the removed claim or cause of action.</p>	<p>(d) Remand After Removal. A motion to remand is governed by Rule 9014. The party filing the motion must serve a copy on all parties to the removed claim or cause of action.</p>
<p>(e) PROCEDURE AFTER REMOVAL.</p>	<p>(e) Procedure After Removal.</p> <p>(1) <i>Bringing Proper Parties Before the</i></p>

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<p>(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the claim or cause of action was removed or otherwise.</p> <p>(2) The district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may require the party filing the notice of removal to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed.</p> <p>(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.</p>	<p>Court. After removal, the district court—or the bankruptcy judge to whom the bankruptcy case has been referred—may issue all necessary orders and process to bring before it all proper parties. It does not matter whether they were served by process issued by the court from which the claim or cause of action was removed, or otherwise.</p> <p>(2) Records of Prior Proceedings. The judge may require the party filing the notice of removal to file with the clerk copies of all records and proceedings relating to the claim or cause of action that were filed in the court from which the removal occurred.</p> <p>(3) Statement by a Party to a Removed Claim. A party who has filed a pleading in a removed claim or cause of action—except the party filing the notice of removal—must:</p> <p>(A) file a statement that the party does or does not consent to the entry of a final order or judgment of the bankruptcy court;</p> <p>(B) ensure that the statement is signed as Rule 9011 provides;</p> <p>(C) file it within 14 days after the notice of removal is filed; and</p> <p>(D) mail a copy to every other party to the removed claim or cause of action.</p>
<p>(f) PROCESS AFTER REMOVAL. If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued</p>	<p>(f) Process Regarding a Defendant After Removal. If a defendant has not been served—or service has not been completed before removal or has been proved defective—process or service may be completed or new process issued as the Part VII rules provide. A defendant served</p>

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<p>pursuant to Part VII of these rules. This subdivision shall not deprive any defendant on whom process is served after removal of the defendant's right to move to remand the case.</p>	<p>after removal may move to remand the claim or cause of action to the court from which it was removed.</p>
<p>(g) APPLICABILITY OF PART VII. The rules of Part VII apply to a claim or cause of action removed to a district court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under the rules of Part VII within 21 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 21 days following the service of summons on such initial pleading, or within seven days following the filing of the notice of removal, whichever period is longest.</p>	<p>(g) Applying Part VII Rules.</p> <p>(1) <i>In General.</i> The Part VII rules apply to a claim or cause of action removed to a district court from a federal or state court and govern the procedure after removal. Repleading is not necessary unless the court orders otherwise.</p> <p>(2) <i>Time to File an Answer.</i> In a removed action, a defendant that has not previously done so must file an answer—or present other defenses or objections available under the Part VII rules. The defendant must do so within the longest of these periods:</p> <p>(A) 21 days after receiving—by service or otherwise—a copy of the initial pleading that sets forth the claim for relief;</p> <p>(B) 21 days after a summons on the original pleading was served; or</p> <p>(C) 7 days after the notice of removal was filed.</p>
<p>(h) RECORD SUPPLIED. When a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or a state court, to be used in the removed civil action or proceeding, and the clerk of the federal or state court, on demand accompanied by payment or tender of the lawful fees, fails to deliver certified copies, the court may, on affidavit reciting the facts, direct such record to be supplied by affidavit or otherwise. Thereupon the proceedings, trial and judgment may be</p>	<p>(h) Clerk's Failure to Supply Certified Records of Court Proceedings. If a party is entitled to copies of the records and proceedings in a civil action or proceeding in a federal or state court for use in the removed action or proceeding, the party may demand certified copies from that court's clerk. After the party pays for them or tenders the fees, if the clerk fails to provide them, the court to which the action or proceeding is removed may—after receiving an affidavit stating these facts—order that the record be supplied by</p>

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<p>had in the court, and all process awarded, as if certified copies had been filed.</p>	<p>affidavit or otherwise. The court may then proceed to trial and judgment, and may award all process, as if certified copies had been filed.</p>
<p>(i) ATTACHMENT OR SEQUESTRATION; SECURITIES. When a claim or cause of action is removed to a district court, any attachment or sequestration of property in the court from which the claim or cause of action was removed shall hold the property to answer the final judgment or decree in the same manner as the property would have been held to answer final judgment or decree had it been rendered by the court from which the claim or cause of action was removed. All bonds, undertakings, or security given by either party to the claim or cause of action prior to its removal shall remain valid and effectual notwithstanding such removal. All injunctions issued, orders entered and other proceedings had prior to removal shall remain in full force and effect until dissolved or modified by the court.</p>	<p>(i) Property Attached or Sequestered; Security; Injunction.</p> <p>(1) <i>Property Attached or Sequestered.</i> The court from which a claim or cause of action has been removed must hold attached or sequestered property to answer the final judgment or decree in the same way it would have been held had there been no removal.</p> <p>(2) <i>Security.</i> Any bond, undertaking, or security given by either party before the removal remains valid.</p> <p>(3) <i>Injunction.</i> Any injunction or order issued, or other proceeding had, before the removal remains in effect until dissolved or modified by the court.</p>

Committee Note

The language of Rule 9027 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9028. Disability of a Judge	Rule 9028. Judge's Disability
Rule 63 F.R.Civ.P. applies in cases under the Code.	Fed. R. Civ. P. 63 applies in a bankruptcy case.

Committee Note

The language of Rule 9028 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<p>Rule 9029. Local Bankruptcy Rules; Procedure When There is No Controlling Law</p>	<p>Rule 9029. Adopting Local Rules; Limit on Enforcing a Local Rule; Absence of Controlling Law</p>
<p>(a) LOCAL BANKRUPTCY RULES.</p> <p>(1) Each district court acting by a majority of its district judges may make and amend rules governing practice and procedure in all cases and proceedings within the district court’s bankruptcy jurisdiction which are consistent with—but not duplicative of—Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make and amend rules of practice and procedure which are consistent with—but not duplicative of—Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Local rules shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States.</p> <p>(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a non-willful failure to comply with the requirement.</p>	<p>(a) Adopting Local Rules.</p> <p>(1) <i>By District Courts.</i> Each district court, acting by a majority of its judges, may make and amend rules governing practice and procedure in all cases and proceedings within its bankruptcy jurisdiction. Fed. R. Civ. P. 83 governs the procedure for adopting local rules. The rules must:</p> <p>(A) be consistent with—but not duplicate—federal statutes and these rules;</p> <p>(B) not prohibit or limit using Official Forms; and</p> <p>(C) conform to any uniform numbering system prescribed by the Judicial Conference of the United States.</p> <p>(2) <i>Delegating Authority to the Bankruptcy Judges.</i> A district court may—subject to any limitation or condition it may prescribe and Fed. R. Civ. P. 83—authorize the district’s bankruptcy judges to do the same.</p> <p>(b) Limit on Enforcing a Local Rule Regarding Form. A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose rights because of a nonwillful failure to comply.</p>
<p>(b) PROCEDURE WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement</p>	<p>(c) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, these rules, the Official Forms, and the district’s local rules. But for any requirement set out elsewhere a sanction or other disadvantage may be imposed for noncompliance only if the alleged violator</p>

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not in federal law, federal rules, Official Forms, or the local rules of the district unless the alleged violator has been furnished in the particular case with actual notice of the requirement.	has been given actual notice of the requirement in the particular case.

Committee Note

The language of Rule 9029 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9030. Jurisdiction and Venue Unaffected	Rule 9030. Jurisdiction and Venue
These rules shall not be construed to extend or limit the jurisdiction of the courts or the venue of any matters therein.	These rules must not be construed to extend or limit jurisdiction of the courts or the venue of any matters.

Committee Note

The language of Rule 9030 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9031. Masters Not Authorized	Rule 9031. Using Masters Not Authorized
Rule 53 F.R.Civ.P. does not apply in cases under the Code.	Fed. R. Civ. P. 53 does not apply in a bankruptcy case.

Committee Note

The language of Rule 9031 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<p>Rule 9032. Effect of Amendment of Federal Rules of Civil Procedure</p>	<p>Rule 9032. Effect of an Amendment to the Federal Rules of Civil Procedure</p>
<p>The Federal Rules of Civil Procedure which are incorporated by reference and made applicable by these rules shall be the Federal Rules of Civil Procedure in effect on the effective date of these rules and as thereafter amended, unless otherwise provided by such amendment or by these rules.</p>	<p>To the extent these rules incorporate by reference the Federal Rules of Civil Procedure, an amendment to the Federal Rules of Civil Procedure is also effective under these rules, unless the amendment or these rules provide otherwise.</p>

Committee Note

The language of Rule 9032 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9033. Proposed Findings of Fact and Conclusions of Law	Rule 9033. Proposed Findings of Fact and Conclusions of Law
(a) SERVICE. In a proceeding in which the bankruptcy court has issued proposed findings of fact and conclusions of law, the clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.	(a) Service. When a bankruptcy court issues proposed findings of fact and conclusions of law, the clerk must promptly serve a copy, by mail, on every party and must note the date of mailing on the docket.
(b) OBJECTIONS: TIME FOR FILING. Within 14 days after being served with a copy of the proposed findings of fact and conclusions of law a party may serve and file with the clerk written objections which identify the specific proposed findings or conclusions objected to and state the grounds for such objection. A party may respond to another party's objections within 14 days after being served with a copy thereof. A party objecting to the bankruptcy judge's proposed findings or conclusions shall arrange promptly for the transcription of the record, or such portions of it as all parties may agree upon or the bankruptcy judge deems sufficient, unless the district judge otherwise directs.	(b) Objections; Time to File. (1) Time to File. Within 14 days after being served, a party may file and serve objections. The objections must identify each proposed finding or conclusion objected to and state the grounds for objecting. A party may respond to another party's objections within 14 days after being served with a copy. (2) Ordering a Transcript. Unless the district judge orders otherwise, a party filing objections must promptly order a transcript of the record—or the parts of it that all parties agree to or the bankruptcy judge considers sufficient.
(c) EXTENSION OF TIME. The bankruptcy judge may for cause extend the time for filing objections by any party for a period not to exceed 21 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing objections must be made before the time for filing objections has expired, except that a request made no more than 21 days after the expiration of the time for filing objections may be granted upon a showing of excusable neglect.	(3) Extending the Time. On request made before the time to file objections expires, the bankruptcy judge may, for cause, extend the time to file for any party for no more than 21 days after the time otherwise provided by this rule expires. But a request made within 21 days after that time expires may be granted upon a showing of excusable neglect.

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<p>(d) STANDARD OF REVIEW. The district judge shall make a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge’s findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions.</p>	<p>(c) Review by the District Judge. The district judge:</p> <ul style="list-style-type: none"> (1) must review de novo—on the record or after receiving additional evidence—any part of the bankruptcy judge’s findings of fact or conclusions of law to which specific written objection has been made under (b); and (2) may accept, reject, or modify them, take additional evidence, or remand the matter to the bankruptcy judge with instructions.

Committee Note

The language of Rule 9033 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 9034. Transmittal of Pleadings, Motion Papers, Objections, and Other Papers to the United States Trustee</p>	<p>Rule 9034. Sending Copies to the United States Trustee</p>
<p>Unless the United States trustee requests otherwise or the case is a chapter 9 municipality case, any entity that files a pleading, motion, objection, or similar paper relating to any of the following matters shall transmit a copy thereof to the United States trustee within the time required by these rules for service of the paper:</p> <ul style="list-style-type: none"> (a) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business; (b) the approval of a compromise or settlement of a controversy; (c) the dismissal or conversion of a case to another chapter; (d) the employment of professional persons; (e) an application for compensation or reimbursement of expenses; (f) a motion for, or approval of an agreement relating to, the use of cash collateral or authority to obtain credit; (g) the appointment of a trustee or examiner in a chapter 11 reorganization case; (h) the approval of a disclosure statement; (i) the confirmation of a plan; (j) an objection to, or waiver or revocation of, the debtor's discharge; (k) any other matter in which the United States trustee requests copies of filed papers or the court orders copies 	<p>Except in a Chapter 9 case or when the United States trustee requests otherwise, an entity filing a pleading, motion, objection, or similar document relating to any of the following must send a copy to the United States trustee within the time required for service:</p> <ul style="list-style-type: none"> (a) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business; (b) the approval of a compromise or settlement of a controversy; (c) the dismissal or conversion of a case to another chapter; (d) the employment of a professional person; (e) an application for compensation or reimbursement of expenses; (f) a motion for, or the approval of an agreement regarding, the use of cash collateral or the authority to obtain credit; (g) the appointment of a trustee or examiner in a Chapter 11 case; (h) the approval of a disclosure statement; (i) the confirmation of a plan; (j) an objection to, or waiver or revocation of, the debtor's discharge; or (k) any other matter in which the United States trustee requests copies of filed papers or the court orders copies sent

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transmitted to the United States trustee.	to the United States trustee.

Committee Note

The language of Rule 9034 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
Rule 9035. Applicability of Rules in Judicial Districts in Alabama and North Carolina	Rule 9035. Applying These Rules in a Judicial District in Alabama and North Carolina
In any case under the Code that is filed in or transferred to a district in the State of Alabama or the State of North Carolina and in which a United States trustee is not authorized to act, these rules apply to the extent that they are not inconsistent with any federal statute effective in the case.	In a bankruptcy case filed in or transferred to a district in Alabama or North Carolina and in which a United States trustee is not authorized to act, these rules apply to the extent they are not inconsistent with any applicable federal statute.

Committee Note

The language of Rule 9035 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 9036. Notice and Service by Electronic Transmission</p>	<p>Rule 9036. Electronic Notice and Service</p>
<p>(a) IN GENERAL. This rule applies whenever these rules require or permit sending a notice or serving a paper by mail or other means.</p> <p>(b) NOTICES FROM AND SERVICE BY THE COURT.</p> <p>(1) <i>Registered Users.</i> The clerk may send notice to or serve a registered user by filing the notice or paper with the court's electronic-filing system.</p> <p>(2) <i>All Recipients.</i> For any recipient, the clerk may send notice or serve a paper by electronic means that the recipient consented to in writing, including by designating an electronic address for receipt of notices. But these exceptions apply:</p> <p>(A) if the recipient has registered an electronic address with the Administrative Office of the United States Courts' bankruptcy-noticing program, the clerk shall send the notice to or serve the paper at that address; and</p> <p>(B) if an entity has been designated by the Director of the Administrative Office of the United States Courts as a high-volume paper-notice recipient, the clerk may send the notice to or serve the paper electronically at</p>	<p>(a) In General. This rule applies whenever these rules require or permit sending a notice or serving a document by mail or other means.</p> <p>(b) Notices From and Service by the Court.</p> <p>(1) <i>Registered Users.</i> The clerk may send notice to or serve a registered user by filing the notice or document with the court's electronic-filing system.</p> <p>(2) <i>All Recipients.</i> For any recipient, the clerk may send notice or serve a document by electronic means that the recipient consented to in writing, including by designating an electronic address for receiving notices. But these exceptions apply:</p> <p>(A) if the recipient has registered an electronic address with the Administrative Office of the United States Courts' bankruptcy-noticing program, the clerk must use that address; and</p> <p>(B) if an entity has been designated by the Director of the Administrative Office of the United States Courts as a high-volume paper-notice recipient, the clerk may send the notice to or serve the document electronically at an address designated by the Director, unless the entity has designated an address under § 342(e) or (f).</p> <p>(c) Notices From and Service by an Entity. An entity may send notice or serve a document in the same manner that the clerk does under (b), excluding (b)(2)(A) and (B).</p>

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<p>an address designated by the Director, unless the entity has designated an address under § 342(e) or (f) of the Code.</p> <p>(c) NOTICES FROM AND SERVICE BY AN ENTITY. An entity may send notice or serve a paper in the same manner that the clerk does under (b), excluding (b)(2)(A) and (B).</p> <p>(d) COMPLETING NOTICE OR SERVICE. Electronic notice or service 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. It is the recipient's responsibility to keep its electronic address current with the clerk.</p> <p>(e) INAPPLICABILITY. This rule does not apply to any paper required to be served in accordance with Rule 7004.</p>	<p>(d) Completing Notice or Service. Electronic notice or service 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 notified or served. The recipient must keep its electronic address current with the clerk.</p> <p>(e) Inapplicability. This rule does not apply to any document required to be served in accordance with Rule 7004.</p>

Committee Note

The language of Rule 9036 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p>Rule 9037. Privacy Protection For Filings Made with the Court</p>	<p>Rule 9037. Protecting Privacy for Filings</p>
<p>(a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:</p> <ol style="list-style-type: none"> (1) the last four digits of the social-security number and taxpayer-identification number; (2) the year of the individual's birth; (3) the minor's initials; and (4) the last four digits of the financial-account number. 	<p>(a) Required Redaction. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual other than the debtor known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:</p> <ol style="list-style-type: none"> (1) the last four digits of a social-security and taxpayer-identification number; (2) the year of the individual's birth; (3) the minor's initials; and (4) the last four digits of the financial-account number.
<p>(b) EXEMPTIONS FROM THE REDACTION REQUIREMENT. The redaction requirement does not apply to the following:</p> <ol style="list-style-type: none"> (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding; (2) the record of an administrative or agency proceeding unless filed with a proof of claim; (3) the official record of a state-court proceeding; (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; (5) a filing covered by subdivision (c) of this rule; and 	<p>(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:</p> <ol style="list-style-type: none"> (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding; (2) the record of an administrative or agency proceeding, unless filed with a proof of claim; (3) the official record of a state-court proceeding; (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; (5) a filing covered by (c); and (6) a filing subject to § 110.

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(6) a filing that is subject to § 110 of the Code.	
(c) FILINGS MADE UNDER SEAL. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the entity that made the filing to file a redacted version for the public record.	(c) Order for a Filing Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the entity that made it to file a redacted version for the public record.
(d) PROTECTIVE ORDERS. For cause, the court may by order in a case under the Code: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.	(d) Protective Orders. For cause, the court may by order in a case under the Code: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.
(e) OPTION FOR ADDITIONAL UNREDACTED FILING UNDER SEAL. An entity making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.	(e) Option to File an Additional Unredacted Document Under Seal. An entity filing a redacted document may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.
(f) OPTION FOR FILING A REFERENCE LIST. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.	(f) Option to File a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. A reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

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<p>(g) WAIVER OF PROTECTION OF IDENTIFIERS. An entity waives the protection of subdivision (a) as to the entity's own information by filing it without redaction and not under seal.</p>	<p>(g) Waiver of Protection of Identifiers. An entity waives the protection of (a) for the entity's own information by filing it without redaction and not under seal.</p>
<p>(h) MOTION TO REDACT A PREVIOUSLY FILED DOCUMENT.</p> <p>(1) <i>Content of the Motion; Service.</i> 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:</p> <p>(A) file a motion to redact identifying the proposed redactions;</p> <p>(B) attach to the motion the proposed redacted document;</p> <p>(C) include in the motion the docket or proof-of-claim number of the previously filed document; and</p> <p>(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.</p> <p>(2) <i>Restricting Public Access to the Unredacted Document; Docketing the Redacted Document.</i> 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.</p>	<p>(h) Motion to Redact a Previously Filed Document.</p> <p>(1) <i>Content; Service.</i> Unless the court orders otherwise, an entity seeking to redact from a previously filed document information that is protected under (a) must:</p> <p>(A) file a motion that identifies the proposed redactions;</p> <p>(B) attach to it the proposed redacted document;</p> <p>(C) include the docket number—or proof-of-claim number—of the previously filed document; and</p> <p>(D) serve the motion and attachment on;</p> <ul style="list-style-type: none"> • the debtor; • the debtor's attorney; • any trustee; • the United States trustee; • the person who filed the unredacted document; and • any individual whose personal identifying information is to be redacted. <p>(2) <i>Restricting Public Access to the Unredacted Document; Docketing the Redacted Document.</i> Pending its ruling, the court must promptly restrict access to the motion and the unredacted document. If the court grants the motion, the clerk must docket the redacted document. The</p>

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	<p>restrictions on public access to the motion and unredacted document remain in effect until a further court order. If the court denies the motion, the restrictions must be lifted, unless the court orders otherwise.</p>

Committee Note

The language of Rule 9037 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

1 **Rule 1007. Lists, Schedules, Statements, and Other**
2 **Documents; Time to File²**

3 * * * * *

4 (b) SCHEDULES, STATEMENTS, AND
5 OTHER DOCUMENTS.

6 * * * * *

7 (7) *Personal Financial-Management*
8 *Course.* Unless an approved provider has notified the
9 court that the debtor has completed a course in
10 personal financial management after filing the
11 petition or the debtor is not required to complete one
12 as a condition to discharge, an individual debtor in a

¹ New material is underlined in red; matter to be omitted is lined through.

² The changes indicated are to the restyled version of Rule 1007 included in the June 2021 Agenda Book of the Committee on Rules of Practice and Procedure (the Standing Committee) at uscourts.gov. The restyled bankruptcy rules are expected to go into effect December 1, 2024, if approved by the Standing Committee, the Judicial Conference, and the Supreme Court, and if Congress takes no action to the contrary.

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

13 Chapter 7 or Chapter 13 case—or in a Chapter 11
14 case in which § 1141(d)(3) applies—must file a
15 certificate of course completion issued by the
16 provider.

17 * * * * *

18 (c) TIME TO FILE.

19 * * * * *

20 (4) *Financial-Management Course.*

21 Unless the court extends the time to file, an
22 individual debtor must file the ~~statement~~
23 certificate required by (b)(7) as follows:

24 (A) in a Chapter 7 case, within 60
25 days after the first date set for the meeting of
26 creditors under § 341; and

27 (B) in a Chapter 11 or Chapter 13
28 case, before the last payment is made under
29 the plan or before a motion for a discharge is
30 filed under § 1141(d)(5)(B) or § 1328(b).

* * * * *

Committee Note

Rule 1007(b)(7) is amended in two ways. First, language is added to make the rule inapplicable to debtors who are not required to complete an instructional course concerning personal financial management as a condition to discharge. See § 727(a)(11), § 1328(g)(2), § 1141(d)(3)(C). Second, the rule is amended to require an individual debtor who has completed an instructional course concerning personal financial management to file the certificate of course completion (often called a Certificate of Debtor Education) issued by the approved provider of that course in lieu of filing an Official Form, if the provider has not notified the court that the debtor has completed the course.

The amendment to Rule 1007(c)(4) reflects the amendment to Rule 1007(b)(7) described above.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

1 **Rule 4004. Granting or Denying a Discharge²**

2 * * * * *

3 (c) GRANTING A DISCHARGE.

4 * * * * *

5 (1) *Chapter 7.* In a Chapter 7 case,
6 when the times to object to discharge and to file a
7 motion to dismiss the case under Rule 1017(e)
8 expire, the court must promptly grant the
9 discharge—except under these circumstances:

10 * * * * *

¹ New material is underlined in red; matter to be omitted is lined through.

² The changes indicated are to the restyled version of Rule 4004 which has been published for public comment and appears in the June 2021 Agenda Book of the Committee on Rules of Practice and Procedure (the Standing Committee) at uscourts.gov. The restyled bankruptcy rules are expected to go into effect December 1, 2024, if approved by the Standing Committee, the Judicial Conference, and the Supreme Court, and if Congress takes no action to the contrary.

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

11 (H) the debtor has not filed
12 a ~~statement~~certificate showing that a
13 course on personal financial
14 management has been completed—if
15 such a ~~statement~~certificate is
16 required by Rule 1007(b)(7).

17 * * * * *

18 (4) *Individual Chapter 11 or*
19 *Chapter 13 Case.* In a chapter 11 case in
20 which the debtor is an individual—or a
21 chapter 13 case—the court shall not grant a
22 discharge if the debtor has not filed a
23 ~~statement~~certificate required by Rule
24 1007(b)(7).

25 * * * * *

Committee Note

The amendments to Rule 4004(c)(1)(H) and (c)(4) reflect the amendment to Rule 1007(b)(7) that replaces the requirement for submission of a statement showing that the debtor has completed a course on personal financial

FEDERAL RULES OF BANKRUPTCY PROCEDURE 3

management with the requirement that the debtor provide the certificate of course completion issued by the approved provider of that course.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

1 **Rule 5009. Closing a Chapter 7, 12, 13, or 15 Case;**
2 **Declaring Liens Satisfied²**

3 * * * * *

4 (b) CHAPTER 7 OR 13—NOTICE OF A
5 FAILURE TO FILE A ~~STATEMENT~~—ABOUT
6 ~~COMPLETING~~ CERTIFICATE OF COMPLETION FOR
7 A COURSE ON PERSONAL FINANCIAL
8 MANAGMENT. This Rule 5009(b) applies if an individual
9 debtor in a Chapter 7 or 13 case is required to file a ~~statement~~
10 certificate under Rule 1007(b)(7) and fails to do so within 45
11 days after the first date set for the meeting of creditors under

¹ New material is underlined in red; matter to be omitted is lined through.

² The changes indicated are to the restyled version of Rule 5009 which has been published for public comment and appears in the June 2021 Agenda Book of the Committee on Rules of Practice and Procedure (the Standing Committee) at uscourts.gov. The restyled bankruptcy rules are expected to go into effect December 1, 2024, if approved by the Standing Committee, the Judicial Conference, and the Supreme Court, and if Congress takes no action to the contrary.

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12 § 341(a). The clerk must promptly notify the debtor that the
13 case will be closed without entering a discharge unless the
14 ~~statement~~certificate if filed within the time prescribed by
15 Rule 1007(c).

16 * * * * *

Committee Note

The amendments to Rule 5009(b) reflect the amendment to Rule 1007(b)(7) that replaces the requirement for submission of a statement showing that the debtor has completed a course on personal financial management with the requirement that the debtor provide the certificate of course completion issued by the approved provider of that course.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

1 **Rule 9006. Computing and Extending Time;**
2 **Motions²**

3 * * * * *

4 (b) EXTENDING TIME.

5 * * * * *

6 (3) *Extensions Governed by Other Rules.*

7 The court may extend the time to:

8 * * * * *

9 (B) file the ~~statement~~certificate

10 required by Rule 1007(b)(7), and the

11 schedules and statements in a small business

12 case under § 1116(3)—but only to the extent

13 and under the conditions stated in

¹ New material is underlined in red; matter to be omitted is lined through.

² The changes indicated are to the restyled version of Rule 9006 which was submitted to the Advisory Committee for approval for publication at its March 31, 2022 meeting.

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14 Rule 1007(c).

15 (c) REDUCING TIME LIMITS.

16 * * * * *

17 (2) *When Not Permitted.* The court may
18 not reduce the time to act under Rule 2002(a)(7),
19 2003(a), 3002(c), 3014, 3015, 4001(b)(2) or (c)(2),
20 4003(a), 4004(a), 4007(c), 4008(a), 8002, or
21 9033(b). Also, the court may not, under Rule
22 1007(c), reduce the time to file the ~~statement~~
23 certificate required by Rule 1007(b)(7).

Committee Note

The amendments to Rules 9006(b)(3)(B) and (c)(2) reflect the amendment to Rule 1007(b)(7) that replaces the requirement for submission of a statement showing that the debtor has completed a course on personal financial management with the requirement that the debtor provide the certificate of course completion issued by the approved provider of that course.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

1 **Rule 8023.1.² Substitution of Parties**

2 **(a) DEATH OF A PARTY.**

3 **(1) *After a Notice of Appeal Is***

4 ***Filed.* If a party dies after a notice of appeal**

5 ***has been filed or while a proceeding is***

6 ***pending on appeal in the district court or***

7 ***BAP, the decedent's personal representative***

8 ***may be substituted as a party on motion filed***

9 ***with that court's clerk by the representative***

10 ***or by any party. A party's motion must be***

11 ***served on the representative in accordance***

12 ***with Rule 8011. If the decedent has no***

13 ***representative, any party may suggest the***

¹ New material is underlined in red.

² Fed. R. App. P. 43 immediately follows the rule on voluntary dismissal, which in Part VIII of the bankruptcy rules appears as Fed. R. Bankr. P. 8023.

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

14 death on the record, and the appellate court
15 may then direct appropriate proceedings.

16 (2) *Before a Notice of Appeal Is*
17 *Filed—Potential Appellant.* If a party entitled
18 to appeal dies before filing a notice of appeal,
19 the decedent’s personal representative—or, if
20 there is no personal representative, the
21 decedent’s attorney of record—may file a
22 notice of appeal within the time prescribed by
23 these rules. After the notice of appeal is filed,
24 substitution must be in accordance with Rule
25 8023.1(a)(1).

26 (3) *Before a Notice of Appeal Is*
27 *Filed—Potential Appellee.* If a party against
28 whom an appeal may be taken dies after entry
29 of a judgment or order in the bankruptcy
30 court, but before a notice of appeal is filed, an
31 appellant may proceed as if the death had not

FEDERAL RULES OF BANKRUPTCY PROCEDURE

3

32 occurred. After the notice of appeal is filed,
33 substitution must be in accordance with Rule
34 8023.1(a)(1).

35 (b) SUBSTITUTION FOR A REASON OTHER
36 THAN DEATH. If a party needs to be substituted for any
37 reason other than death, the procedure prescribed in Rule
38 8023.1(a) applies.

39 (c) PUBLIC OFFICER: IDENTIFICATION;
40 SUBSTITUTION.

41 (1) Identification of a Party. A
42 public officer who is a party to an appeal or
43 other proceeding in an official capacity may
44 be described as a party by the public officer's
45 official title rather than by name. But the
46 appellate court may require the public
47 officer's name to be added.

48 (2) Automatic Substitution of an
49 Officerholder. When a public officer who is a

4 FEDERAL RULES OF BANKRUPTCY PROCEDURE

50 party to an appeal or other proceeding in an
51 official capacity dies, resigns, or otherwise
52 ceases to hold office, the action does not
53 abate. Subject to Rule 2012, the public
54 officer's successor is automatically
55 substituted as a party. Proceedings following
56 the substitution are to be in the name of the
57 substituted party, but any misnomer that does
58 not affect the parties' substantial rights may
59 be disregarded. An order of substitution may
60 be entered at any time, but failure to enter an
61 order does not affect the substitution.

Committee Note

Rule 8023.1 is derived from Fed. R. App. P. 43 and governs substitution of parties upon death or for any other reason in appeals to the district court or bankruptcy appellate panel from a judgment, order or decree of a bankruptcy court.

Official Form 410A

Instructions for Mortgage Proof of Claim Attachment

United States Bankruptcy Court

12/23

Introduction

This form is used only in individual debtor cases. When required to be filed, it must be attached to *Proof of Claim* (Official Form B410) with other documentation required under the Federal Rules of Bankruptcy Procedure.

Applicable Law and Rules

Rule 3001(c)(2)(A) of the Federal Rules of Bankruptcy Procedure requires for the bankruptcy case of an individual that any proof of claim be accompanied by a statement itemizing any interest, fees, expenses, and charges that are included in the claim.

Rule 3001(c)(2)(B) requires that a statement of the amount necessary to cure any default be filed with the claim if a security interest is claimed in the debtor's property.

If a security interest is claimed in property that is the debtor's principal residence, Rule 3001(c)(2)(C) requires this form to be filed with the proof of claim. The form implements the requirements of Rule 3001(c)(2)(A) and (B).

If an escrow account has been established in connection with the claim, Rule 3001(c)(2)(C) also requires an escrow statement to be filed with the proof of claim. The statement must be prepared as of the date of the petition and in a form consistent with applicable nonbankruptcy law.

Directions

Definition

This form must list all transactions on the claim from the *first date of default* to the petition date. The *first date of default* is the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, fees, escrow payments, or other charges immediately payable.

Information required in Part 1: Mortgage and Case Information

Insert on the appropriate lines:

- the case number;
- the names of Debtor 1 and Debtor 2;
- the last 4 digits of the loan account number or any other number used to identify the account;
- the creditor's name;
- the servicer's name, if applicable; and
- the method used to calculate interest on the debt (i.e., fixed accrual, daily simple interest, or other method).

Information required in Part 2: Total Debt Calculation

Insert:

- the principal balance on the debt;
- the interest due and owing;
- any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing; and
- any *Escrow deficiency for funds advanced*—that is, the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed.

If the secured debt has merged into a prepetition judgment, the principal balance on the debt is the remaining amount of the judgment. Any post-judgment interest due and owing, fees and costs, and escrow deficiency for funds advanced shall be the amounts that are collectible under applicable law.

Also disclose the *Total amount of funds on hand*. This amount is the total of the following, if applicable:

- a positive escrow balance,
- unapplied funds, and
- amounts held in suspense accounts.

Total the amounts owed—subtracting total funds on hand—to determine the total debt due.

Insert this amount under *Total debt*. The amount should be the same as the claim amount that you report on line 7 of Official Form 410.

Information required in the Part 3: Arrearage as of the Date of Petition

Insert the amounts of the principal and interest portions of all prepetition monthly installments that remain outstanding as of the petition date. The escrow portion of prepetition monthly

installment payments should not be included in this figure.

Insert the amount of fees and costs outstanding as of the petition date. This amount should equal the *Fees/Charges balance* as shown in the last entry in Part 5, Column P.

Insert any *escrow deficiency for funds advanced*. This amount should be the same as the amount of *escrow deficiency* stated in Part 2.

Insert the *Projected escrow shortage* as of the date the bankruptcy petition was filed. The *projected escrow shortage* is the amount the claimant asserts should exist in the escrow account as of the petition date, less the amount actually held. The amount actually held should equal the amount of a positive escrow account balance as shown in the last entry in Part 5, Column O.

This calculation should result in the amount necessary to cure any prepetition default on the note or mortgage that arises from the failure of the borrower to satisfy the amounts required under the Real Estate Settlement Practices Act (RESPA). The amount necessary to cure should include 1/6 of the anticipated annual charges against the escrow account or 2 months of the monthly pro rata installments due by the borrower as calculated under RESPA guidelines. The amount of the projected escrow shortage should be consistent with the escrow account statement attached to the *Proof of Claim*, as required by Rule 3001(c)(2)(C).

Insert the amount of funds on hand that are unapplied or held in a suspense account as of the petition date.

Total the amounts due listed in Part 3, subtracting the funds on hand, and insert the calculated amount in *Total prepetition arrearage*. This should be the same amount as “Amount necessary to cure any default as of the date of the petition” that your report on line 9 of Official Form 410.

Information required in Part 4: Monthly Mortgage Payment

Insert the principal and interest amount of the first postpetition payment.

Insert the monthly escrow portion of the monthly payment. This amount should take into account the receipt of any amounts claimed in Part 3 as escrow deficiency and projected escrow shortage. Therefore, a claimant should assume that the escrow deficiency and shortage will be paid through a plan of reorganization and provide for a credit of a like amount when calculating postpetition escrow installment payments.

Claimants should also add any monthly private mortgage insurance amount.

Insert the sum of these amounts in *Total monthly payment*.

Information required in Part 5: Loan Payment History from the First Date of Default

Beginning with the First Date of Default, enter:

- the date of the default in Column A;
- amount incurred in Column D;
- description of the charge in Column E;
- principal balance, escrow balance, and unapplied or suspense funds balance as of that date in Columns M, O, and Q, respectively.

For (1) all subsequently accruing installment payments; (2) any subsequent payment received; (3) any fee, charge, or amount incurred; and (4) any escrow charge satisfied since the date of first default, enter the information in date order, showing:

- the amount paid, accrued, or incurred;
- a description of the transaction;
- the contractual due date, if applicable;
- how the amount was applied or assessed; and
- the resulting principal balance, accrued interest balance, escrow balance, outstanding fees or charges balance, and the total unapplied funds held or in suspense.

If more space is needed, fill out and attach as many copies of *Mortgage Proof of Claim Attachment: Additional Page* as necessary.

Committee Note

Part 3 of Form 410A is amended to provide for separate itemization of principal due and interest due. Because under § 1322(e) the amount necessary to cure a default is “determined in accordance with the underlying agreement and applicable nonbankruptcy law,” it may be necessary for a debtor who is curing arrearages under § 1325(a)(5) to know which portion of the total arrearages is principal and which is interest.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (If known): _____ Chapter you are filing under:

Chapter 7
 Chapter 11
 Chapter 12
 Chapter 13

Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

05/22

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, “Do you own a car,” the answer would be yes if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
<p>1. Your full name</p> <p>Write the name that is on your government-issued picture identification (for example, your driver’s license or passport).</p> <p>Bring your picture identification to your meeting with the trustee.</p>	<p>_____ First name</p> <p>_____ Middle name</p> <p>_____ Last name</p> <p>_____ Suffix (Sr., Jr., II, III)</p>	<p>_____ First name</p> <p>_____ Middle name</p> <p>_____ Last name</p> <p>_____ Suffix (Sr., Jr., II, III)</p>
<p>2. All other names you have used in the last 8 years</p> <p>Include your married or maiden names.</p>	<p>_____ First name</p> <p>_____ Middle name</p> <p>_____ Last name</p> <p>_____ First name</p> <p>_____ Middle name</p> <p>_____ Last name</p>	<p>_____ First name</p> <p>_____ Middle name</p> <p>_____ Last name</p> <p>_____ First name</p> <p>_____ Middle name</p> <p>_____ Last name</p>

Debtor 1 _____
First Name Middle Name Last Name

Case number (if known) _____

3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)

XXX - XX - _____
OR
9 XX - XX - _____

XXX - XX - _____
OR
9 XX - XX - _____

4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years

Include trade names and doing business as names

About Debtor 1:

I have not used any business names or EINs.

Business name _____

Business name _____

EIN - - - - -

EIN - - - - -

About Debtor 2 (Spouse Only in a Joint Case):

I have not used any business names or EINs.

Business name _____

Business name _____

EIN - - - - -

EIN - - - - -

5. Where you live

Number Street _____

City State ZIP Code _____

County _____

If your mailing address is different from the one above, fill it in here. Note that the court will send any notices to you at this mailing address.

Number Street _____

P.O. Box _____

City State ZIP Code _____

If Debtor 2 lives at a different address:

Number Street _____

City State ZIP Code _____

County _____

If Debtor 2's mailing address is different from yours, fill it in here. Note that the court will send any notices to this mailing address.

Number Street _____

P.O. Box _____

City State ZIP Code _____

Debtor 1

First Name Middle Name Last Name

Case number (if known)

6. Why you are choosing this district to file for bankruptcy

Check one:

- Over the last 180 days before filing this petition, I have lived in this district longer than in any other district.
I have another reason. Explain. (See 28 U.S.C. § 1408.)

Four horizontal lines for providing an explanation.

Check one:

- Over the last 180 days before filing this petition, I have lived in this district longer than in any other district.
I have another reason. Explain. (See 28 U.S.C. § 1408.)

Four horizontal lines for providing an explanation.

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy (Form 2010)). Also, go to the top of page 1 and check the appropriate box.

- Chapter 7
Chapter 11
Chapter 12
Chapter 13

8. How you will pay the fee

- I will pay the entire fee when I file my petition. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order.
I need to pay the fee in installments. If you choose this option, sign and attach the Application for Individuals to Pay The Filing Fee in Installments (Official Form 103A).
I request that my fee be waived (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the Application to Have the Chapter 7 Filing Fee Waived (Official Form 103B) and file it with your petition.

9. Have you filed for bankruptcy within the last 8 years?

- No
Yes. District When Case number
District When Case number
District When Case number

Debtor 1 _____
First Name Middle Name Last Name

Case number (if known) _____

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

No
 Yes. Debtor _____ Relationship to you _____
District _____ When _____ Case number, if known _____
MM / DD / YYYY
Debtor _____ Relationship to you _____
District _____ When _____ Case number, if known _____
MM / DD / YYYY

11. Do you rent your residence?

No. Go to line 12.
 Yes. Has your landlord obtained an eviction judgment against you?
 No. Go to line 12.
 Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it as part of this bankruptcy petition.

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

No. Go to Part 4.
 Yes. Name and location of business

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

Name of business, if any

Number Street

City State ZIP Code

Check the appropriate box to describe your business:

Health Care Business (as defined in 11 U.S.C. § 101(27A))
 Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
 Stockbroker (as defined in 11 U.S.C. § 101(53A))
 Commodity Broker (as defined in 11 U.S.C. § 101(6))
 None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code, and are you a small business debtor or a debtor as defined by 11 U.S.C. § 1182(1)?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor or a debtor choosing to proceed under Subchapter V so that it can set appropriate deadlines. If you indicate that you are a small business debtor or you are choosing to proceed under Subchapter V, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

No. I am not filing under Chapter 11.
 No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
 Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I do not choose to proceed under Subchapter V of Chapter 11.
 Yes. I am filing under Chapter 11, I am a debtor according to the definition in § 1182(1) of the Bankruptcy Code, and I choose to proceed under Subchapter V of Chapter 11.

Debtor 1 _____
First Name Middle Name Last Name

Case number (if known) _____

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

No

Yes. What is the hazard? _____

If immediate attention is needed, why is it needed? _____

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

Where is the property?

Number Street _____

City State ZIP Code _____

Debtor 1

First Name Middle Name Last Name

Case number (if known)

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Debtor 1

First Name Middle Name Last Name

Case number (if known)

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have? 16a. Are your debts primarily consumer debts? 16b. Are your debts primarily business debts? 16c. State the type of debts you owe that are not consumer debts or business debts.

17. Are you filing under Chapter 7? Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

18. How many creditors do you estimate that you owe? 1-49, 50-99, 100-199, 200-999, 1,000-5,000, 5,001-10,000, 10,001-25,000, 25,001-50,000, 50,001-100,000, More than 100,000

19. How much do you estimate your assets to be worth? \$0-\$50,000, \$50,001-\$100,000, \$100,001-\$500,000, \$500,001-\$1 million, \$1,000,001-\$10 million, \$10,000,001-\$50 million, \$50,000,001-\$100 million, \$100,000,001-\$500 million, \$500,000,001-\$1 billion, \$1,000,000,001-\$10 billion, \$10,000,000,001-\$50 billion, More than \$50 billion

20. How much do you estimate your liabilities to be? \$0-\$50,000, \$50,001-\$100,000, \$100,001-\$500,000, \$500,001-\$1 million, \$1,000,001-\$10 million, \$10,000,001-\$50 million, \$50,000,001-\$100 million, \$100,000,001-\$500 million, \$500,000,001-\$1 billion, \$1,000,000,001-\$10 billion, \$10,000,000,001-\$50 billion, More than \$50 billion

Part 7: Sign Below

For you I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct. If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11, 12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7. If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b). I request relief in accordance with the chapter of title 11, United States Code, specified in this petition. I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571. X Signature of Debtor 1 Executed on MM / DD / YYYY X Signature of Debtor 2 Executed on MM / DD / YYYY

Debtor 1 _____
First Name Middle Name Last Name

Case number (if known) _____

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

X

Signature of Attorney for Debtor Date MM / DD / YYYY

Printed name

Firm name

Number Street

City State ZIP Code

Contact phone Email address

Bar number State

Debtor 1

First Name Middle Name Last Name

Case number (if known)

For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- No
- Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

- No
- Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

- No
- Yes. Name of Person _____

Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

X _____
Signature of Debtor 1

X _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

Contact phone _____

Contact phone _____

Cell phone _____

Cell phone _____

Email address _____

Email address _____

2022-05 COMMITTEE NOTE

The form is amended in response to the enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act (the “BTATC” Act), Pub. L. No. __-__, __ Stat. __. The BTATC Act reinstates the definition of “debtor” for determining eligibility to proceed under subchapter V of chapter 11 that was in effect from March 27, 2020 through March 27, 2022, under the CARES Act, as amended (see 2020-04 Committee Note). Line 13 of the form is amended to reflect that change. This amendment will terminate two years after the date of enactment of the BTATC Act, unless extended.

2022-03 STAFF NOTATION

The CARES Act changes described in the 2020-04 Committee Note lapsed on March 27, 2022, and the form has reverted to the pre-CARES Act (February 2020) version.

2020-04 COMMITTEE NOTE

The form is amended in response to the enactment of the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), Pub. L. No. 116-136, 134 Stat. 281.¹ That law provides a new definition of “debtor” for determining eligibility to proceed under subchapter V of chapter 11. Line 13 of the form is amended to reflect that change. This amendment to the Code will terminate one year after the date of enactment of the CARES Act.

2020-02 COMMITTEE NOTE

Line 13 is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Line 13 is amended to add a check box for a small business debtor to indicate that it is making that choice, and the existing check box for small business debtors

¹ As amended by the COVID-19 Bankruptcy Relief Extension Act of 2021, Pub. L. 117-5, 135 Stat. 249 (providing that the CARES Act definition of “debtor” for determining eligibility to proceed under subchapter V of the chapter 11 will terminate two years (on March 27, 2022) after the CARES Act was enacted).

Official Form 101 (Committee Note)

is amended to allow the debtor to indicate that it is not electing to proceed under subchapter V.*

* * * * *

Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number *(if known)*: _____ Chapter _____

Check if this is an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy

05/22

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals*, is available.

1. Debtor's name _____

2. All other names debtor used in the last 8 years _____
Include any assumed names, trade names, and *doing business* as names _____

3. Debtor's federal Employer Identification Number (EIN) _____

4. Debtor's address	Principal place of business	Mailing address, if different from principal place of business
	Number _____ Street _____	Number _____ Street _____
	City _____ State _____ ZIP Code _____	P.O. Box _____ City _____ State _____ ZIP Code _____
	County _____	Location of principal assets, if different from principal place of business Number _____ Street _____ City _____ State _____ ZIP Code _____

5. Debtor's website (URL) _____

Debtor _____
Name

Case number (if known) _____

6. Type of debtor

- Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
- Partnership (excluding LLP)
- Other. Specify: _____

7. Describe debtor's business

A. Check one:

- Health Care Business (as defined in 11 U.S.C. § 101(27A))
- Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- Railroad (as defined in 11 U.S.C. § 101(44))
- Stockbroker (as defined in 11 U.S.C. § 101(53A))
- Commodity Broker (as defined in 11 U.S.C. § 101(6))
- Clearing Bank (as defined in 11 U.S.C. § 781(3))
- None of the above

B. Check all that apply:

- Tax-exempt entity (as described in 26 U.S.C. § 501)
- Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. § 80a-3)
- Investment advisor (as defined in 15 U.S.C. § 80b-2(a)(11))

C. NAICS (North American Industry Classification System) 4-digit code that best describes debtor. See <http://www.uscourts.gov/four-digit-national-association-naics-codes> .

____ _

8. Under which chapter of the Bankruptcy Code is the debtor filing?

Check one:

- Chapter 7
- Chapter 9
- Chapter 11. Check all that apply:

A debtor who is a "small business debtor" must check the first sub-box. A debtor as defined in § 1182(1) who elects to proceed under subchapter V of chapter 11 (whether or not the debtor is a "small business debtor") must check the second sub-box.

- The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D), and its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$3,024,725. If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
- The debtor is a debtor as defined in 11 U.S.C. § 1182(1), its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$7,500,000, and it chooses to proceed under Subchapter V of Chapter 11. If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
- A plan is being filed with this petition.
- Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
- The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11 (Official Form 201A) with this form.
- The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.

- Chapter 12

Debtor _____
Name

Case number (if known) _____

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

- No
- Yes. District _____ When _____ Case number _____
MM / DD / YYYY
- District _____ When _____ Case number _____
MM / DD / YYYY

If more than 2 cases, attach a separate list.

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

- No
- Yes. Debtor _____ Relationship _____
District _____ When _____
MM / DD / YYYY
- Case number, if known _____

List all cases. If more than 1, attach a separate list.

11. Why is the case filed in this district?

- Check all that apply:*
- Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.
 - A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

- No
- Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? *(Check all that apply.)*

- It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.
What is the hazard? _____
- It needs to be physically secured or protected from the weather.
- It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).
- Other _____

Where is the property?

Number _____ Street _____

 City _____ State ZIP Code _____

Is the property insured?

- No
- Yes. Insurance agency _____
 Contact name _____
 Phone _____

Statistical and administrative information

Debtor _____
Name

Case number (if known) _____

13. Debtor's estimation of available funds

- Check one:
- Funds will be available for distribution to unsecured creditors.
 - After any administrative expenses are paid, no funds will be available for distribution to unsecured creditors.

14. Estimated number of creditors

- | | | |
|----------------------------------|--|--|
| <input type="checkbox"/> 1-49 | <input type="checkbox"/> 1,000-5,000 | <input type="checkbox"/> 25,001-50,000 |
| <input type="checkbox"/> 50-99 | <input type="checkbox"/> 5,001-10,000 | <input type="checkbox"/> 50,001-100,000 |
| <input type="checkbox"/> 100-199 | <input type="checkbox"/> 10,001-25,000 | <input type="checkbox"/> More than 100,000 |
| <input type="checkbox"/> 200-999 | | |

15. Estimated assets

- | | | |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000 | <input type="checkbox"/> \$1,000,001-\$10 million | <input type="checkbox"/> \$500,000,001-\$1 billion |
| <input type="checkbox"/> \$50,001-\$100,000 | <input type="checkbox"/> \$10,000,001-\$50 million | <input type="checkbox"/> \$1,000,000,001-\$10 billion |
| <input type="checkbox"/> \$100,001-\$500,000 | <input type="checkbox"/> \$50,000,001-\$100 million | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion |

16. Estimated liabilities

- | | | |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000 | <input type="checkbox"/> \$1,000,001-\$10 million | <input type="checkbox"/> \$500,000,001-\$1 billion |
| <input type="checkbox"/> \$50,001-\$100,000 | <input type="checkbox"/> \$10,000,001-\$50 million | <input type="checkbox"/> \$1,000,000,001-\$10 billion |
| <input type="checkbox"/> \$100,001-\$500,000 | <input type="checkbox"/> \$50,000,001-\$100 million | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion |

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to \$500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Declaration and signature of authorized representative of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

X

Signature of authorized representative of debtor

Printed name

Title

Debtor _____
Name

Case number (if known) _____

18. Signature of attorney



Signature of attorney for debtor

Date _____
MM / DD / YYYY

Printed name

Firm name

Number Street

City State ZIP Code

Contact phone

Email address

Bar number State

2022-05 COMMITTEE NOTE

The form is amended in response to the enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act (the “BTATC” Act), Pub. L. No. ___-___, ___ Stat. ___. The BTATC Act reinstates the definition of “debtor” for determining eligibility to proceed under subchapter V of chapter 11 that was in effect from March 27, 2020, through March 27, 2022, under the CARES Act, as amended (see 2020-04 Committee Note). Line 8 of the form is amended to reflect that change. This amendment will terminate two years after the date of enactment of the BTATC Act, unless extended.

2022-04 STAFF NOTATION

The CARES Act changes described in the 2020-04 Committee Note lapsed on March 27, 2022, and the form has reverted to the pre-CARES Act (February 2020) version.

In addition, the debt limit listed in line 8 of the form is adjusted effective April 1, 2022, as part of the tri-annual dollar adjustments required by 11 U.S.C. § 104.

2020-04 COMMITTEE NOTE

The form is amended in response to the enactment of the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), Pub. L. No. 116-136, 134 Stat. 281.¹ That law provides a new definition of “debtor” for determining eligibility to proceed under subchapter V of chapter 11. Line 8 of the form is amended to reflect that change. This amendment to the Code will terminate one year after the date of enactment of the CARES Act.

¹ As amended by the COVID-19 Bankruptcy Relief Extension Act of 2021, Pub. L. 117-5, 135 Stat. 249 (providing that the CARES Act definition of “debtor” for determining eligibility to proceed under subchapter V of the chapter 11 will terminate two years (on March 27, 2022) after the CARES Act was enacted).

2020-02 COMMITTEE NOTE

Line 8 of the form is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Line 8 is amended to provide a check box for a small business debtor to indicate that it is making that choice.

* * * * *

TAB 4B

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of March 31, 2022
Remotely by Conference Call and Microsoft Teams

The following members attended the meeting:

Circuit Judge Thomas L. Ambro
Bankruptcy Judge Rebecca Buehler Connelly
Circuit Judge Bernice Bouie Donald
Bankruptcy Judge Dennis R. Dow
David A. Hubbert, Esq.
Bankruptcy Judge Benjamin A. Kahn
District Judge Marcia S. Krieger
Bankruptcy Judge Catherine Peek McEwen
Debra L. Miller, Esq.
District Judge J. Paul Oetken
Damian S. Schaible, Esq.
Professor David A. Skeel
Tara Twomey, Esq.
District Judge George H. Wu

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Laura B. Bartell, associate reporter
Senior District Judge John D. Bates, Chair of the Committee on Rules of Practice and Procedure
(the Standing Committee)
Professor Catherine T. Struve, reporter to the Standing Committee
Professor Daniel R. Coquillette, consultant to the Standing Committee
Ramona D. Elliott, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
Kenneth S. Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Circuit Judge William J. Kayatta, liaison from the Standing Committee
Bankruptcy Judge Nancy V. Alquist, Liaison to the Committee on the Administration of the
Bankruptcy System
Brittany Bunting, Administrative Office
Bridget M. Healy, Esq., Administrative Office
S. Scott Myers, Esq., Administrative Office
Shelly Cox, Administrative Office
Dana Yankowitz Elliott, Administrative Office
Jason Broome, Administrative Office
Leanna Kipp, Administrative Office
Michael Croom, Administrative Office
Susan Jensen, Administrative Office
Cherry Simpson, Administrative Office

Carly E. Griffin, Federal Judicial Center
Burton DeWitt, Rules Law Clerk
Rebecca R. Garcia, Chapter 12 and 13 trustee
Nancy Whaley, National Association of Chapter 13 Trustees
John Hawkinson, freelance journalist
Lisa K. Mullen, Office of David Wm. Ruskin, Chapter 13 trustee
Marcy J. Ford, Trott Law, P.C.
Pam Bassel, Chapter 13 trustee
Teri E. Johnson, Law Office of Teri E. Johnson, PLLC

Discussion Agenda

1. Greetings and Introductions

Judge Dennis Dow, chair of the Advisory Committee, welcomed the group and thanked everyone for joining this meeting. He asked everyone to keep microphones muted unless that person is talking. Motions will be passed if there are no objections. Otherwise, members will use the raise hand function for voting and discussions. Lunch break will occur when and if appropriate.

Judge Dow began by asking Scott Myers to describe the current situation with the rules and forms as a result of the March 27, 2022, expiration of the amendments made by the CARES Act. Mr. Myers has posted the pre-CARES Act versions of Forms 101, 201, 122A-1, 122B, and 122C-1 on their respective current form landing pages. He is also updating the current rules page to note the lapse of the CARES Act and the related changes it made to Interim Rule 1020.

On March 14, 2022, Senator Grassley introduced a bill to make the higher debt limit permanent for Subchapter V, as well as modifying the eligibility requirements for chapter 13. The bill would not affect the means test forms. However, if the Grassley bill passes in the next few days or weeks, Interim Rule 1020 and Forms 101 and 201 will again be modified to incorporate the changes that expired on March 27. That would probably require an email vote of this Advisory Committee to recommend to the Standing Committee that those forms be reinstated and the Interim Rule go back into effect, and sending information to the courts.

Judge Dow asked whether the proposed changes in the eligibility requirements for chapter 13 have any form or rule implications. Mr. Myers said that he sees no implications. Ken Gardner asked whether the changes would be retroactive. Mr. Myers said he does not know but the bill will have to be rewritten because it contemplated that it would be passed before April 1, 2022. Judge Kahn and Judge McEwen pointed out that the current version is retroactive.

2. Approval of Minutes of Remote Meeting Held on September 14, 2021

The minutes were approved by motion and vote with one amendment to reflect that Judge Laurel Isicoff was in attendance.

3. Oral Reports on Meetings of Other Committees

(A) *Jan. 4, 2022 Standing Committee Meeting*

Judge Dow gave the report.

(1) Joint Committee Business

(a) ***Electronic Filing by Self-Represented Litigants.*** Judge Bates noted that he had asked Professor Cathie Struve to convene a joint meeting of the reporters to coordinate the responses of the various committees to these suggestions. Professor Struve reported that the reporters suggested ideas on research questions that might be helpful in resolving these issues and agreed to ask for assistance from the Federal Judicial Center.

(b) ***Juneteenth National Independence Day.*** Three of the four Advisory Committees have approved proposed amendments to add the new holiday to the list of legal holidays in their respective time-computation rules, and the fourth Advisory Committee is expected to do so at its spring meeting. All proposals will be presented to the Standing Committee at its June 2022 meeting for approval as technical amendments that can be forwarded for final approval without publication and comment.

(2) Bankruptcy Rules Committee Business

The Standing Committee recommended for publication an amendment to Rule 7001, which responds to Justice Sotomayor's suggestion in her concurring opinion in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021). The amendment provides that an action seeking turnover of tangible personal property of an individual debtor may be brought by motion rather than adversary proceeding.

Judge Dow also provided the Standing Committee information on the status of:

(a) ***Rule 9006(a)(6) (Legal Holidays).*** The Bankruptcy Advisory Committee approved a technical amendment adding Juneteenth National Independence Day to the list of legal holidays.

(b) ***Electronic Signatures.*** Judge Dow described the ongoing work on electronic signatures by debtors and others who do not have a CM/ECF account. The Advisory Committee is considering potential amendments to Rule 5005(a) and is conferring with the DOJ and the FJC in considering the issues.

(c) ***Restyling.*** Judge Dow reported that Parts III through VI are out for public comment and would be presented to the Standing committee for final approval at its next meeting. Parts VII through IX are in process and should be ready for the Standing Committee to approve publication at the same meeting.

(B) ***March 30, 2022, Meeting of the Advisory Committee on Appellate Rules***

Because Judge Donald was unable to attend the meeting, Professor Struve provided the report.

(1) **Appellate Rules 2 and 4.** The proposed amendments to FRAP 2 and 4 adopted in response to the CARES Act were given final approval.

(2) **Appellate Rule 26.** The proposed amendment to FRAP 26 to include the Juneteenth National Independence Day as a legal holiday was approved.

(3) **Appellate Rule 29.** There was lengthy discussion on proposals to amend FRAP 29 to require additional disclosures by amici curiae. No decisions were made.

(4) **Bankruptcy Rule 8006(g).** There was a brief discussion on the impact of proposed amendments to Bankruptcy Rule 8006(g) that were shared later in the meeting.

(C) ***March 29, 2022 Meeting of the Advisory Committee on Civil Rules***

Judge Catherine Peek McEwen provided a report. The meeting was conducted on a hybrid basis because of the COVID-19 health emergency.

(1) **Civil Rule 12.** In January, the Standing Committee approved for public comment an amendment to Civil Rule 12(a) that will clarify that the time to serve responsive pleadings does not override a deadline set by statute. Although Civil Rule 12 is not applicable in bankruptcy proceedings, we should look at Bankruptcy Rule 7012(a) to determine if a parallel amendment is warranted.

(2) **Civil Rule 16.** Civil Rule 16 is set to be amended Dec. 1, 2022, regarding expert witness disclosures. Bankruptcy Rule 7016(a) applies Civil Rule 16.

(3) **CARES Act – Rules Emergency.** The Civil Advisory Committee gave final approval to Rule 87, the rules emergency proposal.

(4) **Rule 15(a)(1).** The Civil Advisory Committee gave final approval to an amendment to Civil Rule 15(a)(1) to replace the word “within” with “no later than.” This rule applies in bankruptcy adversary proceedings.

(5) **Rule 9(b).** The Civil Advisory Committee had been considering an amendment to Rule 9(b) to change the second sentence that allows state of mind to be pleaded “generally” by deleting that word and saying instead that state of mind may be pleaded “without setting forth the facts or circumstances from which the condition may be inferred.” The proposal was made by Dean A. Benjamin Spencer and was intended to undo the portion of the Supreme Court’s Iqbal decision holding that although mental state need not be alleged “with particularity,” the allegation must still satisfy Rule 8(a) – meaning some facts must be pleaded.

Dean Spencer's view is set out at length in a Cardozo Law Review article. Based on reported case law holding that the heightened scrutiny in the first sentence is not applicable to the second sentence, there appears to be no need for the proposed amendment. Therefore, the Civil Advisory Committee accepted the recommendation of the Rule 9(b) Subcommittee to take no action on this proposal.

(6) **Juneteenth Amendment.** The Civil Advisory Committee at its meeting in October 2021 gave final approval to an amendment to Rule 6(a)(6)(A) to include Juneteenth National Independence Day in the list of statutory holidays. That proposed amendment will be forwarded to the Standing Committee for its June meeting, with the comparable amendments made by the other advisory committees for final approval without publication.

(7) **Privilege Logs– Rule 26(b)(5)(A).** The Discovery Subcommittee is considering proposals to amend Rule 26(b)(5)(A) and presented a preliminary draft to the Civil Advisory Committee for comments. The goal is for the subcommittee to study the draft over the next year with the hope that a proposal will be ready in March 2023. This rule applies in bankruptcy cases, so we will continue to monitor the Subcommittee's efforts.

(8) **Joint Civil-Appellate Subcommittee on Final Judgment Rule.** The Joint Civil-Appellate Subcommittee (aka "Hall v. Hall Subcommittee") appointed to study the effects of the final judgment rule for consolidated actions announced in Hall v. Hall, 138 S. Ct. 1118 (2018), received an extensive Federal Judicial Center study of appeals in consolidated actions filed in 2015, 2016, and 2017. It subsequently began informal efforts to ask judges in the Second, Third, Seventh, Ninth, and Eleventh Circuit Courts of Appeals about their experience with Hall v. Hall. Only the Second Circuit has dismissed appeals based on Hall v. Hall. The Subcommittee will meet again to consider further steps. The initial study was not useful. Consequently, the FJC's Emery Lee devised a different study methodology that he believed would yield better data. His initial findings were released recently and show few affected appeals. The Subcommittee has not met to discuss them.

(9) **Civil Rule 6(a)(4)(A).** Civil Rule 6(a)(4)(A)'s "last day" clause is being studied by the FJC for whether the end of a day at midnight imposes undue burden on lawyers. Bankruptcy Rule 9006(a)(4) is our parallel rule.

(10) **Civil Rule 41.** A subcommittee will be formed to study Civil Rule 41 and the extent of dismissals under the rule, e.g., part of an action. Bankruptcy Rule 7041 makes Civil Rule 41 applicable in adversary proceedings, so we will monitor the developments.

(11) **Civil Rule 55.** Civil Rule 55(a)'s mandate for Clerks to enter defaults is being studied by Emery Lee and will be revisited in October. Bankruptcy Rule 7055 makes Civil Rule 55 applicable in adversary proceedings.

(12) **IFP Practices and Standards.** The Civil Advisory Committee has received various submissions over the past couple of years relating to the great variations in standards employed to qualify for in forma pauperis status as among different districts and as

among judges in the same district. The Civil Advisory Committee discussed creating a joint subcommittee or other joint study of in forma pauperis standards, which could craft a civil rule or provide uniform and good practice guidance on IFP standards. There is no proposal for present action, but the topic will remain on the agenda at least until next fall to see whether there is a sufficiently promising proposal to warrant further work.

(13) **Pro-Se and E filing.** Reporters for all the committee are deliberating on giving pro se filers authority to file electronically; recommendations may come next fall.

The next meeting of the Civil Advisory Committee will be on October 12, 2022, in D.C.

(D) ***Dec. 7-8, 2021, 2021 Meeting of the Committee on the Administration of the Bankruptcy System (the “Bankruptcy Committee”)***

Judge Alquist provided the report.

The Bankruptcy Committee met in December in Miami in person. The next meeting is scheduled for June 23-24, 2022.

The Bankruptcy Committee reviewed the failure of Congress to act on its legislative proposal in response to the CARES Act, and was updated on the proposed rules amendments, including new Rule 9038.

As to proposed amendments to Rule 3011, which were based on the bankruptcy Committee’s proposal, the Bankruptcy Committee is grateful for the Advisory Committee’s consideration of these amendments.

The Bankruptcy Committee also supports the proposed amendment to Rule 7001(1) in response to the decision of the Supreme Court in *City of Chicago v. Fulton*, 141 S.Ct. 585 (2021).

Subcommittee Reports and Other Action Items

4. Report of the Emergency Rule Subcommittee

(A) ***Consider comments on proposed new Bankruptcy Rule 9038***

Judge Wu and Professor Gibson provided the report.

At its June 2021 meeting, the Standing Committee approved for publication proposed emergency rules for the Civil, Criminal, Appellate, and Bankruptcy Rules, including proposed Bankruptcy Rule 9038. Only one comment was submitted concerning Rule 9038. The Federal Bar Association submitted a comment stating that it “supports each of the revised and new rules developed by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees in response to the rulemaking directive in Section 15002(b)(6) of the CARES Act.”

The Subcommittee recommended that the Advisory Committee give final approval to Rule 9038, as published, and ask the Standing Committee to do the same. The Advisory Committee voted to approve Rule 9038 and ask the Standing Committee to give final approval to the Rule.

5. Report by the Consumer Subcommittee

(A) *Recommendation Concerning Suggestion 21-BK-G for Amendments to Rule 1007(b)(7)*

Professor Bartell provided the report.

Current Bankruptcy Rule 1007(b)(7) requires that, “[u]nless an approved provider has notified the court that the debtor has completed a course in personal financial management after filing the petition, an individual debtor in a Chapter 7 or Chapter 13 case—or in a Chapter 11 case in which § 1141(d)(3) applies—must file a statement that such a course has been completed (Form 423).”

Bankruptcy Judge Arthur I. Harris of the N.D. Ohio submitted Suggestion 21-BK-G, in which he proposed that use of Official Form 423 not be required. Instead, he suggested that the Rule be amended to also allow submission to the court of the Certificate of Debtor Education that is provided to the debtor by the provider of that course.

At the last meeting of the Advisory Committee, the Subcommittee presented a proposed amendment to Rule 1007(b)(7) that would make that certificate the *only* acceptable evidence of completion of the course on personal financial management, and would explicitly exclude from the requirements of the Rule a debtor who is not required to complete such a course. If the debtor has been excused from completing the course by court order, the court order will provide adequate evidence of that fact, and submission of an Official Form seems unnecessary.

Just prior to the fall meeting of the Advisory Committee, Professor Struve pointed out that there are a number of other bankruptcy rules (in particular, Rules 1007(b)(7), 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2)) that refer to the “statement required by” Rule 1007(b)(7), all of which would have to be modified if the language of Rule 1007(b)(7) were changed to require a certificate rather than a statement. This could be avoided if the draft language replaced the words “certificate of course completion” with “statement of course completion” in both the text of the rule and the committee note.

The Advisory Committee expressed its support for the amendments proposed by the Subcommittee, but remanded the proposed amendments to the Subcommittee to consider whether the terminology in the proposed amendments should be changed to “statement” or whether the other rules that refer to the “statement” should be amended to refer to a “certificate.” The Advisory Committee also asked the Forms Subcommittee to consider whether Form 423 should be eliminated if the amendments to Rule 1007(b)(7) go into effect.

The Subcommittee concluded that it was not appropriate to change the language in the proposed amendments to Rule 1007(b)(7) from “certificate” to “statement” because the document from the providers is clearly labeled a certificate. Therefore, the Subcommittee recommended that the amendment to Rule 1007(b)(7), and conforming amendments to Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2) and the related committee notes be approved for publication (with some minor changes in Rule 1007(b)(7) and committee note suggested by the style consultants).

The Advisory Committee approved those amendments and committee notes and recommended to the Advisory Committee that they be published for comment.

(B) Consider Comments on Proposed Amendments to Bankruptcy Rule 3002.1

Professor Gibson provided the report. Proposed amendments to Rule 3002.1 were published for comment in August 2021. The amendments are designed to encourage a greater degree of compliance with the rule and to provide a new midcase assessment of the mortgage claim’s status in order to give a chapter 13 debtor an opportunity to cure any postpetition defaults that may have occurred.

Twenty-seven comments were submitted on the proposed amendments, some of which were lengthy and detailed and others briefly stating support or opposition to the amendments.

The reactions to the published amendments were mixed. Broadly described, the comments fell into 3 categories:

- (1) Comments opposing the amendments, or at least the midcase review, submitted by some chapter 13 trustees, including one signed by 68 trustees.
- (2) Comments favoring the amendments, submitted by some consumer debtor attorneys.
- (3) Comments favoring the amendments but giving suggestions for improvement, submitted by trustees, debtors’ attorneys, judges, and an association of mortgage lenders.

The Subcommittee met three times to discuss the comments and to consider a course of action. Because the Subcommittee was unable to complete its consideration of the comments, it did not recommend any action on the proposed amendments to Rule 3002.1 at this meeting. Instead, it wished to provide the Advisory Committee an overview of the comments and the major points they raised, and report on the Subcommittee’s discussions and tentative decisions in response to those comments.

The Subcommittee began its discussions with two threshold issues: are the amendments needed, and is there authority to promulgate them under the Rules Enabling Act, 28 U.S.C.

§ 2075? The Subcommittee concluded that, although there were some negative reactions to the proposed amendments, there is a need for some improvements to the Rule. The Subcommittee also concluded that Rule 3002.1 is a procedural rule that implements a debtor's right under § 1322 to cure and maintain payments on a home mortgage or, in some cases to pay it off over the duration of a chapter 13 plan. The proposed amendments were intended to provide consequences for noncompliance with that rule, provide procedures for reconciling records, and to authorize an enforceable order that documents the debtor's successful completion of the mortgage payments under the plan. The Subcommittee has tentatively approved a change to the HELOC provision to ensure that it does not exceed rulemaking authority, but is confident that the amendments are authorized by the Rules Enabling Act.

The Subcommittee has tentatively agreed to several changes to the published version of subdivision (b). The provision in paragraph (3)(A) for annual notices of payment change for HELOCs would be made optional. The provision was proposed for the convenience of HELOC claim holders, so if they would prefer to continue to file notices whenever the payment amount changes, the Subcommittee saw no reason to prohibit them from doing so. Making the provision optional would also satisfy the concern expressed by one commenter about altering substantive rights.

The Subcommittee's consideration of the comments has led it to sketch out a revised midcase assessment procedure. It would be optional and could be initiated at any time in the case by whoever is making the postpetition mortgage payment—the trustee in a conduit case, the debtor in a non-conduit case—by filing a motion for determination of the status of the mortgage. The procedure would be default-based. The claim holder would not be required to respond, but if it did not do so, the court could enter an order favorable to the moving party based on the facts set forth in the motion. If the claim holder did respond and opposed the motion, it would be treated as a contested matter to be resolved by the court. No objection to the response or motion to compel would be required.

While the Subcommittee would like the end-of-case procedure to be as similar as possible as the midcase one, it has not yet resolved issues about how the procedure should be structured. Among the uncertain issues are whether the procedure should be mandatory in all cases, who should initiate it, whether it should be by notice or motion, whether the claim holder should be required to respond, what action should be taken if there is no response, and how it would apply in a non-conduit case.

Judge Connelly noted that working through the comments was a heroic task undertaken by Professor Gibson. This rule will have a far-reaching impact and it is important that the Advisory Committee get it right. The Subcommittee plans to continue its consideration of those issues and all of the comments so that it can have a recommendation of proposed changes to the Rule 3002.1 amendments to present at the fall meeting. The Subcommittee hopes that those changes will not be so substantial as to require republication. If they are not and if the Advisory Committee gives final approval to the amendments by spring 2023, they would be on track to take effect in 2024.

At this meeting, the Subcommittee was seeking the Committee members' thoughts on the comments submitted on the proposed Rule 3002.1 amendments and what changes, if any, should be made to the Rule. In particular, it asked for feedback on whether members agree with the Subcommittee's resolution of the threshold issues—need for amendments and authority to promulgate them—and on the tentative decisions discussed above. It also solicited ideas about how best to structure the end-of-case procedure for obtaining a determination of the status of the mortgage.

Judge Kahn expressed his gratitude to the Subcommittee for its work, and said that one cannot overstate the importance of this issue in chapter 13. Some of those who commented and objected to the proposed amendments were in districts that already had local procedures for a midcase review. He supports the approach of the Subcommittee.

Judge McEwen pointed out that Keith Lundin had very specific comments, and asked whether the Subcommittee had examined those. Professor Gibson said that those specific comments would be addressed at the next Subcommittee meeting. Judge Dow pointed out that many of his comments were addressed to existing language that was not being modified. Judge McEwen said that her district rarely sees this issue, and supports making the midcase review optional.

Debra Miller also supports making the midcase review optional and allowing it to occur at any time. The end-of-case procedures need to be worked on, and in addition to rule changes some education needs to be conducted among the trustees. She believes that we can develop a good system that will resolve a lot of the issues that the commenters raised.

Judge Donald asked whether the amendments would meaningfully affect discharge rates in chapter 13. Ms. Miller said that she thought it would help a great deal.

Judge Kahn supports making both midcase and end-of-case reviews voluntary because of the cost issues. He thinks no one is going to go to the court when the debtor has fallen behind in making the mortgage payments. It is not clear that a court may provide additional time for curing at the end of a case. Ms. Miller stated that a midcase motion may be styled as a request for information. Ms. Elliott stated that if the burden is on the debtor, there needs to be education for debtor's attorneys. Judge Connelly asked Judge Kahn to clarify his view that end-of-case procedures should be voluntary. Judge Kahn stated that he likes the model of current Rule 3002.1 – the trustee should be required to file a report of payments in conduit jurisdictions but without mandatory motions. Professor Gibson said that the difficult issue is what happens when the claim holder does not respond to the request for information about postpetition payments. Judge Kahn suggested that nonresponse could lead to the debtor voluntarily filing a motion, and the claim holder would be barred from presenting any evidence of the postpetition payments they failed to disclose. Judge Dow suggested that we go back to the rule as it was and modify from that starting point. Ms. Miller said that the biggest issue with the current rule is that nothing is filed at all. That causes the problems. But we can make some changes to the amended rule. Professor Gibson suggests that a different trigger than making the final cure payment is necessary because the trustee may not be making any cure payments.

The Advisory Committee agreed with the Subcommittee's conclusions on the threshold issues, and its approach to the midcase review. The Subcommittee should continue its work and try to submit a revised draft at the fall meeting.

6. Report by the Forms Subcommittee

(A) Consider Comments and Recommendation for Final Approval of Proposed Amendments to Official Form 101 and Committee Note

Professor Bartell provided the report. The Standing Committee approved publication of amendments to Form 101 at its last meeting. The amendments (1) eliminate the portion of Question 4 that asks for any business names the debtor has used in the last 8 years (leaving only the request for employer identification numbers, if any), and (2) expand the margin instruction at Question 2 (which now asks for "All other names you have used in the last 8 years" and directs the debtor to "Include your married or maiden names") to modify the language in small font after "All other names you have used in the last 8 years" to read "Include your married or maiden names and any assumed, trade names and doing business as names." The amendments also add the additional instruction: "Do NOT list the name of any separate legal entity, like a corporation, partnership, or LLC, that is not filing this petition" and revise the lines for including the information to add lines for "business name (if applicable)". The amendments make Form 101 consistent with Forms 105, 201, and 205, the other forms of petitions.

We received one comment on the proposed amendment from Sam Calvert, who suggested the part 1, Question 2, be divided into 2a (which would be the Question as published) and 2b, which would provide a space for information about an entity for whom the debtor was serving as guarantor or surety.

The Subcommittee decided to make no change in response to this comment. The proposed changes to Official Form 101 make it consistent with Official Forms 105, 201 and 205, none of which includes the information Mr. Calvert is requesting. Moreover, that information is available on Schedule E/F.

The Subcommittee recommended the amended Form 101 and Committee Note to the Advisory Committee for final approval in the form in which it was published. The Advisory Committee approved the amended Form 101 as published.

(B) Consider comments and Recommendation for Final Approval of Proposed Amendments to Official Forms 309E1, 309E2, and Committee Note

Professor Bartell provided the report. The Advisory Committee approved publication of proposed amendments to Official Forms 309E1 (line 7) and 309E2 (line 8) to clarify the language about deadlines for objecting to the debtor's discharge and for objecting to the dischargeability of a specific debt. We received no comments on the proposed amendments. At the Subcommittee meeting it was agreed to insert a comma in line 7 of Form 309E1 and line 8 of

Form 309E2 in two places, one after “§ 1141(d)(3) in the first bullet and one after “or (6)” in the second bullet.

With those changes, the Subcommittee recommended the amended Official Forms 309E1 and 309E2 and the Committee Note to the Advisory Committee for final approval. The Advisory Committee approved the amended Forms and Committee Note with those changes.

(C) *Consider Recommendation to Retire Official Form 423 if Proposed Amendments to Rule 1007(b)(7) Become Effective*

Professor Bartell provided the report. The Consumer Subcommittee has recommended amendments to Rule 1007(b)(7) (and several other rules) to make the certificate of completion issued by the provider of a course in personal financial management the exclusive acceptable evidence of the debtor’s completion of the course and to exclude from the provisions of the Rule a debtor who is not required to complete such a course.

The Advisory Committee asked the Subcommittee to consider whether, if the amendments to Rule 1007(b)(7) become effective, Form 423 should be withdrawn as having no further purpose.

Official Form 423 has two different certifications. In the first, the debtor certifies that the debtor completed an approved course in personal financial management, and provides the date the course was taken, the name of the approved provider, and the certificate number. Alternatively, the debtor may certify that the debtor is not required to complete a course in personal financial management because the court has granted a motion waiving the requirement, and to identify the ground for such a waiver (incapacity, disability, active duty, or residence in a district in which the approved instructional course cannot adequately meet the debtor’s needs).

As to the first certification, because the proposed amendment to Rule 1007(b)(7) makes submission of the certificate of course completion the exclusive means of satisfying the condition to discharge for an individual debtor in a chapter 7 or chapter 13 case, or in a chapter 11 case in which § 1141(d)(3)(C) applies, there is no need for the Official Form 423 submission because the certificate of course completion contains all the required information.

As to the second certification, if the court has already approved a motion excusing the debtor from the personal financial management course requirement, the court order so stating provides adequate evidence of that waiver and, again, there is no need for the Official Form 423 submission saying the same thing.

The Subcommittee recommended to the Advisory Committee that, if the proposed amendments to Rule 1007(b)(7) become effective, Official Form 423 be withdrawn. The Advisory Committee agreed with the recommendation.

(D) ***Consider Suggestion 22-BK-A to Amend Proof of Claim Attachment – Form 410A***

Professor Bartell provided the report. We received a suggestion, 22-BK-A, from Bankruptcy Judge Robert J. Faris of Hawaii, who suggests that Form 410A Proof of Claim Attachment A, be modified in Part 3 (Arrearage as of Date of the Petition) to replace the first line (which currently asks for “Principal & Interest”) with two lines, one for “Principal” and one for “Interest.”

Although the Subcommittee was not uniformly convinced by the reasons Judge Faris proposed for the change, it agreed that the information would be useful by placing the burden on the creditor of giving the debtor and the chapter 13 trustee the information necessary to determine whether the plan is treating the creditor’s claim correctly.

The Subcommittee recommended that the Advisory Committee approve for publication the amended Form 410A with the accompanying committee note. The Advisory Committee approved the Form and committee note for publication.

(E) ***Comments on Proposed Amendments to Official Form 417A***

Professor Gibson provided the report. Last August the Standing Committee published for comment amendments to Official Form 417A that were proposed to conform to amendments proposed for Rule 8003. No comments were submitted on the proposed amendments to the form or to the rule.

The Subcommittee recommended that the Advisory Committee give its final approval to the proposed amendments to Official Form 417A, as published, and that it ask the Standing Committee to do the same, with a Dec. 1, 2023 effective date when the amended rule goes into effect. The Advisory Committee approved the proposed amendments and requested the Standing Committee to give final approval to them, with a Dec. 1, 2023 effective date.

(F) ***Comments on New Forms Related to Rule 3002.1***

Professor Gibson provided the report. Last August the Standing Committee published for comment proposed Official Forms 410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R. They were proposed to implement proposed amendments to Rule 3002.1 that would create new procedures for a midcase and end-of-case determination of the status of a home mortgage claim in a chapter 13 case.

Nine comments were submitted on the proposed forms. The comments received on the underlying rule amendments, like those on the proposed forms, expressed a range of views and in some cases were quite detailed. As previously discussed, the Consumer Subcommittee is still in the process of considering the comments and deciding what revisions to the published rule amendments to recommend. Because the amendments to Rule 3002.1 that the forms in question implement remain in flux, the Subcommittee decided to defer its consideration of the comments

on the forms until decisions about the rule amendments have been made. It hopes to be able to make its recommendations about any needed revisions to the forms at the fall Advisory Committee meeting.

7. Report by the Technology and Cross-Border Insolvency Subcommittee

(A) *Suggestion 20-BK-E from CACM for Rule Amendment Establishing Minimum Procedures for Electronic Signatures of Debtors and Others*

Judge Oetken and Professor Gibson presented the report. The Subcommittee has been considering its response to the suggestion (20-BK-E) by the Committee on Court Administration and Case Management (“CACM”) regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account, along with suggestions by Sai (21-BK-H and 21-BK-I) regarding electronic filing and the use of electronic signatures by self-represented individuals.

At the fall meeting of the Advisory Committee the Subcommittee presented for discussion a preliminary draft of an amendment to Rule 505(a)(2)(C) regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account. Discussion of the proposal brought up several questions and concerns. Among the issues raised whether there is really a perception among attorneys that the retention of wet signatures presents a problem that needs solving.

The Reporter followed up on the question of whether there is a problem that requires an amendment to the rules by a discussion with Bankruptcy Judge Vincent Zurzolo whose inquiry to CACM led to CACM’s suggestion to the Advisory Committee. Judge Zurzolo expressed the view that the courts were out of step with modern commerce by still requiring the retention of wet signatures rather than using some kind of electronic signature product, like DocuSign. He said that there was mild concern among the lawyers about having to retain wet signatures, but a stronger interest in facilitating the electronic filing of documents such as stipulations, where the filing attorney files a document with other attorneys’ signatures.

The Subcommittee discussed what it considered to be a fundamental question that has yet to be resolved by the Advisory Committee: Does a problem exist under current practices that needs a national rule solution? Attorneys can file documents in the bankruptcy courts electronically, and the use of their CM/ECF account provides the basis for accepting their electronic signatures as valid. If they electronically file documents that their client or another individual has signed, they generally must retain the original document with the wet signature.

To date, the Advisory Committee has not received a suggestion from any bankruptcy attorney that the current procedures are causing problems. Judge Zurzolo’s inquiry to CACM about the use of electronic signatures seems to have been based more on the desire to bring bankruptcy courts into the modern age of e-signing rather than on concerns he heard from attorneys about having to retain wet signatures. The suggestion from CACM does note that in 2013 it had suggested that “courts’ local rules varied in their requirements to retain original

paper documents bearing ‘wet’ signatures, and that these varying practices posed problems for attorneys that file in multiple districts.” Comments in response to the Advisory Committee’s earlier electronic-signature proposal, however, did not produce comments bearing out that concern. CACM’s current suggestion is based on concern that the absence of a provision in Rule 5005 regarding the electronic signatures of individuals without CM/ECF accounts may make courts “hesitant to make such a change without clarification in the rules that use of electronic signature products is sufficient for evidentiary purposes.”

The Subcommittee concluded that current Rule 5005 does not address the issue of the use of electronic signatures by individuals who are not registered users of CM/ECF and that it therefore does not preclude local rulemaking on the subject. The Bankruptcy Court for the District of Nebraska already has such a rule (L.B.R. 9011-1), and other courts, such as Bankruptcy Court for the Central District of California, may adopt such rules in the future. The Subcommittee concluded that a period of experience under local rules allowing the use of e-signature products would help inform any later decision to promulgate a national rule. This discussion should put to rest any concerns about the authority of districts to adopt local rules. Electronic signature technology will also likely develop and improve in the interim.

For those reasons, the Subcommittee recommended that no further action be taken on the CACM suggestion.

The Subcommittee believes that the question of electronic signatures of pro se debtors presents different issues and should be considered separately. Professor Struve convened a working group of the reporters of the various Advisory Committees and AO staff to consider the issues presented by the pending suggestions regarding electronic filing by pro se litigants. The working group has met twice. The Federal Judicial Center has prepared a draft report with the information it has gathered about national practices on the issue. The FJC reported that districts that had provided pro se litigants access to CM/ECF had encountered very few problems. The researchers found that it is rare that bankruptcy filers are given CM/ECF access. Instead they generally use electronic self-representation software (ESR) that is available in NextGen, and petitions completed using this software are complete and legible. The difference between bankruptcy practice and non-bankruptcy practice is that the filing of the petition has an immediate effect on other parties. The working group asked whether uniformity is required between different practice areas.

One overriding question raised was whether this is an issue of rule-making or technology and administration. The one area in which the working group identified a rules-related issue is the requirement for physical service (the requirement for paper service if CM/ECF is not used).

The FJC study is not final and will be shared when it is.

Professor Struve added her thanks for the hard work of the FJC and the reporters on this issue.

Ken Gardner stated that CM/ECF is not the issue; the electronic signature is the issue. We need to deal with electronic signatures for pro se debtors. Judge McEwen has a litigant who has been filing with DocuSign because he is homeless and has no ability to print or scan. This is a serious issue.

8. Report of the Privacy, Public Access, and Appeals Subcommittee

(A) Consider Possible Amendments Addressing the Timing of Post-judgment Motions in Bankruptcy Proceedings Initially Heard in the District Court

Professor Gibson provided the report. In response to a recent First Circuit decision, Professor Cathie Struve—reporter for the Standing Committee—raised with the reporters an issue that involves the overlap of the bankruptcy, civil, and appellate rules. The issue is whether, in a bankruptcy proceeding heard and decided by a district court, the time for filing postjudgment motions of the type that toll the period for filing a notice of appeal should be 14 days, as in the bankruptcy court, or should be 28 days because of the longer time for taking an appeal from the district court. Because the resolution of this issue likely requires either amending Bankruptcy Rules 7052 (Amended or Additional Findings), 9015(c) (Renewed Motion for Judgment as a Matter of Law), and 9023 (New Trials) or recommending that the Federal Rules of Appellate Procedure be amended, it was referred to this Subcommittee for consideration.

The district court in *In re Lac-Mégantic Train Derailment Litigation* exercised bankruptcy jurisdiction over all personal injury actions against the debtor and others. Twenty-eight days after a final judgment dismissing a defendant for lack of personal jurisdiction and denying the plaintiffs’ motion to file an amended complaint, the plaintiffs moved for reconsideration of the order. The district court denied the motion for reconsideration and the plaintiffs filed an appeal, apparently within 30 days after the denial of reconsideration. The First Circuit dismissed the appeal for lack of appellate jurisdiction because the motion for reconsideration was not filed within 14 days after the entry of judgment as required by Bankruptcy Rule 9023, which is applicable to noncore proceedings heard by a district court. Because the motion was untimely, it did not toll the time for appealing under Fed. Rule of Appellate Procedure 4(a). The notice of appeal was filed more than 30 days after the original entry of judgment, so the court lacked appellate jurisdiction.

In calling the Lac-Mégantic case to the reporters’ attention, Professor Struve pointed out a potential problem caused by the different time periods for filing postjudgment motions under Civil Rules 50, 52, and 59 (28 days) and their bankruptcy counterparts, Rules 7052, 9015(c), and 9023 (14 days). Under FRAP 4(a)(4)(A), the listed postjudgment motions toll the time for filing a notice of appeal if “a party files in the district court any of [those] motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules.” According to FRAP 6(a), that rule applies when an appeal is taken from a district court’s exercise of jurisdiction under 28 U.S.C. § 1334.

But Professor Struve questioned which time period applies in such cases. If applied literally—using the time allowed by the Civil Rules—Rule 4(a)(4)(A) would allow motions that

are untimely under Bankruptcy Rules 7052, 9015(c), and 9023 to toll the time for filing a notice of appeal from a bankruptcy proceeding in the district court. On the other hand, if the bankruptcy time periods must be complied with, an inconsistency appears to be created with Rule 4(a)(4)(A)'s provision for tolling when motions are timely under the Civil Rules.

One possibility the Subcommittee considered to make clear that the current bankruptcy deadlines for postjudgment motions apply under FRAP 4(a)(4)(A) in bankruptcy proceedings heard by a district court was to suggest that the Appellate Rules Advisory Committee consider an amendment to Rule 4(a)(4)(A) to refer specifically to motions under the Federal Rules of Bankruptcy Procedure. An alternative approach considered was to suggest an amendment to FRAP 6(a) to add language that might state as follows: "The reference in Rule 4(a)(4)(A) to the time allowed by the Federal Rules of Civil Procedure must be read as a reference to the time allowed by the Federal Rules of Civil Procedure as shortened, for some types of motions, by the Federal Rules of Bankruptcy Procedure."

The Subcommittee considered whether, instead of suggesting a FRAP amendment, the Bankruptcy Rules should be amended to draw a distinction between proceedings heard by the district court and those heard by the bankruptcy court. The Subcommittee rejected that approach, and also concluded that it was not appropriate to recommend no action be taken on this matter.

The Subcommittee recommended that the Advisory Committee ask the Advisory Committee on Appellate Rules to consider amending FRAP 6(a) along the lines suggested above, with the actual wording of any such amendment remaining in the hands of the Advisory Committee on Appellate Rules.

Judge Kahn asked why the 30-day period in FRAP was not changed to 28 days. Professors Gibson and Struve noted that only periods less than 30 days were changed. Judge Kahn asked whether the Subcommittee considered whether there should be consistency in the district court between bankruptcy and non-bankruptcy matters. Professor Gibson said that there are alternative quests for consistency – either consistency in the district court or consistency with respect to all bankruptcy proceedings wherever they are heard. We have no other examples of different rules when a bankruptcy matter is heard by a district court, and therefore the Subcommittee opted for consistency for all bankruptcy proceedings.

Judge Ambro explained that he wants to be as simple as possible in dealing with the problem. That is the approach the Subcommittee adopted. Judge Krieger noted that in cases in district court the applicable process is different than when the matter is in bankruptcy court. Judges and litigants are uncertain what procedures to use. Perhaps there should be some way to alert judges and litigants which process applies.

Judge Dow asked whether there are other decisions on the applicability of bankruptcy rules in the district court. Professor Gibson said that district courts have consistently held that bankruptcy rules apply when the district court hears a bankruptcy matter. Judge Kayatta and Judge McEwen agreed. Professor Struve endorsed the Subcommittee solution. Judge Ambro wants to make sure attorneys do not have malpractice claims for violating timing rules. Judge

Wu asked whether the procedures are really that different between district court and bankruptcy court. Professor Gibson said that most procedures are the same, but that means that there is concern when they differ. Judge Krieger suggested that district judges should start with the bankruptcy rules rather than the civil rules when dealing with bankruptcy matters. Judge Connelly suggested adding an appendix that showed differences. Professor Coquillette said that the FJC is a good vehicle for educating district judges on this issue.

The Advisory Committee agreed to make the suggestion to the Appellate Rules Committee that they consider amending FRAP 6(a).

(B) *Consider Comments on Proposed Amendments to Rule 8003*

Professor Gibson provided the report. Last August the Standing Committee published for comment amendments to Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) that were proposed to conform to amendments recently made to FRAP 3. No comments were submitted on the proposed amendments.

The Subcommittee recommended that the Advisory Committee give its final approval to the proposed amendments to Rule 8003, as published, and the committee note, and that it ask the Standing Committee to do the same. The Advisory Committee gave final approval to the proposed amendments and committee note, and will request the Standing Committee to do so.

(C) *Consider Comments on Proposed Amendments to Rule 3011*

Professor Bartell provided the report. The Standing Committee approved publication of amendments to Rule 3011 with respect to unclaimed funds in response to a proposal from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee), 20-BK-G.

There was one comment on the proposed amendments from Daniel J. Isaacs-Smith of the Administrative Office of the United States Courts. He suggested that language referring to “information in the data base” be changed to “data about such funds” because there is no reference elsewhere to a data base. The Subcommittee agreed to delete the words “data base” and instead of using the word “data” to use the word “information.” Professor Bartell noted that Rule 3011 is among the restyled rules that are being presented to the Advisory Committee for final approval at this meeting, and the existing clause (a) will be restyled in connection with that project.

Ken Gardner supported the modifications. The Advisory Committee approved the amendments to Rule 3011 with the changes from publication presented to the Advisory Committee.

(D) *Consider Recommendation to Publish an Amendment to Rule 8006(g)*

Professor Bartell provided the report. Under 28 U.S.C. § 158(d)(2)(A), a judgment, order or decree of a bankruptcy court may be appealed directly to the court of appeals if the

bankruptcy court, district court or bankruptcy appellate panel, acting on its own or on the request of a party to the judgment, order or decree, or all the appellants and appellees (if any) acting jointly, certify that the judgment, order or decree meets the requirements of that section and the court of appeals agrees to accept the direct appeal.

Fed. R. Bankr. P. 8006(g) currently states that “Within 30 days after the certification has become effective under (a), a request for leave to take a direct appeal to a court of appeals must be filed with the circuit clerk in accordance with Fed. R. App. P. 6(c).” Bankruptcy Judge A. Benjamin Goldgar has suggested a change in Rule 8006(g) to specify who must file the request for permission to take a direct appeal. The current rule is written in the passive voice and leaves the question open. He described one of his cases in which he certified his judgment for direct appeal but the appellants declined to file the request for permission to take the direct appeal. It was not clear that the appellees could file the request, and they did not do so. Without a request for permission to appeal, the court of appeals cannot entertain the appeal. He suggested that the Rule be amended to add a sentence stating that “any appellant or appellee” or “any party to the appeal” may file the request for permission to take a direct appeal to the court of appeals.

The Subcommittee recommends amended language that makes two substantive changes. First, it changes the word “must” to “may” to avoid suggesting that any party must file a request for leave to take a direct appeal. Second, the Subcommittee recommends adding a new sentence at the end of the Rule stating that “A request may be filed by any party to the prospective appeal.”

Tara Twomey asked whether only the appellant should have the right to take a direct appeal. Judge Ambro said that the change expands the options to get a resolution of an issue the court believes is significant. Ms. Twomey also asked whether the trustee should be able to file the request. Judge Ambro said yes if it is a party to the appeal.

Judge Kahn does not think this is a substantive change. If the judge certifies, someone should be filing the request. The problem is that the current rule is written in passive voice. Judge Dow agreed.

Professor Struve said that this change may be good as a policy matter. But she believes the existing rule assumed that the request would be by the appellant because it dovetails with FRAP 5. The implementation may require some changes to FRAP 6. Under FRAP 5 the words “petitioner” and “appellant” are used interchangeably. Perhaps publication should be delayed until the Appellate Rules Committee considers its implications for FRAP 5 and 6.

Judge Ambro suggested remanding the suggestion to the Subcommittee to consider Professor Struve’s concerns. Judge McEwen said that it is important to get certified matters to the court of appeals as soon as possible. Judge Bates agreed that this should not be published without considering the implications for the appellate rules. The Advisory Committee remanded the suggestion to the Subcommittee for further consideration.

(E) ***Consider Suggestion 21-BK-O for a New Rule (Rule 8023.1) to Address Substitution of Parties in Bankruptcy Appeals***

Professor Bartell provided the report. Bankruptcy Judge A. Benjamin Goldgar suggests the creation of a new bankruptcy rule to deal with substitution of parties in a bankruptcy appeal to the district court or bankruptcy appellate panel. He notes that neither Fed. R. Civ. P. 25 (which deals with substitution of parties) or Federal Rule of Appellate Procedure 43 (which also deals with substitution of parties) is applicable in this situation.

FRAP 43 applies only “in the United States courts of appeals.” The Federal Rules of Civil Procedure “apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure.” Fed. R. Civ. P. 81(a)(2). The only Federal Rule of Bankruptcy Procedure that makes Fed. R. Civ. P. applicable to bankruptcy proceedings is Fed. R. Bank. P. 7025, which states that “Subject to the provisions of Rule 2012 [dealing with substitution of a trustee], Rule 25 F.R.Civ.P. applies in adversary proceedings. Fed. R. Civ. P. 25 is not mentioned in Part IX of the Federal Rules of Bankruptcy Procedure as being applicable in cases under the Bankruptcy Code. Nor is Rule 25 mentioned in Part VIII of the Federal Rules of Bankruptcy Procedure as applicable to bankruptcy appeals.

The Subcommittee was convinced by the suggestion, and recommended that the Advisory Committee approve for publication a new Rule 8023.1 (modeled on FRAP 43) and the related committee note. The Advisory Committee approved the new Rule 8023.1 and committee note for publication (with some minor changes suggested by the style consultants).

9. **Report of the Restyling Subcommittee**

Judge Krieger began by noting that we are nearing the end of the process, and wanted to praise the efforts of the Subcommittee members, the reporters and the Administrative Office personnel who worked on this project.

(A) ***Consider Comments on Restyled Rules Parts III, IV, V, and VI***

Professor Bartell provided the report. Parts III-VI of the Restyled Federal Rules of Bankruptcy Procedure (the “Restyled Rules”) were published for comments in August 2021. We received four sets of comments.

The first set of comments came from the National Bankruptcy Conference (NBC), reflecting a review of the restyled rules by its Court System and Bankruptcy Administration Committee. The second came from the National Conference of Bankruptcy Judges. The third came from a San Jose, California law firm, Gold and Hammes. The last set came from the National Association of Consumer Bankruptcy Attorneys (NACBA). In addition, one comment from James Davis that was included in the comments on the proposed substantive revision of Rule 3002.1 was deemed by the reporters to be stylistic in nature and related to the published current version of the rule. All these comments were carefully considered by the Associate Reporter and the style consultants, and recommendations on changes to the published rules were

presented to the Restyling Subcommittee. The reactions of the Subcommittee were then reviewed again with the style consultants, and the drafts being presented to the Advisory Committee reflect these discussions.

The Subcommittee recommended the restyled rules in Parts III – VI for final approval and submission to the Standing Committee, with the suggestion that none of the restyled rules be submitted to the Judicial Conference until all restyled rules have been given final approval.

The Advisory Committee gave final approval to the restyled rules in Parts III – VI for submission to the Standing Committee with that suggestion.

(B) ***Consider Recommendation for Publication of Restyled Rules in Parts VII – IX***

Professor Bartell provided the report. The Subcommittee presents to the Advisory Committee the last group of restyled rules for approval for publication. The work between the style consultants and the Subcommittee and the reporters has been very productive and collegial, and the Subcommittee again wants to thank the style consultants for their superb work

The Subcommittee recommends that the Advisory Committee approve the restyled rules in Parts VII-IX for publication. The Advisory Committee approved the restyled rules for publication.

10. **Future meetings**

The fall 2022 meeting has been scheduled for Sept. 15, 2022 in Washington, D.C.

11. **New Business**

There was no new business.

Judge Donald expressed her appreciation for the leadership of Judge Dow on the Advisory Committee.

12. **Adjournment**

The meeting was adjourned at 1:40 p.m.

Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. No objections were presented, and all recommendations were approved by acclamation at the meeting.

1. Privacy, Public Access, and Appeals Subcommittee
 - (A) Recommendation of no action regarding Suggestions 21-BK-N and 21-BK-L for rule and form amendments concerning unclaimed funds

Draft

TAB 5

TAB 5A

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

ROBERT M. DOW, JR.
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 13, 2022

Introduction

1
2 The Civil Rules Advisory Committee met in San Diego, California, on March 29, 2022.
3 Public on-line attendance was provided. Draft Minutes of this meeting are attached.

4 Part I of this report presents five items for action at this meeting. Amendments to Rules
5 15(a)(1) and 72(b)(1), and the addition of a new Rule 87, all published for comment in August
6 2021, are presented for a recommendation to adopt. An amendment of Rule 6(a)(6)(A) is presented
7 for a recommendation to adopt without publication. A proposal to amend Rule 12(a)(4) that was
8 published for comment in August 2020 is presented with a recommendation that it not be advanced
9 for adoption.

10 Part II provides information about ongoing subcommittee projects. The MDL
11 Subcommittee is continuing to consider possible rule amendments that would include provisions
12 in Rule 16(b) or Rule 26(f), or perhaps a new Rule 16.1, addressing the court’s role in appointment
13 and compensation of leadership counsel and management of the MDL pretrial process, including
14 ongoing supervision by the court of the development and resolution of the litigation. The drafts
15 developed for initial discussion would simply focus attention on these issues by the court and the
16 parties without greater direction or detail. The subcommittee received extensive comments from
17 interested bar groups on the approach presented to the Advisory Committee in October and
18 presented to the March meeting along with a revised draft.

19 The Discovery Subcommittee has begun to study suggestions that amendments should be
20 made to Rule 26(b)(5)(A) on what have come to be called “privilege logs.” It will defer further
21 consideration of a proposal to create a new rule to address standards and procedures for sealing
22 matters filed with the court. A sealing project has been launched by the Administrative Office and
23 it seems better to wait to receive the benefits of that project.

24 The Committee adopted the recommendation of the Rule 9(b) Subcommittee to remove
25 from the agenda a proposal to amend the second sentence of Rule 9(b) to revise the interpretation
26 adopted by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

27 There is no need for further description of the work of two other subcommittees. A joint
28 subcommittee with the Appellate Rules Committee has explored possible amendments to address
29 the effects of Rule 42 consolidation in determining when a judgment becomes final for purposes
30 of appeal. It will resume work soon, upon formal completion of a second FJC study. Another joint
31 subcommittee continues to consider the time when the last day for electronic filing ends. Further
32 subcommittee deliberations will be supported by the final report on research by the FJC.

33 Part III describes continuing work on several topics carried forward on the agenda for
34 further study.

35 The topic that has been longest on the agenda began with a proposal to clarify the jury
36 demand provision in Rule 81(c) for removed cases. Discussion in the Standing Committee
37 prompted a proposal by then-Judge Gorsuch and Judge Graber, Standing Committee Members,
38 that the general jury demand procedures in Rules 38 and 39 be revised to require a jury trial in all
39 cases triable of right by a jury, absent explicit waiver by all parties. This topic will be developed
40 after the FJC completes a study mandated by the Omnibus Budget bill to identify practices and
41 rules that lead to higher rates of jury trials.

42 Another topic carried forward is the question whether an attempt should be made to
43 establish uniform standards and procedures for deciding requests for permission to proceed in
44 forma pauperis. The need is great, but the prospects for effective solutions in Enabling Act rules
45 do not seem good. Other resources may prove more effective. If the questions are taken so far as
46 to attempt to draft rules solutions, other advisory committees must be involved, perhaps along with
47 other Judicial Conference committees.

48 Judge Furman suggested that it may be desirable to amend Rule 41(a)(1)(A) to resolve a
49 split in the decisions on the question whether a party can dismiss part of an action by notice without
50 prejudice. This question leads to related questions, some of them implicated in the same words
51 referring to “the plaintiff” and “an action.” These questions could become difficult. A
52 subcommittee will be appointed to study them when committee resources can be freed from other
53 tasks.

54 Rule 4 provisions for serving the summons and complaint were studied by the CARES Act
55 Subcommittee and are involved with the emergency rules provisions in Rule 87 as recommended
56 for adoption. This work renewed interest in several proposals among those regularly received.
57 Here too, a subcommittee will be appointed when extensive work can be fit into the agenda. A
58 particular problem that may demand early attention is presented by entities that have no physical
59 location that can be identified for service.

60 Rule 5(d)(3)(B) limits on electronic filing by unrepresented parties also are being carried
61 forward. The reporters for the Appellate, Bankruptcy, Civil, and Criminal Rules Committees are
62 working together on these issues, with the help of an extensive study by the FJC.

63 Initial accounts suggest that practice in many courts deviates from the prescriptions in Rule
64 55 that the clerk “must” enter a default in defined circumstances, and later “must” enter a default
65 judgment in seemingly narrow circumstances. The FJC is undertaking a study designed in part to
66 measure actual practices and in part to understand the reasons that lead to any routine departures
67 from the rules that may be found.

68 Cases applying the Rule 63 provision for recalling a witness when a successor judge takes
69 over a hearing or trial will be examined to determine whether the seemingly discretionary text is
70 applied too narrowly.

71 Work will begin to find means that do not require amending 73(b)(1) to reduce the risk that
72 unfiltered operation of a court’s CM/ECF system will notify a judge of a party’s consent to
73 assignment of a case to a magistrate judge before all parties have consented.

74 Part III omits an additional topic carried forward on the agenda but not discussed at this
75 meeting. This topic arises from a potential ambiguity in Rule 4(c)(3) that may affect the procedure
76 for ordering a United States marshal to serve process in an in forma pauperis or seaman case.

77 Part IV describes several items that have been removed from the agenda.

78 A thoughtful submission suggested that a rule should be adopted to establish uniform
79 national standards and procedures for filing amicus curiae briefs in the district courts. Discussion
80 of ongoing work on Appellate Rule 29 in the Standing Committee last January expanded to include
81 this proposal. The reasons for removing it from the agenda are described at modest length.

82 A number of other recent proposals were removed from the agenda after brief discussion.
83 They are summarized with corresponding brevity.

84 **I. Action Items**

85 **A. For Adoption: New Rule 87: Civil Rules Emergencies**

86 The dedicated hard work to develop emergency rules provisions by the Appellate,
87 Bankruptcy, Civil, and Criminal Rules Committees is well known. Civil Rule 87 was published
88 for comment in August 2021 and is now advanced for a recommendation that it be adopted as
89 published, with minor changes in the Committee Note. This recommendation is elaborated in
90 conjunction with the parallel recommendations of the other advisory committees.

91 **B. Rule 12(a)(4) Not Recommended for Adoption**

92 In August 2020 an amendment of Rule 12(a)(4) suggested by the Department of Justice
93 was recommended for publication. There were only three public comments, but they stirred
94 vigorous debate in the Committee and in the Standing Committee. The discussion at successive
95 meetings persuaded the Committee to propose that the published amendment not be recommended
96 for adoption.

97 The published proposal added a clause to Rule 12(a)(4) that provided additional time to
98 respond after a Rule 12 motion is denied or postponed for disposition at trial and the defendant is
99 a United States officer or employee sued in an individual capacity for an act or omission occurring
100 in connection with duties performed on the United States' behalf:

101 **Rule 12. Defenses and Objections: When and How Presented; Motion for**
102 **Judgment on the Pleadings; Consolidating Motions; Waiving**
103 **Defenses; Pretrial Hearing**

104 **(a) Time to Serve a Responsive Pleading.**

105 (1) ***In General.*** Unless another time is specified by this rule or a federal
106 statute, the time for serving a responsive pleading is as follows:

107 * * * * *

108 (4) ***Effect of a Motion.*** Unless the court sets a different time, serving a
109 motion under this rule alters these periods as follows:

110 (A) if the court denies the motion or postpones its disposition
111 until trial, the responsive pleading must be served within 14
112 days after notice of the court's action, or within 60 days if
113 the defendant is a United States officer or employee sued in
114 an individual capacity for an act or omission occurring in
115 connection with duties performed on the United States'
116 behalf; or

117

* * * * *

118 The Department supported the proposal on several grounds. Over the period from 2017 to
119 2021 the Department has provided representation in individual-capacity actions in numbers
120 ranging from a low of 1,226 in 2017 to a high of 2,028 in 2021. These actions can be complicated,
121 and much time can be required to prepare an adequate pleading. Special concerns arise, moreover,
122 from the common assertion of official immunity defenses and the collateral-order rule that permits
123 appeal from denial of a motion to dismiss that raises an immunity defense. Careful thought must
124 be devoted to the decision whether to recommend an appeal. The Department must be confident
125 that the pleadings present solid ground for the immunity defense, and that a pleadings-based appeal
126 will not lead to creation of unwise or unnecessary immunity law because of the inadequacy of the
127 pleadings as the record on appeal. Any recommendation to appeal, moreover, must be approved
128 by the Solicitor General, a process that can easily run to the full 60-day period that would be
129 adopted by the amendment. Further support for the 60-day period was found in the amendment of
130 Rule 12(a)(3) that allows 60 days to serve a responsive pleading in these actions and the later
131 amendment of Appellate Rule 4(a)(1)(B)(iv) that sets appeal time at 60 days.

132 These reasons persuaded the Committee to unanimously recommend publication. Doubts
133 were stirred, however, by two of the public comments. Each of these comments suggested that
134 plaintiffs in these actions face formidable hurdles and should not be subjected to the burden of
135 added delay in getting to the issues after a motion to dismiss is denied. These protests were
136 anchored in concerns about untoward practices by some law enforcement officers and deep
137 concerns about official immunity doctrine. In addition, the comments pointed out that the
138 Department had 60 days to frame the motion to dismiss and has every opportunity to continue to
139 develop the case during the time required to decide the motion. The standard 14 days should be
140 adequate to frame an answer in most cases, and special needs can be addressed by a motion to
141 extend the time.

142 The Department responded to these comments by observing that it regularly seeks an
143 extension of time to answer beyond 14 days, and regularly wins extensions. Sixty days was
144 suggested to be a common period. The frequent assertion of immunity defenses and the need to
145 determine whether to appeal also was repeated. The need to move for an extension, moreover, is
146 complicated by uncertainty whether the extension will be granted. The Department must work to
147 prepare an answer to be filed in 14 days until it knows whether an extension will be granted, and
148 at times may be forced to participate in the next steps of pretrial procedure, even including
149 discovery, before a ruling on the motion. The hastily prepared and filed answer will not be as
150 useful to the court and plaintiff as a more carefully prepared answer.

151 Successive committee meetings began by framing the question as a choice between
152 competing presumptions. The rule now presumes that 14 days is an adequate time to prepare an
153 answer, but allows a motion to extend when that is not enough. The published rule presumes that
154 60 days are needed, but allows a motion to reduce the time when the case should progress faster.
155 The choice between these presumptions was distilled into a series of empirical questions: how
often are motions to dismiss made in these cases? How many of the motions include an official

157 immunity defense? How often are the motions denied? How often are motions made to extend the
158 time to respond, how often are they granted, and how long is the extension when one is granted?

159 Discussion of these questions generated increasingly serious doubts about the need for
160 more time, and about the length of any extended presumptive period that might be provided. The
161 frequent focus on the complications introduced by collateral-order appeal opportunities led to
162 suggestions that any extended period should be provided only for motions that involve an
163 immunity defense. Motions to shorten the extended presumed period, or to confine any extended
164 period to cases with an immunity defense, garnered substantial support but eventually failed. The
165 desire for better empirical information persisted.

166 The Department of Justice made valiant efforts to gather better empirical information to
167 address the questions that clouded the proposal. In the end it concluded that the requested
168 information is dispersed too widely within the Department to be available. The same structural
169 problems would make it unlikely that better information could be gathered in a program designed
170 to capture information about experience in these cases for a year or two years in the future.

171 At the March meeting the Department reported that it continues to believe that its original
172 proposal is desirable and should be recommended for adoption as published. The Department also
173 recognizes and honors the committees' desire for better empirical information than it has been able
174 to gather. But it would be a mistake to respond to the lack of more than anecdotal information by
175 voting to adopt a modified version that sets a shorter presumptive extended period or limits an
176 extended period to cases that raise official immunity defenses. That would not be a worthwhile use
177 of the Enabling Act process.

178 Faced with the lack of empirical information to resolve the remaining questions, the
179 Committee voted to recommend that the published proposal not be approved for adoption.

180 **C. Recommended for Adoption: Rule 15(a)(1): Mind the Gap**

181 This proposal to amend Rule 15(a)(1) was published in August 2021. The Committee
182 advances it for a recommendation for adoption as published, for the reasons described in the
183 Committee Note. Public comments offer no reason to reconsider. The Committee voted to delete
184 the sentence enclosed by brackets in the Committee Note as an unnecessary elaboration on the
185 meaning of "within."

186 **(a) Amendments Before Trial.**

187

188 **(1) *Amending as a Matter of Course.*** A party may amend its pleading
189 once as a matter of course ~~within~~ no later than:

190

191 **(A)** 21 days after serving it, or

192

193 **(B)** if the pleading is one to which a responsive pleading is
194 required, 21 days after service of a responsive pleading or 21

195 days after service of a motion under Rule 12(b), (e), or (f),
196 whichever is earlier.

197 COMMITTEE NOTE

198 Rule 15(a)(1) is amended to substitute “no later than” for “within” to measure the time
199 allowed to amend once as a matter of course. A literal reading of “within” would lead to an
200 untoward practice if a pleading is one to which a responsive pleading is required and neither a
201 responsive pleading nor one of the Rule 12 motions has been served within 21 days after service
202 of the pleading. Under this reading, the time to amend once as a matter of course lapses 21 days
203 after the pleading is served and is revived only on the later service of a responsive pleading or one
204 of the Rule 12 motions. ~~[The amendment could not come “within” 21 days after the event until the~~
205 ~~event had happened.]~~ There is no reason to suspend the right to amend in this way. “No later than”
206 makes it clear that the right to amend continues without interruption until 21 days after the earlier
207 of the events described in Rule 15(a)(1)(B).

208 SUMMARY OF COMMENTS

209 Andrew Straw, Disability Party, CV 2021-0003: “I have no problem with the minor change, but
210 the rule must allow an amendment to the operative complaint when an appeal comes back down
211 under certain conditions.” (The balance of the comment complains, among other things, of
212 mistreatment by two federal courts of appeals, dishonest actions by them, inappropriate use of the
213 “frivolous” characterization, and “the 5 law licenses taken away from me with suspension for 54
214 months.”)

215 Federal Magistrate Judges Association, CV 2021-0007: “Based on the explanation of the
216 amendment, we foresee no unintended consequences from this modest change.”

217 New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: The
218 proposal is “salutary and desirable.”

219 Audrey Lessner, CV-2021-0004: It is not clear what proposed amendment this comment addresses,
220 or whether it is intended as a suggestion for a new amendment of Rule 12(a): “I am strongly
221 encouraging the Federal Courts to have a 90-day limit on time to answer a civil case concerning
222 families.”

223 Federal Bar Association, 21-CV-0013: The proposal is consistent with strengthening the federal
224 judicial system. No objections.

225 Aaron Ahern, CV-2021-0015: Again, it is not clear which proposed rule amendment this comment
226 addresses: “This must not e[*sic*]ffect victims of major crime including gross negligent domestic
227 violence. Who haven’t collected relief. In good faith.”

228 *Changes Since Publication*

229 No changes are recommended in the text of Rule 15(a)(1) as published. The Committee
230 Note is recommended for adoption with the change described above, deleting an unnecessary
231 sentence that was published in brackets.

232 **D. Recommended for Adoption: Rule 72(b)(1): Notice of Magistrate**
233 **Judge Recommendations**

234 This proposal to amend Rule 72(b)(1) was published for comment in August 2021. Public
235 comments advance no reason for changing or withdrawing the proposal. The Committee voted to
236 delete the sentence in the Committee Note published in brackets. The sentence offered reassurance
237 to guide the comment process, and has served its purpose. The Committee advances the
238 amendment for a recommendation for adoption as published:

239 **(b) Dispositive Motions and Prisoner Petitions.**

240 **(1) Findings and Recommendations.** * * * The magistrate judge must
241 enter a recommended disposition, including, if appropriate,
242 proposed findings of fact. The clerk must ~~promptly mail~~
243 immediately serve a copy to on each party as provided in Rule 5(b).

244 COMMITTEE NOTE

245 Rule 72(b)(1) is amended to permit the clerk to serve a copy of a magistrate judge's
246 recommended disposition by any of the means provided in Rule 5(b). [~~Service of notice of entry~~
247 ~~of an order or judgment under Rule 5(b) is permitted by Rule 77(d)(1) and works well.~~]

248 SUMMARY OF COMMENTS

249 Federal Magistrate Judges Association, CV 2021-0007: “We endorse this update, which much
250 more accurately reflects current expectations regarding service, and avoids confusion caused by
251 the outdated mailing requirement.”

252 New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: The
253 proposal is “salutary and desirable.”

254 Shane Jeansonne, 21-CV-0010: This is a bad idea. Prisoners have no access to the CM/ECF
255 system. If they do not have access to mailed copies of the recommendations, they will be unable
256 to adequately object or appeal. (This comment seems to overlook the provision of Rule 5(b)(2)(E)
257 that allows sending notice by filing with the court’s electronic-filing system only as to a registered
258 user.)

259 Federal Bar Association, 21-CV-0013: The proposal is consistent with strengthening the federal
260 judicial system. No objections.

261 *Changes Since Publication*

262 No changes are recommended in the text of Rule 72(b)(1) as published. The Committee
263 Note is recommended for adoption with the change described above, deleting an unnecessary
264 sentence that was published in brackets.

265 **E. Recommended for Adoption Without Publication: Rule 6(a)(6)(A):**
266 **Juneteenth Holiday**

267 The Committee advances for a recommendation to adopt without publication of an
268 amendment of Rule 6(a)(6)(A) to include Juneteenth National Independence Day in the list of
269 statutory holidays included in the definition of “legal holiday.” The amendment reflects the
270 Juneteenth National Independence Day Act, P.L. 117-17 (2021).

271 Adoption without publication will reduce the hiatus between establishment of this new
272 legal holiday and its recognition in rule text. There is no reason for delay -- indeed Rule 6(a)(6)(B)
273 already recognizes the holiday by including as a legal holiday “any day declared a holiday by the
274 President or Congress.” Amending Rule 6(a)(6)(A) serves only to make its enumeration of
275 statutory holidays complete.

276 As amended, Rule 6(a)(6)(A) would read:

277 **Rule 6. Computing and Extending Time; Time for Motion Papers**

278 **(a) Computing Time. * * ***

279 **(6) “Legal Holiday” Defined.** “Legal Holiday” means:

280 (A) the day set aside by statute for observing * * * Memorial Day,
281 Juneteenth National Independence Day, Independence Day, * * *.

282 COMMITTEE NOTE

283 Rule 6(a)(6) is amended to add Juneteenth National Independence Day to the days set aside
284 by statute as legal holidays.
285

286 **II. Subcommittee Reports**

287 **A. MDL Subcommittee**

288 The MDL Subcommittee has had the benefit of considerable and very helpful input from
289 the bench and bar. In particular, this has included the following events:

290 Dec. 3, 2021 -- Lawyers for Civil Justice Membership meeting, Nashville, TN (meeting
291 with primarily defense-side lawyers)

292 Feb. 13, 2022 -- American Association for Justice Convention, Palm Desert, CA (meeting
293 with primarily plaintiff-side lawyers)

294 March 7-10, 2022 -- Emory Law School Institute for Complex Litigation and Mass Claims
295 Conference, Miami, FL (two-day conference with many experienced MDL transferee
296 judges and current and past members of the Judicial Panel on Multidistrict Litigation and
297 also many experienced plaintiff- and defense-side lawyers)

298 As reported at the Standing Committee's January 2022 meeting, the focus of the
299 Subcommittee had by then shifted to emphasizing "prompts" to assist and focus transferee judges
300 and lawyers handling cases subject to an MDL transfer order. Since the January meeting, issues
301 about the Subcommittee's focus at the end of 2021 have caused it to consider a different placement
302 of an MDL rule, though the basic issues on which it has focused are the same.

303 The third of the events mentioned above did not occur until after the agenda materials for
304 the Advisory Committee's March 2022 meeting were due. Below is a presentation of the sketch
305 of a possible rule amendment that was included in the Advisory Committee's agenda book for that
306 meeting earlier this year. Though most of the basic issues raised by that sketch remain on the table,
307 a somewhat different approach to them seems warranted. The Subcommittee is beginning to
308 evaluate that approach.

309 By way of background, this project began in 2017 with submissions that urged a variety of
310 additions to the Civil Rules. One was an expanded opportunity for appellate review of at least
311 some interlocutory rulings in MDL proceedings. The Subcommittee spent a great deal of time on
312 this possibility, and received a great deal of information about it. Eventually, it concluded that
313 existing routes to interlocutory review seemed sufficient for MDL proceedings as they are for other
314 proceedings.

315 Another amendment idea was often called "vetting." It emphasized the assertion that in
316 some very large MDLs a significant number of claims were submitted by people who actually did
317 not (a) use the drug or medical device involved, or (b) suffer the sort of adverse medical
318 development alleged in the litigation. Initial proposals (and a bill passed by the House of
319 Representatives in March 2017) required in every covered proceeding that claimants produce
320 evidence up front of use of the product and diagnosis for the pertinent condition at the beginning
321 of litigation. The statutory proceeding (not acted upon by the Senate) even imposed on the court
322 the obligation to review every submission sua sponte to determine its adequacy.

323 The Subcommittee ultimately concluded that requiring this sort of effort by rule would not
324 be warranted. For one thing, even accepting the assertion that as many as 30% of claims might fail
325 at this point, it was not clear why the remaining 70% should be put on hold for this initial disclosure
326 requirement. It was also possible that resolution of some other issue -- for example, preemption or
327 whether plaintiffs' expert evidence on causation would be admissible -- might make the specifics
328 about each claim largely unnecessary.

329 In addition, FJC research on actual methods of gathering information of this sort showed
330 that often (particularly in "mega" MDL proceedings involving more than 1,000 plaintiffs) the
331 courts did adopt a requirement that plaintiffs complete a plaintiff's fact sheet (PFS) early in the
332 proceedings. But those PFSs ordinarily were tailored to the issues in the given case, and also took
333 considerable time to draft. A generic "fact sheet" requirement in a rule seemed extremely difficult
334 to devise.

335 Meanwhile, an alternative and new approach -- called a "census" of claims -- came under
336 consideration. This sort of method of case management could yield valuable information to assist
337 the court in its task of organizing a "mega" MDL, so it went well beyond the "vetting" idea. Yet
338 it could yield information that could be used to filter out unsupportable claims. At least three
339 current "mega" MDLs (one of which -- the Zantac MDL -- is before Judge Robin Rosenberg (S.D.
340 Fla.), Chair of the MDL Subcommittee) have employed this new method to good effect.

341 So the census idea, though new, seemed to have promise. In rulemaking terms, however,
342 it is likely to require tailoring, as did the PFS practice. To prompt consideration of this possibility,
343 therefore, it seemed that any rule should call for something like consideration that the parties
344 engage in an early exchange of information about their claims and defenses. That idea has been
345 introduced in the recent rule sketches, and appears in the sketch in this agenda book.

346 The overall orientation reflected in the sketch in this agenda book might be said to have
347 two main features: (a) to direct the parties to meet and discuss critical case management issues at
348 the inception of the MDL proceedings and report to the court about their agreements or
349 disagreements, and (b) to prompt the court to give appropriate early consideration to the important
350 topics that bear on management of the proceedings, often including regular follow-up pretrial
351 conferences.

352 The original idea for including these prompts in the rules was to add to the list of topics for
353 discussion during the Rule 26(f) conference in order to empower the court at its initial Rule 16
354 management conference to deal with the issues pertinent to a given proceeding. Accordingly, the
355 Rule 26(f) proposal included in the agenda book for the last Advisory Committee meeting
356 expanded the list of topics for discussion at that event. The idea is that, without focused input from
357 the lawyers, the court would not be adequately informed to take action on critical issues during the
358 Rule 16(b) conference.

359 The recent bench/bar events suggest, however, that this approach may present two
360 challenges not fully addressed in the draft presented to the Advisory Committee:

361 (1) Relying on a Rule 26(f) conference in major MDL proceedings is risky. The
362 various actions combined by the Panel may be filed at very different times, so that
363 the date for such a conference in some of them may be long past, while it lies in the
364 future in many others. Although in an “ordinary” civil action that may be a valuable
365 vehicle for discussion by counsel of organizational issues, it likely will not be in
366 many major MDL proceedings. In addition, in later-filed cases the potential
367 transferor court might stay proceedings (including the 26(f) conference) pending a
368 Judicial Panel decision whether to centralize the various actions.

369 (2) The responsibility of the court to appoint leadership counsel (at least on the
370 plaintiff side) presents the difficult question who is to participate in a conference to
371 address these issues before the court’s initial management conference. One idea on
372 this topic was that the court select “coordinating counsel” to perform that function.
373 Otherwise, freelance activities by counsel might significantly complicate the
374 process. But because this initial designation ought not supplant the court’s eventual
375 designation of “permanent” leadership counsel, it would be important to guard
376 against that possibility while recognizing also that experienced counsel eligible for
377 the “coordinating counsel” might also be excellent choices for a permanent
378 leadership role.

379 These two sets of concerns have prompted the Subcommittee to begin consideration of an
380 alternative -- recommending a new Rule 16.1 specifically for MDL proceedings (or perhaps
381 “multiparty proceedings”) and including in that rule a prompt to the court that it (a) schedule an
382 early initial management conference, and (b) direct the parties (perhaps through “coordinating
383 counsel”) to meet and confer about designated topics and report to the court in advance of that
384 initial management conference.

385 The basic thrust of the current discussion in terms of topics to be addressed remains much
386 as it was in the most recent draft in the agenda books. But it is possible that the vehicle for
387 addressing these topics will be revised into a new proposed Rule 16.1. Discussions of this
388 possibility remain at a very initial stage, and it is not clear that the Subcommittee will elect to
389 pursue this approach. The specifics of this revised approach would largely track the specifics of
390 the sketch of amendment ideas presented below.

391 Whether or not the revised approach gains favor, an abiding question is whether adding
392 such a rule would be justified. On the one hand, the number of MDL centralizations is quite small
393 compared to the overall civil docket of the federal courts. But on the other hand the number of
394 individual actions subject to transfer orders from the Judicial Panel on Multidistrict Litigation is
395 very large -- perhaps approaching 40% of the overall federal civil docket. It might seem odd if
396 there were no acknowledgement in the Civil Rules of the distinctive challenges posed by the largest
397 of these proceedings.

398 There is also reason to believe that guidance in the rules for these important proceedings
399 would be helpful. The Subcommittee has heard from at least some transferee judges who now
400 think they did not fully appreciate the implications of some of the early orders they entered. The
401 Panel, meanwhile, is seeking to enlist new judges as potential transferees. Lawyers might also

402 benefit from some guidance in the rules about how these proceedings are handled; the lawyers the
403 Subcommittee has heard from are largely the most accomplished in the field. Though it is less
404 likely that lawyers in MDL proceedings are as unfamiliar with how they work as some lawyers
405 who file class actions appear to be, those who do not have an inside track in MDL might benefit
406 from having some general direction in the rules about how those proceedings are to be handled.

407 The Subcommittee welcomes reactions from Standing Committee members.

408 Revised Approach presented to Advisory Committee

409 The following is a Reporter's Sketch that takes a more aggressive approach than prior
410 sketches to the Rule 26(f) topics, largely to provide the court with needed information about
411 management of the MDL proceedings from the outset. Possible issues are addressed in footnotes.

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

413 * * * * *

414 **(f) Conference of the Parties; Planning for Discovery.**

415 * * * * *

416 **(3) Discovery [and Case Management] Plan.**¹ A discovery [and case
417 management] plan must state the parties' views and proposals on:

418 * * * * *

419 **(F) In actions transferred for coordinated pretrial proceedings under 28**
420 **U.S.C. § 1407 [a case management plan, including]:**

421 **(i) whether the parties should be directed to exchange**
422 **information about their claims and defenses at an early point**
423 **in the proceedings;**

424 **(ii) whether [leadership] {lead}**² **counsel for plaintiffs should be**
425 **appointed [and whether liaison defense counsel should be**

¹ The title "case management" might be added here, but that may be overloading the great majority of cases in which Rule 26(f) requires only a discovery plan. On the other hand, it does seem that scheduling orders under Rule 16(b) go beyond purely discovery issues, including the time to join additional parties, amending pleadings, and hearing summary judgment motions. Rule 16(b)(3)(A) requires the court to limit the time for these activities, and in that sense is about scheduling, but these topics go beyond discovery. At least for MDL proceedings, hearing from the parties about additional topics seems useful.

² There has been some discussion of whether a new term -- leadership counsel -- should be used in place of the familiar term lead counsel. One reason for a new term is that in the MDL setting it is often desirable for the court to adopt a specialized method of selecting counsel, appoint many lawyers to various positions,

426 appointed],³ the process for such appointments, and the
427 responsibilities of such appointed counsel, [and whether
428 common benefit funds should be created to support the work
429 of such appointed counsel];⁴

430 (iii) whether the court should adopt a schedule for sequencing
431 discovery, deciding disputed legal issues, or any other order
432 under Rule 16(c)(2)(A), (E), (F), (I), or (L);⁵

and (perhaps) enter a rather detailed order prescribing the responsibilities of designated counsel. In addition, it may be that “term limits” are sometimes a desirable feature of such orders. It is not clear that other lead counsel appointments involve comparable provisions.

³ There has been only limited discussion of the role of the court in appointing liaison counsel in multi-defendant MDL proceedings. Because such appointments may be important in some such proceedings, they could be noted here. If that might be in order, it would seem that the court could profit from hearing the parties’ views on whether and how to make such appointments, and what authority/limitations might be included in an appointment order.

⁴ In *In re Roundup Products Liability Litigation*, 544 F.Supp.3d 950 (N.D. Cal. 2021), Judge Chhabria raised some significant questions about the scope of authority for an MDL transferee judge to order the creation of a common benefit fund. The Subcommittee has initially discussed some of these points, but not in detail, and it has not focused on the corresponding possibility that the court might enter an order enabling reimbursement for expenses incurred by liaison counsel for the defendants. There is authority supporting such an order when liaison counsel are appointed for defendants. See *In re San Juan Dupont Plaza Hotel Fire Litigation*, 93 F.3d 1 (1st Cir. 1996), described in a footnote to the notes of the Nov. 2 meeting.

⁵ This is a first effort to call for discussion during the 26(f) meeting of a constellation of issues that the court might address early in MDL proceedings. It seemed useful to tie the description of possible issues to specific provisions of Rule 16(c)(2). If of use, the Rule 16(c)(2) provisions mentioned above are:

- (A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;
- (E) determining the appropriateness and timing of summary adjudication under Rule 56;
- (F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;
- (I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;
- (L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.

It bears noting that one could consider (A) above somewhat related to the “vetting” idea that continues to be emphasized by some who favor rule amendments. In addition, it bears noting that reference

433 **(iv)** a schedule for pretrial conferences to enable the court to
434 manage the proceedings [including possible resolution of
435 some or all claims]; and^{6 7}

436 **(FG)** any other orders that the court should issue under Rule 26(c) or
437 under Rule 16(b) and (c).

438 A Committee Note could elaborate on the many topics that it is valuable for the parties to
439 call to the judge’s attention. It may be that the sketch above includes unnecessary detail. Ideally,
440 lawyers involved in MDL proceedings would be conversant enough with their management to
441 make detailed direction unnecessary. On the other hand, to the extent there are “new entrants” into
442 the field it may be useful to provide more detail.

443 **Rule 16. Pretrial Conferences; Scheduling; Management**

444 * * * * *

445 **(b) Scheduling and Case Management.**

446 * * * * *

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

448 * * * * *

449 **(B) *Permitted Contents.***

450 * * * * *

451 (vii) include an order under Rule 16(b)(5); and

452 (viii) include other appropriate matters.

453 * * * * *

454 **(5) Multidistrict Litigation. In addition to complying with Rules 16(b)(1) and**
455 **16(b)(3), a court managing actions transferred for coordinated pretrial**

to (I) may be premature at the 26(f) stage, but might also prompt useful attention to including provisions in an order appointing leadership counsel that provide some potential for court oversight.

⁶ This final prompt may be unnecessary, but since it is likely often for the court to establish a schedule for pretrial conferences it may also be useful for the parties to offer their views on how those should be handled.

⁷ The bracketed language introduces the possibility of judicial oversight, or at least reporting to the judge, about potential settlements. It may be premature to raise this possibility so early in the proceedings.

- 456 proceedings pursuant to 28 U.S.C. § 1407 should consider [appointing
457 interim plaintiffs’ [leadership] {lead} counsel prior to the Rule 26(f)
458 conference and]⁸ entering an order about the following at an early pretrial
459 conference [after receiving the parties’ Rule 26(f) case management plan]⁹:
- 460 **(A)** directing the parties to exchange information about their claims and
461 defenses at an early point in the proceedings;
- 462 **(B)** appointing plaintiffs’ [leadership] {lead} counsel with appropriate
463 specifics including:¹⁰
- 464 **(i)** the responsibilities and structure of [leadership] {lead}
465 counsel;
- 466 **(ii)** the duration of the appointment];¹¹
- 467 **(iii)** any limitations on the activities of other plaintiff counsel];¹²
- 468 **(iv)** methods for compensating plaintiffs’ [leadership] {lead}
469 counsel;
- 470 **(v)** directing plaintiffs’ [leadership] {lead} counsel to make
471 regular reports to the court -- in case management

⁸ There has been some discussion of “freelancing” efforts among plaintiff counsel in advance of meeting with defense counsel and before the initial appearance before the court. That presents something of a chicken/egg problem -- who represents the plaintiffs at the initial Rule 26(f) event? The idea of interim leadership counsel here is different from interim class counsel under Rule 23(g), and the sole or main role here is to manage the expanded Rule 26(f) responsibilities for the plaintiff side. Presumably (as with interim class counsel appointments) the lawyers can find a way to approach the court about this issue. Judicial involvement may be preferable to a free-for-all effort by competing counsel.

⁹ It would seem to go without saying that the court ought first receive the Rule 26(f) plan before entering the orders described below.

¹⁰ There has been considerable discussion of the desirability of relatively comprehensive and specific orders appointing lead or leadership counsel. The term “appropriate specifics” is designed to encourage courts to develop such orders up front.

¹¹ This bracketed phrase highlights the possibility of appointment for a fixed term rather than an open-ended appointment.

¹² It remains unclear whether this provision is useful.

- 472 conferences or otherwise -- about the progress and prospects
473 for resolution¹³ of the litigation;
- 474 [(C) appointing liaison counsel for defendants, if appropriate, and
475 addressing methods for compensating liaison counsel for expenses
476 incurred in that role;]¹⁴
- 477 (D) adopting a case management order addressing:
- 478 (i) sequencing of discovery;
- 479 (ii) a schedule for deciding disputed legal issues; and
- 480 (iii) any other order under Rule 16(c)(2), including
481 Rule 16(c)(2)(A), (E), (F), (I), or (L).¹⁵

482 Because this approach may not be favored going forward, no attempt has been made to
483 draft Committee Notes that might accompany it.

484 **B. Discovery Subcommittee**

485 The primary focus of the Discovery Subcommittee has been on submissions about burdens
486 and difficulties with Rule 26(b)(5)(A), which was adopted in 1993 and directed parties withholding
487 items on grounds of privilege or work product to identify those materials and describe the nature
488 of the materials in a manner that would “enable other parties to assess the claim [of privilege].”

489 The Subcommittee has reached relative consensus on an approach to amending the rule,
490 but did not propose that this draft amendment be submitted to the Standing Committee this year
491 for publication and public comment. In part, that was because the MDL Subcommittee was
492 considering proposing additional changes to Rules 26(f) and 16(b), which are the rules also under
493 consideration by the Discovery Subcommittee. There was concern that propounding different
494 changes to the same rules in succeeding years could cause confusion. As noted in the MDL
495 Subcommittee portion of this report, it may be that the MDL Subcommittee will ultimately suggest
496 adding a new Rule 16.1 rather than proposing amendments to Rules 16(b) and 26(f), but is not

¹³ Is this reference to “resolution” sufficient to include the concept of reports about settlement possibilities? Note that Rule 16(c)(2)(I) refers to “settling the case.”

¹⁴ It remains unclear whether it is useful to raise this issue in the rule. One reason might be to provide authority also for the creation of a common fund for defense outlays.

¹⁵ This provision largely reproduces the proposed addition to Rule 26(f). Given the prod in that rule, it may well be unnecessary to include a parallel provision here. On the other hand, for judges new to the MDL assignment it may be useful to replicate the 26(f) direction here. It should be clear that calling attention to these provisions in Rule 16(c) in no way limits the court’s authority to enter orders addressing other matters discussed in Rule 16(c)(2).

497 certain whether that will occur. Since the current rule has been in effect for nearly 30 years, it
498 seemed prudent to wait another year to permit the MDL Subcommittee to complete its work, or at
499 least to determine whether it intends to go forward with proposing changes to Rule 16(b) and 26(f).

500 Another topic that the Discovery Subcommittee has on its agenda is addressing filing under
501 seal in the Civil Rules. Suggestions have been made that a national rule be adopted to provide a
502 procedure for requesting leave to file under seal and, perhaps, for challenges to such requests for
503 filing under seal. While Discovery Subcommittee consideration was going forward, the
504 Administrative Office inaugurated what appears to be a study of filing under seal addressing a
505 broader set of cases, not just civil cases in the district courts. In light of that broader study, the
506 Discovery Subcommittee has not proceeded further with possible changes to the Civil Rules.¹

507 This report provides background on the issues presented and also the working draft the
508 Subcommittee expects to consider going forward. The Subcommittee invites input from the
509 Standing Committee on its current orientation.

510 Advent and Implementation of Rule 26(b)(5)(A)

511 Before 1993, the rules did not say anything about disclosure by a producing party that it
512 withheld requested materials from production. That year, Rule 26(b)(5)(A) was added. As restyled
513 in 2007, it provides:

514 **(A)** *Information Withheld.* When a party withholds information otherwise
515 discoverable by claiming that the information is privileged or subject to
516 protection as trial-preparation material, the party must:

517 **(i)** expressly make the claim; and

518 **(ii)** describe the nature of the documents, communications, or tangible
519 things not produced or disclosed -- and do so in a manner that,
520 without revealing information itself privileged or protected, will
521 enable other parties to assess the claim.

522 As quoted in the draft Committee Note for a possible Rule 26(f) amendment below, the
523 1993 Committee Note emphasized that the exact method of complying with this new requirement
524 should be keyed to the circumstances of given cases. But according to submissions to the
525 Committee some requesting parties demanded, or some courts insisted upon, document-by-
526 document listing even in cases involving large numbers of documents. Preparation of those lists
527 reportedly sometimes involved great expense on top of the expense of reviewing responsive
528 materials to identify privileged materials.

¹ It is worth noting that the [21st Century Courts Act of 2022](#), introduced in both the Senate and the House in April 2022, contains provisions addressing sealed court filings. See S. 4010 § 6; H.R. 7426 § 6. It is not clear what action will be taken on this bill, which contains many other provisions.

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

568 * * * * *

569 **(f) Conference of the Parties; Planning for Discovery.**

570 * * * * *

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

573 * * * * *

574 **(D)** any issues about claims of privilege or of protection as trial-
575 preparation materials, including the [timing for and]² method to be
576 used to comply with Rule 26(b)(5)(A) and -- if the parties agree on
577 a procedure to assert these claims after production -- whether to ask
578 the court to include their agreement in an order under Federal Rule
579 of Evidence 502;

580 * * * * *

581 DRAFT COMMITTEE NOTE

582 Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in
583 Rule 26(b)(5)(A) that producing parties describe materials withheld on grounds of privilege or as
584 trial-preparation materials. The Committee has been informed that compliance with
585 Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document “privilege
586 log.” Frequently, however, those privilege logs do not actually provide the information needed to
587 enable other parties or the court to assess the justification for withholding the materials. And on
588 occasion, despite the requirements of Rule 26(b)(5)(A), producing parties may over-designate and
589 withhold materials [clearly] not entitled to protection from discovery.

590 This amendment provides that the parties must address the question how they will comply
591 with Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. A companion
592 amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about
593 complying with Rule 26(b)(5)(A) in scheduling or case management orders.

594 Requiring this discussion at the outset of litigation is important to avoid problems later on,
595 particularly if objections to a party’s compliance with Rule 26(b)(5)(A) might otherwise emerge
596 only at the end of the discovery period. [The rule therefore directs the parties to discuss and report
597 to the court on the timing for compliance with the rule’s requirements.]

² The bracketed language has not been discussed with the Subcommittee, but the Subcommittee has discussed the problems that can arise from belated service of a privilege log. Committee Note language below addresses the same point.

598 This amendment also seeks to grant the parties maximum flexibility in designing an
599 appropriate method for identifying the grounds for withheld materials, and to prompt creativity in
600 designing methods that will work in a particular case. One matter that may often be valuable in
601 that regard is candid discussion of what information the receiving party needs to evaluate the claim.
602 Depending on the nature of the litigation, the nature of the materials sought through discovery, and
603 the nature of the privilege or protection involved, what is needed in one case may not be necessary
604 in another. No one-size-fits-all approach would actually be suitable in all cases.

605 From the beginning, Rule 26(b)(5)(A) was intended to recognize the need for flexibility.
606 The 1993 Committee Note explained:

607 The rule does not attempt to define for each case what information must be provided
608 when a party asserts a claim of privilege or work product protection. Details
609 concerning time, persons, general subject matter, etc., may be appropriate if only a
610 few items are withheld, but may be unduly burdensome when voluminous
611 documents are claimed to be privileged or protected, particularly if the items can
612 be described by categories.

613 Despite this explanation, the Committee has been informed that in some cases the rule has not been
614 applied in a flexible manner, sometimes imposing undue burdens. And the growing importance
615 and volume of digital material sought through discovery have compounded these difficulties.

616 But the Committee is also persuaded that the most effective way to solve these problems
617 is for the parties to develop and report to the court on a practical method for complying with
618 Rule 26(b)(5)(A). Cases vary from one another, in the volume of material involved, the sorts of
619 materials sought, and the range of pertinent privileges.

620 In some cases, it may be suitable simply to have the producing party deliver a document-
621 by-document listing with explanations of the grounds for withholding the listed materials.

622 As suggested in the 1993 Committee Note, in some cases some sort of categorical approach
623 might be effective to relieve the producing party of the need to list many withheld documents.
624 Suggestions have been made about various such approaches. For example, it may be that
625 communications between a party and outside litigation counsel could be excluded from the listing,
626 and in some cases a date range might be a suitable method of excluding some materials from the
627 listing requirement. Depending on the particulars of a given action, many such methods may
628 enable creative counsel to reduce the burden and increase the effectiveness of complying with
629 Rule 26(b)(5)(A). But the use of categories calls for careful drafting and application keyed to the
630 specifics of the action.

631 In some cases, technology may facilitate both privilege review and preparation of the
632 listing needed to comply with Rule 26(b)(5)(A), perhaps by preparation of what is sometimes
633 called a “metadata log.” One technique that the parties might discuss in this regard is whether a
634 some sort of listing of the identities of people who sent or received materials withheld should be
635 supplied, to enable the recipient to appreciate how that bears on a claim of privilege.

636 Requiring that this topic be taken up at the outset of litigation and that the court be advised
637 of the parties' plans in this regard is a key purpose of this amendment. Belated production of a
638 privilege log until near the close of the discovery period can create serious problems. Often it will
639 be valuable to provide for "rolling" production of materials and an accompanying listing of
640 withheld items. In that way, areas of potential dispute may be identified and, if the parties cannot
641 resolve them, presented to the court for resolution. That resolution, then, can guide the parties in
642 further discovery in the action.

643 The Committee has also been informed that in some cases there appears to have been over-
644 designation of materials as privileged. Though it is sometimes difficult to determine whether
645 certain materials are properly withheld, the Committee has been informed that in some instances
646 privilege claims are made without significant foundation. One problem may be overbroad
647 designation by risk-averse reviewers. In addition, it may sometimes be that attorneys are routinely
648 copied to bolster inappropriate claims of privilege. It is important to note that Rule 26(g)(1) applies
649 to privilege claims. It is hoped that carefully designed methods of complying with
650 Rule 26(b)(5)(A) can avoid disputes about unjustified claims of privilege.

651 **Rule 16. Pretrial Conferences; Scheduling; Management**

652 * * * * *

653 **(b) Scheduling and Management.**

654 * * * * *

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

656 * * * * *

657 **(B) Permitted Contents.**

658 * * * * *

659 **(iv)** include the [timing for and] method to be used to comply
660 with Rule 26(b)(5)(A) and any agreements the parties reach
661 for asserting claims of privilege or of protection as trial-
662 preparation material after information is produced,
663 including agreements reached under Federal Rule of
664 Evidence 502;

665 * * * * *

666 DRAFT COMMITTEE NOTE

667 Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D), which directs
668 the parties to discuss the method to be used to comply with Rule 26(b)(5)(A) in the action, and to
669 report to the court about that issue. In addition, two words -- "and management" -- are added to

670 the title of this rule in recognition that it contemplates that the court will in many instances do
671 more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration
672 of such activity.

673 The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their
674 discovery plan a method for complying with the requirements in Rule 26(b)(5)(A) regarding
675 providing information about materials withheld from production on grounds of the withheld items
676 are privileged or subject to trial-preparation protection. [It also directs that the discovery plan
677 address the timing for compliance with this requirement, in order to avoid problems that can arise
678 if issues about compliance emerge only at the end of the discovery period.]

679 The Committee has been informed that early attention to the particulars on this subject can
680 often avoid problems later in the litigation that can be avoided by establishing case-specific
681 procedures up front, thus serving scheduling purposes as well. It may be desirable for the
682 Rule 16(b) order to provide for “rolling” production that may identify possible disputes about
683 whether certain withheld materials are indeed protected. If the parties are unable to resolve those
684 disputes between themselves, it is often desirable to have them resolved at an early stage by the
685 court, in part so that the parties can apply the court’s resolution of the issues in further discovery
686 in the case.

687 Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the
688 specifics of a given case -- type of materials being produced, volume of materials being produced,
689 type of privilege or protection being invoked, and other specifics pertinent to a given case -- there
690 is no overarching standard for all cases. For some cases involving a limited number of withheld
691 items, a simple document-by-document listing may be the best choice. In some instances, it may
692 be that certain categories of materials may be deemed exempt from the listing requirement, or
693 listed by category. In the first instance, the parties themselves should discuss these specifics during
694 their Rule 26(f) conference; these amendments to Rule 16(b) permit the court to provide
695 constructive involvement early in the case. Though the court ordinarily will give much weight to
696 the parties’ preferences, the court’s order prescribing the method for complying with Rule
697 26(b)(5)(A) does not depend on party agreement.

698 **C. Rule 9(b) Subcommittee**

699 The Advisory Committee received a proposal by Committee member Dean and Professor
700 A. Benjamin Spencer to amend the second sentence of Rule 9(b) in light of the interpretation of
701 that rule in the Supreme Court’s decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 686-687 (2009). The
702 proposal was supported by Dean Spencer’s article, A. Benjamin Spencer, *Pleading Conditions of*
703 *the Mind Under Rule 9(b): Repairing the Damage Wrought by Iqbal*, 41 *Cardozo L. Rev.* 1015
704 (2020). The article stressed pre-1938 English authority under a rule that was a model of the rule
705 included in the Civil Rules in 1938. The proposal focused on the second sentence of the rule, and
706 urged that the rule be amended in order to guarantee an opportunity to plead intent, knowledge and
707 state of mind generally in all cases, not just fraud cases. Specifically, the proposal was to amend
708 the second sentence of Rule 9(b) as follows:

709 Malice, intent, knowledge, and other conditions of a person’s mind may be alleged
710 ~~generally without setting forth the facts or circumstances from which the condition~~
711 may be inferred.

712 In October, 2021, a Rule 9(b) Subcommittee was appointed, chaired by Judge Sara Lioi,
713 and including Judge Cathy Bissoon, Justice Thomas Lee, Joseph Sellers and Helen Witt.
714 Meanwhile the Rules Law Clerk did research on the application of the second sentence of Rule
715 9(b) before *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which announced what has come
716 to be called the “plausibility” standard for the sufficiency of pleadings. The research revealed that
717 the second sentence of the rule had almost never played a role in decisions on motions to dismiss
718 outside the fraud context (the focus of the first sentence of Rule 9(b)) before the 2007 decision in
719 *Twombly*.

720 On Dec. 15, 2021, the Rule 9(b) Subcommittee met via Teams and thoroughly discussed
721 the issues raised by Dean Spencer’s article and addressed by the Rules Law Clerk’s research. At
722 the end of this discussion, the subcommittee voted unanimously to recommend that this proposal
723 be removed from the agenda. The matter was fully discussed during the Advisory Committee’s
724 March 29 meeting and the proposal was dropped from the agenda without dissent.

725 The following memorandum provides considerable background in an effort to put the
726 current proposal into the larger context of pleadings issues presented under the Civil Rules.

727 Past Committee Consideration
728 of Pleading Requirements

729 In *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court announced that “a complaint
730 should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff
731 can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 45-46. In
732 1998, Professor Hazard noted that “*Conley v. Gibson* turned Rule 8 on its head by holding that a
733 claim is insufficient only if the insufficiency appears from the pleading itself.” Hazard, *From*
734 *Whom No Secrets Are Hid*, 76 Texas L. Rev. 1665, 1685 (1998).

735 Whatever one’s attitude toward *Conley v. Gibson*, it is apparent that the second sentence
736 of Rule 9(b) did not loom large in decisions under that precedent. Indeed, lower courts frequently
737 insisted on factual allegations to support “conclusory” allegations of knowledge or intent. Even in
738 the fraud context, the Second Circuit held in 1979 that despite the second sentence plaintiffs
739 pleading securities fraud had to “specifically plead those events which they assert give rise to a
740 strong inference that the defendants had knowledge of the facts contained in * * * the complaint
741 or recklessly disregarded their existence.”¹ In the Private Securities Litigation Reform Act,
742 adopted in 1995, Congress picked up this Second Circuit language and put it into the statute as a
743 pleading standard for securities fraud claims.

¹ *Ross v. A.H. Robins Co., Inc.*, 607 F.2d 545, 558 (2d Cir. 1979).

744 In 1993, the Supreme Court made it clear that though the first sentence of Rule 9(b) applies
745 to fraud cases, it does not apply to all cases. In *Leatherman v. Tarrant County Narcotics and*
746 *Coordination Unit*, 507 U.S. 163 (1993), it rejected a Fifth Circuit “heightened pleading” standard
747 in a suit against local officials, noting: “Perhaps if Rules 8 and 9 were rewritten today, claims
748 against municipalities under § 1983 might be subjected to the added specificity requirement of
749 Rule 9(b). But that is a result which must be obtained by the process of amending the Federal
750 Rules, and not by judicial interpretation.” *Id.* at 168.

751 The Court’s reference in *Leatherman* to amending the rules prompted considerable
752 Advisory Committee study but ultimately no amendment was proposed. Meanwhile, at least some
753 academics urged that Rule 9(b) be abrogated. See Christopher M. Fairman, *An Invitation to the*
754 *Rulemakers -- Strike Rule 9(b)*, 38 UC Davis L. Rev. 281 (2004); William M. Richman, Donald
755 E. Lively & Patricia Mell, *The Pleading of Fraud: Rhymes Without Reason*, 60 So. Cal. L. Rev.
756 959, 994 (1987) (Rule 9(b) “should be abandoned as a relic whose time is past”); Jeff Sovern,
757 *Reconsidering Federal Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud*
758 *Cases?*, 104 F.R.D. 143 (1985) (urging that Rule 9(b) “be eliminated from the federal civil rules”).

759 In *Twombly*, the Court “retired” the “no set of facts” standard from *Conley v. Gibson*. 550
760 U.S. at 562-63. In *Iqbal*, it held that plaintiff’s complaint had to be dismissed under the pleading
761 standard articulated in *Twombly*, because that standard applied to all cases governed by Rule
762 8(a)(2), something commentators had questioned after 2007. As a consequence, plaintiff’s
763 allegation that the Attorney General and the Director of the FBI adopted an aggressive law-
764 enforcement posture after the September 11, 2001, attacks to discriminate on grounds of religion
765 or national origin was found insufficient. Plaintiff urged that the second sentence of Rule 9(b)
766 excused him from alleging specifics to support his claim of discriminatory intent. Writing for the
767 Court, Justice Kennedy rejected this argument on the ground that plaintiff’s allegation was
768 “conclusory” (556 U.S. at 686-87):

769 It is true that Rule 9(b) requires particularity when pleading “fraud or mistake,”
770 while allowing “[m]alice, knowledge, and other conditions of mind [to] be alleged
771 generally.” But “generally” is a relative term. In the context of Rule 9, it is to be
772 compared to the particularity requirement applicable to fraud or mistake. Rule 9
773 merely excuses a party from pleading discriminatory intent under an elevated
774 pleading standard. It does not give him license to evade the less rigid -- though still
775 operative -- strictures of Rule 8.

776 See also A. Benjamin Spencer, *Plausibility Pleading*, 49 Bos. Col. L. Rev. 431, 473 (2008)
777 (describing the second sentence of Rule 9(b) as “a reference to the pleading standard of Rule
778 8(a)(2)”).

779 Until this argument was advanced by plaintiff in *Iqbal*, the second sentence of Rule 9(b)
780 had not received much attention in the courts. In *Leatherman*, the Supreme Court ruled that at least
781 the first sentence of the rule did not apply to non-fraud claims. As quoted above, the Second Circuit
782 read Rule 9(b), even in a fraud case, to permit demanding pleading requirements of knowledge of
783 the falsity of representations, which Congress later adopted as the pleading standard in the PSLRA.

784 And in non-fraud cases, including discrimination cases, pleading requirements for factual
785 allegations supporting conclusory allegations of motive had been upheld.²

786 The Supreme Court’s decisions in *Twombly* and *Iqbal* prompted a very large amount of
787 academic writing, most of it unfavorable to the Court’s decisions. Even though the Court did not
788 (as it had in its *Leatherman* decision in 1993) invite rulemaking, the decisions also prompted much
789 Advisory Committee activity. Various possible revisions of Rule 8 appeared in a number of agenda
790 books. The Rules Law Clerk at the time compiled a massive study of post *Iqbal* decisions in the
791 lower courts (eventually some 700 pages long).

792 Meanwhile, the Federal Judicial Center did a thorough study that compared decisions
793 before 2007 (when *Twombly* was decided) and after 2009 (when *Iqbal* was decided), and
794 concluded that there was no statistically significant increase in the granting of motions to dismiss.
795 See J. Cecil, G. Cort, M. Williams & J. Batillon, *Motions to Dismiss for Failure to State A Claim*
796 *After Iqbal*, Report to the Judicial Conference Advisory Committee on Civil Rules (2011). This
797 report was challenged as being too cautious in applying standards of statistical significance. See
798 Hoffman, *Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study*
799 *of Motions to Dismiss*, 6 Fed. Cts. L. Rev. 1 (2011); see also Dodson, *A New Look at Dismissal*
800 *Rates of Federal Civil Claims*, 96 *Judicature* 127 (2012) (finding a statistically significant increase
801 in the rate of dismissals after *Iqbal* compared to the rate before *Twombly*, but also that dismissal
802 was quite common before *Twombly*).

803 The current proposal

804 As noted above, in *Iqbal* the Court interpreted the second sentence of Rule 9(b) as a
805 qualification of the first sentence, so the entire subdivision is important:

806 (b) **Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a
807 party must state with particularity the circumstances constituting fraud or
808 mistake. Malice, intent, knowledge, and other conditions of a person’s mind
809 may be alleged generally.

² See *Albany Welfare Rights Organization Day Care Center v. Scherck*, 463 F.2d 620, 623 (2d Cir. 1972) the court upheld dismissal of a complaint alleging retaliation on the ground that the complaint “presents no facts to support the allegation that the refusal to refer children [to plaintiff’s childcare facility] was in retaliation for [the executive director’s] organizing activities.” Other courts made similar decisions. See Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 *Colum. L. Rev.* 433, 447-50 (1986) (describing demanding pleading requirements in securities fraud, civil rights, and conspiracy cases); Marcus, *The Puzzling Persistence of Pleading Practice*, 76 *Texas L. Rev.* 1749 (1998) (finding that courts continued to require specifics to support certain claims into the late 1990s).

810 The proposed amendment would revise the second sentence:

811 Malice, intent, knowledge, and other conditions of a person’s mind may be alleged
812 generally without setting forth the facts or circumstances from which the condition
813 may be inferred.

814 The overall approach underlying the proposed amendment reflects deep dissatisfaction
815 with the general “plausibility” pleading standard that has evolved since 2007, but does not propose
816 a frontal attack on *Twombly* and *Iqbal*. Nonetheless, it clearly seeks to countermand the
817 interpretation the Court gave to the second sentence in *Iqbal*. It also introduces the possibility that
818 the second sentence of Rule 9(b) would begin to apply to claims having nothing to do with fraud,
819 contrary to many decisions requiring factual allegations to support “conclusory” allegations before
820 *Twombly* was decided. And it would do that without any invitation (as could be found in the
821 Court’s 1993 decision in *Leatherman*) for the Advisory Committee to amend the rule.

822 The *Iqbal* opinion elucidated the now-familiar general Rule 8(a)(2) standards for pleading
823 “a short and plain statement of the claim showing that the pleader is entitled to relief.” The details
824 of the *Iqbal* complaint deserve a brief summary to pave the way for the Rule 9(b) ruling. The
825 plaintiff, “a citizen of Pakistan and a Muslim,” was arrested on fraud charges, pleaded guilty,
826 served a term of imprisonment, and was removed to Pakistan. He did not challenge the arrest or
827 the confinement as such. But he did claim that he was designated a “person of high interest” in
828 connection with the terrorist attacks of September 11, 2001, and placed in administrative maximum
829 confinement, “on account of his race, religion, or national origin.” The Court accepted the prospect
830 that he had pleaded claims against some of the many defendants. The case came to it on qualified
831 immunity appeals by two of the defendants — John Ashcroft, the former Attorney General, and
832 Robert Mueller, the Director of the FBI. He alleged that Ashcroft was the principal architect of the
833 unconstitutional policy, and that Mueller was instrumental in its adoption. He further alleged that
834 they “knew of, condoned, and willfully and maliciously agreed to subject” him to harsh conditions
835 of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national
836 origin and for no legitimate penological interest.”

837 The Court found these allegations failed to push the claim beyond mere possibility into
838 plausibility. It applied a legal standard that “purposeful discrimination requires more than ‘intent
839 as volition or intent as awareness of consequences.’ * * * It instead involves a decisionmaker’s
840 undertaking a course of action “because of,” not merely “in spite of,” [the action’s] adverse effects
841 upon an identifiable group.” Knowledge of, and acquiescence in, discriminatory acts by their
842 subordinates would not suffice to hold the Attorney General and the Director of the FBI liable.
843 The allegations of these defendants’ purpose “are conclusory, and not entitled to be assumed true.”
844 “It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful
845 nature, that disentitles them to the presumption of truth.” The allegations were “consistent with”
846 an unlawful discriminatory purpose, but did not plausibly establish this purpose “given more likely
847 explanations.” Lower-ranking government officials may have designated the plaintiff a person of
848 high interest and subjected him to unlawful conditions of confinement for unlawful reasons, but
849 nothing more could be inferred against these two defendants than seeking “to keep suspected
850 terrorists in the most secure conditions available until the suspects could be cleared of terrorist
851 activity.”

852 The Court addressed Rule 9(b) after setting the general pleading requirements. It
853 characterized the plaintiff’s argument to be that by allowing discriminatory intent to be pleaded
854 “generally,” Rule 9(b) permits a conclusory allegation without more. This argument was rejected
855 on the face of the rule text. “Generally” is used to distinguish allegations of malice, intent,
856 knowledge, or other conditions of a person’s mind from the particularity standard established for
857 fraud or mistake. “Generally” “does not give [a party] license to evade the less rigid — although
858 still operative — strictures of Rule 8. * * * And Rule 8 does not empower respondent to plead the
859 bare elements of his cause of action, affix the label ‘general allegation,’ and expect his complaint
860 to survive a motion to dismiss.”

861 Pursuing an amendment for publication would require significant work of the sort that was
862 undertaken after the *Leatherman* decision in 1993 and again after the *Iqbal* decision in 2009. A
863 starting point would be that it is puzzling to insert a qualification of Rule 8(a)(2) as a second
864 sentence in Rule 9(b), without even a cross-reference to Rule 8. Instead, the second sentence is no
865 more than an amelioration of the particular pleading requirement in the first sentence, allowing the
866 condition-of-mind elements of a claim of fraud or mistake to be pleaded generally. On this view,
867 Rule 8(a)(2) has all along governed allegations of malice, intent, knowledge, and other conditions
868 of a person’s mind outside the realm of fraud and mistake. Variations in the general Rule 8(a)(2)
869 standard over time apply to such allegations as intent to discriminate or actual malice in defaming
870 a public figure, but that is a direct consequence of Rule 8(a)(2), not a departure from the existing
871 law concerning the second sentence of Rule 9(b).

872 It bears emphasis that the range of substantive claims (beyond fraud) that might be affected
873 by such an amendment is significant. For example, *Twombly* involved a claim of “conspiracy”
874 under § 1 of the Sherman Act, a concept often translated as “agreement” but without any coherent
875 concept to identify the line between “conscious parallelism” and some more closely convergent
876 states of competitors’ minds. The basis for decision commonly is a detailed set of facts of behavior
877 in the marketplace, not any direct evidence of collusion. Time and again, “agreement” is no more
878 than an inference from such facts. But it is an inference that looks to the state of mind of two or
879 more actors, as inferred from the facts. The *Twombly* complaint included detailed statements of
880 facts, and explicit allegations of conspiracy, but the Court did not find plausible support for the
881 required inference. Unless the antitrust question is answered by ruling that “agreement” requires
882 explicit offer and acceptance, however, how is an allegation of intent — for example, an intent to
883 exclude competition by rivals for incumbent carriers — not an allegation of a condition of mind?
884 How should a new rule for pleading conditions of mind be framed to avoid overruling *Twombly*?

885 One approach to the general proposal might be to examine multiple areas of the law where
886 a claim depends on proving malice, intent, knowledge, or other conditions of a person’s mind,
887 seeking to develop an appropriate pleading standard for each. But if that task seems as
888 unmanageable as a parallel task seemed from 1993 to 2007, which general rule would be better?
889 Whatever practices emerge from adapting the general and highly variable standards of Rule 8(a)(2)
890 as mandated by the Supreme Court? Or a return to a practice that treats as a sufficient allegation
891 of fact a direct averment of “malice,” “intent,” “knowledge,” or some other condition of a person’s
892 mind as required by the substantive claim asserted in the pleading?

919 Though the submission cites examples of recent rulings one might question, the
920 subcommittee discussion suggested that judges know that “people are not mind readers,” and a
921 lawyer noted that in state courts governed by a “fact pleading” standard the judges are realistic
922 about allegations of motive or intent even under that standard.

923 After a thorough discussion of the issues, the subcommittee voted unanimously to
924 recommend that the Advisory Committee remove this item from its agenda, and the Advisory
925 Committee accepted this recommendation without dissent.

926 **III. Matters Carried Forward**

927 **A. Jury Trial: Rules 38, 39, and 81(c)**

928 The procedures for demanding a jury trial have been long on the agenda. They began with
929 a protest by a disappointed litigant that a word change in Rule 81(c) by the 2007 Style Project
930 changed the requirements for demanding a jury trial in an action removed from state court. Rule
931 81(c) gives effect to a demand made in the state court before removal. If a demand was not made
932 before removal, the rule went on: “if the state law ~~does~~ did not require an express demand for jury
933 trial, a party need not make one after removal unless the court orders the parties to do so within a
934 specified time.” “Does not” excused the demand requirement only if state law does not require a
935 demand at any point. The proponent of an amendment argued unsuccessfully in his case that the
936 change to “did not” meant that a demand need not be made after removal, even though state law
937 requires a demand, if the time set by state law for making the demand had not been reached at the
938 time of removal. That argument is undercut by the standard language in the 2007 Committee Note:
939 “These changes are intended to be stylistic only.” The proposed amendment would clearly express
940 the rejected interpretation of the 2007 amendment.

941 Consideration of the proposal led the Committee to begin to study the possibility of
942 simplifying Rule 81(c) by honoring a jury demand made in state court before removal, but
943 requiring a demand under Rule 38 within a specified time after removal in all other cases. This
944 project was reported to the Standing Committee at the June 2016 meeting. Immediately after the
945 meeting, then-Judge Gorsuch and Judge Graber, Standing Committee members, proposed that
946 Rule 38 should be amended, with corresponding changes in Rules 39 and 81, to eliminate the
947 demand requirement. Jury trials would be provided in every case in which there is a constitutional
948 or statutory right to jury trial unless all parties stipulate to a bench trial.

949 Several arguments were advanced to support the proposal. Elimination of the demand
950 requirement would encourage jury trials. “Simplicity is a virtue.” The demand procedure can be a
951 trap for the unwary. Eliminating it would produce greater certainty, and “honors the Seventh
952 Amendment more fully.” And there is no indication of negative experiences in the many states that
953 do not require a specific demand.

Agenda Book, Standing Committee meeting, Jan. 4, 2022, at 170.

954 The Committee concluded at its November 2016 meeting that the proposal to eliminate the
955 demand procedure raises complex questions, both procedural and empirical. The Rules Committee
956 Support Office undertook to organize the first stage of the research, to include “case law, anecdotal
957 reports, academic analysis, and available empirical evidence.” The agenda materials for the April
958 2017 Committee meeting included elaborate drafts of revised Rules 38 and 39 that illustrated
959 different approaches that could be adopted to relax or abandon the demand requirement, with the
960 note that Rule 79(a)(3) -- entry of “jury” on the docket -- might also be reconsidered.

961 There the matter rests. It was restored for active consideration at the Committee’s March
962 meeting. A further pause, however, has come to seem desirable. The Omnibus Budget bill includes
963 directions that the FJC identify jurisdictions that have a high number of jury trials and analyze
964 whether litigation practices, local court rules, or other factors contribute to a higher incidence of
965 jury trials. The project is on a short timeline. The Committee concluded that it is better to defer
966 further consideration of these sensitive questions in order to begin with the lessons to be learned
967 in the FJC study.

968 **B. In forma Pauperis Standards and Procedures**

969 The standards and procedures applied in ruling on motions for leave to proceed in forma
970 pauperis have been on the Committee’s agenda for a while. It has been clear from the beginning
971 that existing practices are the antithesis of uniform standards or procedures. There are manifest
972 opportunities for improvement. The challenge is to decide who is in the best position to meet the
973 challenge. Rules Enabling Act rules, and the procedure for developing them, would encounter
974 severe challenges if they were to become the vehicle of choice. The immediate goal is to survey
975 the field of possible alternative groups that might take up the task.

976 28 U.S.C. § 1915(a)(1) provides that a court may authorize litigation without prepayment
977 of fees or security for fees by “a person who submits an affidavit that includes a statement of all
978 assets such prisoner [sic] possesses that the person is unable to pay such fees or give security
979 therefor.” The statute provides no additional guide for determining whether a litigant is “unable to
980 pay such fees.” The standards applied vary widely from court to court, and often from judge to
981 judge within a single court. The prospect that a uniform national standard might be devised dims
982 on recognizing that a particular level of assets may leave a litigant unable to pay fees that could be
983 paid by a litigant facing quite different living costs in a different section of the country. The
984 sufficiency of any particular level of assets, moreover, can be calculated only after determining
985 the level of competing demands on those assets and the worthiness of those demands. Complex
986 formulas might be devised, but are likely to require frequent adjustment. The capacity of Rules
987 Enabling Act processes to meet these basic challenges is open to doubt.

988 Beyond determining what level of assets is sufficient, it is essential to determine what
989 assets count as assets that a litigant “possesses.” The information that may be required in
990 undertaking this task is illustrated by Form 4 appended to the Rules of Appellate Procedure, a form
991 that the Appellate Rules Committee is studying for possible revision. In its present state, Form 4
992 calls for information about such matters as a spouse’s income from gifts, alimony, child support,
993 and disability payments, and a spouse’s employment history. This form implies substantive

994 judgments that all of these resources count as assets that a litigant possesses. Those judgments are
995 more secure if they can be anchored in unequivocal interpretations of § 1915(a)(1), but a
996 dissatisfied litigant might well challenge any of them. Consider, for example, “child support”
997 received by a spouse, an income stream that may relieve the applicant of an expenditure that might
998 otherwise count in determining what net assets the litigant possesses, but does not seem to count
999 directly as the litigant’s possession. However that may be, difficult judgments are implied by each
1000 of these items and many others. Here again, it is far from clear that Enabling Act rules can provide
1001 sound answers.

1002 These challenges might better be considered by some other group that commands different
1003 sources of information, better resources for evaluating the myriad choices that are implied in
1004 formulating uniform guidance without yet attempting to create specific formulas, and procedures
1005 that enable adjustments faster than can be made under § 2072. The Administrative Office has
1006 formed a working group to study some of these issues. Other Judicial Conference committees,
1007 perhaps the Committee on Court Administration and Case Management, might take an interest.
1008 Before deciding whether it is feasible to even begin its own project, the Committee will seek to
1009 identify potential alternative entities that might take up the task.

1010 **C. Rule 41(a)(1): Partial Dismissals**

1011 Judge Furman suggested that the Committee should study the division of opinions on the
1012 scope of Rule 41(a)(1)(A). This rule provides:

1013 **(1) By the Plaintiff.**

1014 **(A) Without a Court Order.** Subject to Rules 23(e), 23.1(c), 23.2, and
1015 66 and any applicable federal statute, the plaintiff may dismiss an
1016 action without court order by filing:

1017 **(i)** a notice of dismissal before the opposing party serves
1018 either an answer or a motion for summary judgment;
1019 or

1020 **(ii)** a stipulation of dismissal signed by all parties who
1021 have appeared.

1022 Rule 41(a)(1)(B) provides that the dismissal is without prejudice unless the notice or stipulation
1023 states otherwise.

1024 Judge Furman encountered, but was able to avoid answering in the case before him, a
1025 question that has produced divided opinions. Does the right to dismiss “an action” permit dismissal
1026 of only part of the action, or can it be invoked only to dismiss all claims among all parties?
1027

1028 A lengthy research memorandum by Burton DeWitt, the Rules Law Clerk, shows that
1029 although courts are divided, there are clear majority answers to three related questions that can be
1030 identified by simple examples.

1031 The question encountered by Judge Furman arises when one plaintiff advances two claims
1032 against one defendant. The plaintiff seeks to dismiss one of the claims without prejudice, while
1033 continuing the action on the other. Most courts say this cannot be done. The opinions seem to rely
1034 on defining what is “an action,” without exploring the competing policy considerations that might
1035 bear on the answer. The “action” comprises both claims.

1036 A closely related question arises when one plaintiff advances identical claims against two
1037 defendants in a single action. The plaintiff then seeks to dismiss all claims against one defendant
1038 without prejudice, while continuing the action against the other. Here most courts accept this tactic.
1039 There is little indication of efforts to explain why dismissal as to one of two defendants is any
1040 more dismissal of “an action” than dismissal of one of two claims against a single defendant.
1041 Competing policy concerns might well be resolved to support the distinction, but are not apparent
1042 on the face of the word. The research memorandum describes a related question, describing cases
1043 found, without looking for them, that allow a plaintiff to dismiss without prejudice against a
1044 defendant that has not answered or moved for summary judgment, even though another defendant
1045 has done one or the other.

1046 Few courts seem to have faced the third question. Two plaintiffs join in an action to assert
1047 identical claims against a single defendant. One plaintiff seeks to dismiss without prejudice all
1048 claims against the defendant. The research memorandum reports that when courts face this
1049 question, they “have been unanimous in applying the same law to plaintiffs and claimants as they
1050 do to voluntary dismissal of a defendant.” Here too, competing policy concerns may be identified.

1051 The meaning of Rule 41 may be set against the background of Rules 15(a) and 21.
1052 Decisions interpreting Rule 41 frequently observe that a plaintiff can achieve dismissal of a claim
1053 or a defendant by amending the complaint, a tactic that is available once as a matter of course
1054 during the period recognized by Rule 15(a)(1). The preclusion consequences of this tactic may be
1055 difficult to predict. Similarly, it is observed that under Rule 21 the court may drop or add a party
1056 “on just terms.” The terms may direct that dropping a party is with or without prejudice.

1057 A Rule 41(a) project might be extended to include other questions that appear on the face
1058 of the rule. Rule 41(a)(1)(A)(i) cuts off the right to dismiss unilaterally and without prejudice when
1059 the defendant files an answer or a motion for summary judgment. Why not treat a motion to dismiss
1060 in the same way? May there be other litigating events that also should cut off unilateral dismissal
1061 without prejudice because the defendant or the court have made substantial investments in the
1062 action? This possibility as illustrated by *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203
1063 F.2d 105, 108 (2d Cir. 1953), which ruled that the right to dismiss was defeated by an extensive
1064 hearing leading to denial of a preliminary injunction. The court reasoned that literal application of
1065 the rule “would not be in accord with its essential purpose of preventing arbitrary dismissals after
1066 an advanced stage of a suit has been reached.” Other courts have proved reluctant to follow this
1067 lead, stymied by the rule text, but it deserves consideration in a thorough reexamination of the rule.

1068 Similar questions might be asked of Rule 41(c), which applies “this rule” to “dismissal of
1069 any counterclaim, crossclaim, or third-party claim.” To qualify for unilateral dismissal without
1070 prejudice under Rule 41(a)(1)(A)(i), the motion must be made before a responsive pleading is filed
1071 or, if there is no responsive pleading, before evidence is introduced at a hearing or trial. They
1072 should be kept in mind if a comprehensive review of Rule 41(a)(1) is undertaken.

1073 The Committee has concluded that, in the words of one member, “a rule that means
1074 different things to different people should be fixed.” A subcommittee will be appointed when the
1075 competing demands for subcommittee work permit. Alternative approaches will be considered.
1076 The simplest task would be to write rule text that incorporates the answers given by a majority of
1077 the cases by suitable elaboration of “an action.” A more difficult task would be to explore the open-
1078 ended and indeterminate policies that push in opposite directions. On one side lies a plaintiff’s
1079 interest in a second opportunity to pursue claims or defendants that come to seem a poor fit in a
1080 first action. On the other side lies a defendant’s interest in avoiding the burdens of remaining
1081 subject to a second action, perhaps in a less convenient court with a more unfavorable array of
1082 parties after evidence becomes more difficult to muster. No attempt has been made to work through
1083 these concerns or to predict how they might be resolved.

1084 **D. Rule 4**

1085 While it deliberated the drafts that developed into the Emergency Rules 4(e), (h)(1), (i),
1086 and (j)(2) provided by proposed Rule 87(c)(1), the CARES Act Subcommittee considered the
1087 alternative prospect of revising the corresponding general provisions to enable the court to
1088 authorize service of process by alternative methods reasonably calculated to give notice. In the
1089 end, it concluded that this possibility should be deferred until the Committee might undertake a
1090 broader review of Rule 4.

1091 Rule 4 has been the subject of regular suggestions for amendment. Perhaps the most modest
1092 has been to allow a request to waive service to be made by electronic communication, a fitting
1093 complement to the purpose of the waiver procedure to reduce costs. A more ambitious proposal
1094 has been to reduce the Rule 4(i) requirements for serving multiple persons or agencies in actions
1095 involving the federal government or its agencies or employees. It might, for example, be effective
1096 to recognize service on the United States Attorney without requiring the plaintiff also to send
1097 notice to the Attorney General.

1098 Expanded service by electronic means will have to be considered at some time. A modest
1099 beginning is made in the Supplemental Rules for Social Security review actions that the Supreme
1100 Court sent to Congress in April, substituting a notice of electronic filing from the court for Rule 4
1101 service. A similar approach might be taken to service under Rule 4(i) by substituting for service a
1102 court notice of electronic filing sent to appropriate electronic addresses established by the
1103 Department of Justice.

1104 A particular need for service by electronic methods was noted. Plaintiffs increasingly
1105 encounter prospective defendants that have no physical presence or address, that exist only in the

1106 electronic ether. If such an entity could be located “at a place not within any judicial district of the
1107 United States,” Rule 4(f)(3) can be, and has been, invoked by court order for electronic service. A
1108 similar order may be entered outside Rule 4(f)(3), but this practice is subject to reasonable
1109 challenges.

1110 The Committee concluded that important questions surround Rule 4. They will be
1111 explored, but at a time when competing demands on Committee resources permit a commitment
1112 of the substantial efforts of a new subcommittee. The most urgent question may be the problem of
1113 intangible entities without location or address, but for the moment it may suffice to rely on creative
1114 development under, or somehow alongside, current Rule 4.

1115 **E. Rule 5(d)(3)(B): Expanded pro se e-filing**

1116 Civil Rule 5(d) was amended as part of an all-committees process in 2018 to “recognize[]
1117 increased reliance on electronic filing.” The Committee Note went on to explain the provisions of
1118 Rule 5(d)(3)(B)(i), which permit a person not represented by an attorney to file electronically “only
1119 if allowed by court order or by local rule.” The Note observed that “[i]t is not yet possible to rely
1120 on an assumption that pro se litigants are generally able to seize the advantages of electronic
1121 filing.” This conclusion was reached with some regret after reflecting on the advantages that
1122 electronic filing provides for the filer, all other parties, and the court.

1123 Experience during the Covid-19 pandemic led some courts to expand opportunities for
1124 electronic filing by unrepresented parties. Distinctions often were drawn between case-initiating
1125 filings and later filings. It was rather common to accept electronic filing only by means other than
1126 direct access to the court’s ECF system. Email filings were a frequent choice, relying on the clerk’s
1127 office to utilize a method of entering the filings into the ECF system that reduces concerns about
1128 contaminating the system with malign computer intrusions.

1129 The FJC has undertaken a comprehensive survey of current practices. The reporters for all
1130 the advisory committees met in March to learn and discuss the preliminary results. They will meet
1131 soon again to consider the final report and to open the question whether the time has come to
1132 modify the present rules. It seems likely that the focus will be on the possibility of expanding
1133 opportunities for electronic filing by unrepresented parties, without reconsidering the provisions
1134 in all the rules that, like Civil Rule 5(d)(3)(B)(ii), require an unrepresented person to file
1135 electronically “only by court order, or by a local rule that includes reasonable exceptions.”

1136 **F. Rule 55: The Clerk “Must”**

1137 Questions about the duties Rule 55 imposes on court clerks to enter defaults and default
1138 judgments came to the Committee informally by questions from judges in courts that have shifted
1139 some of these duties to the court.

1140 Rule 55(a) directs that when a party “has failed to appear or otherwise defend, and that
1141 failure is shown by affidavit or otherwise, the clerk must enter the party’s default.” “Must” was
1142 inserted into the rule text by the 2007 Style Project as one of many decisions on how to substitute

1143 a different word of command for the ubiquitous but now forbidden “shall.” It appears that at least
1144 on occasion some courts require that the default be entered by the court. This practice may reflect
1145 concerns that determining whether a named party has in fact been served, or has failed to
1146 “otherwise defend,” may involve more than simple ministerial tasks.

1147 Rule 55(b) similarly directs that the clerk “must” enter a default judgment against a
1148 defendant who has been defaulted for not appearing at the request of a plaintiff whose claim is for
1149 a sum certain or a sum that can be made certain by computation, if the request is supported by an
1150 affidavit showing the amount. Some courts, perhaps many, require that only a judge may enter a
1151 default judgment. There may be powerful reasons to shift this responsibility to the court.
1152 Determination of what is a sum certain, either or on its face or as made certain by computation,
1153 may involve uncertain questions of law, or an affidavit that seems to omit facts the law requires
1154 for the computation. It may be desirable as well to protect the clerk against well-established
1155 practices that intersect the rule text. If one of two defendants is defaulted for failure to appear, for
1156 example, but another defendant remains to litigate common questions on the merits, a default
1157 judgment may not be entered.

1158 The FJC has agreed to undertake a study of default practices. One goal will be to map the
1159 actual division of authority between clerk and court across many districts. A more ambitious goal
1160 will be to explore the reasons for such departures of practice from rule text as may be found. The
1161 experience and concerns that underlie the departures will provide an important foundation for the
1162 next step in considering possible amendments.

1163 **G. Rule 63: Recalling Witnesses for Successor Judge**

1164 Rule 63 allows another judge to proceed when a judge conducting a hearing or trial is
1165 unable to proceed. The second sentence reads:

1166 In a hearing or nonjury trial, the successor judge must, at a party’s request, recall
1167 any witness whose testimony is material and disputed and who is available to testify
1168 again without undue burden.

1169 This sentence was brought to the Committee by a suggestion that the rule text be amended
1170 to reflect the proposition that the availability of a video transcript of the witness’s testimony may
1171 dispel any need to recall the witness.

1172 Discussion of this proposal at the October 2021 Committee meeting recognized that Rule
1173 63 includes many opportunities to turn the discretionary decision whether to recall a witness on a
1174 pragmatic assessment of the circumstances of a particular hearing or trial. Many issues presented
1175 by the multifarious events that qualify as “hearings,” for example, are likely to be quite different
1176 from the issues presented by a “trial” on the merits. At the same time, some committee members
1177 expressed concern that the rule text may be applied more narrowly than should be. Further research
1178 was requested.

1179 Research into the cases that apply Rule 63 was not completed in time for consideration in
1180 March. The topic will return to the agenda next October.

1181 **H. Rule 73(b)(1): Protecting Against Disclosure of Consent to Proceed Before a**
1182 **Magistrate Judge**

1183 Rule 73(b)(1) directs that a district judge or magistrate judge may be informed of a party's
1184 response to the clerk's notice of the opportunity to proceed before a magistrate judge only if all
1185 parties consent to the referral. This rule implements 28 U.S.C. § 636(c)(2), which directs that rules
1186 of court for referring civil matters to magistrate judges shall include procedures to protect the
1187 voluntariness of the parties' consent. The proposal observes that in some courts the CM/ECF
1188 system automatically sends notice of each party's consent as it is filed, automatically violating
1189 Rule 73(b)(1).

1190 This is not a new problem. It was carried forward from the April 2019 Committee meeting
1191 "pending examination of the opportunities to adjust operation of the CM/ECF system." Some
1192 number of districts have developed local practices that prevent premature disclosure to a judge of
1193 individual consents to proceed before a magistrate judge. An effective approach has been to refuse
1194 to accept a consent for filing unless it is signed by all parties. The process may be expedited by
1195 issuing the consent form to the plaintiff, who can solicit consents from other parties if the plaintiff
1196 chooses to consent.

1197 The difficulty does not seem to lie in Rule 73, but rather in failure to attend to what may
1198 or may not be the inexorable operation of the CM/ECF system, current or "next gen." The
1199 Committee will undertake further inquiry, inviting committee members to explore practices in
1200 their own districts and asking the Federal Magistrate Judges Association for further information.

1201 **IV. Matters Removed from Agenda**

1202 All of the following items were discussed and removed from the agenda without dissent.

1203 21-CV-F: Briefs Amicus Curiae. This proposal would adopt a new Civil Rule to establish standards
1204 and procedures for filing amicus curiae submissions in the district courts. It was briefly discussed
1205 at this Committee's October meeting and was extensively discussed in the Standing Committee
1206 last January, in conjunction with issues arising under Appellate Rule 29. It was extensively
1207 discussed again at the March meeting, building on the discussion last January.

1208 The proposal suggests that amicus curiae briefs are filed far less frequently in district courts
1209 than in the courts of appeals. The result is that many districts have no clear procedures or standards
1210 to guide those who wish to file an amicus brief. The proposal was submitted by lawyers at a large
1211 firm who regularly file amicus briefs all around the country and who would benefit from the
1212 guidance provided by a uniform national rule. The proposal includes a draft drawn from a local
1213 rule in the District for the District of Columbia and Appellate Rule 29.

1214 It was recognized that amicus briefs may provide perspectives and analysis different from
1215 the presentations made by the parties. The brief may prove to be a true friend of the court and
1216 support a better-informed decision. A district court decision, although not formally precedent in a

1217 hierarchical concept of precedent, may influence other courts, and in some circumstances -- such
1218 as the now hotly debated “nationwide injunction” -- may have an impact on nonparties far greater
1219 than the precedential impact of many appellate decisions. Amicus practice can provide valuable
1220 assistance in a district court and to the law, just as in an appellate court.

1221 The analogy to Appellate Rule 29, however, may prove uncertain. The risk that an amicus
1222 filing may lead to recusal of the only judge assigned to the case in a district court seems real.
1223 Beyond that, the parties have roles in the district court that are quite different from their roles on
1224 appeal. They frame the issues of claim and defense, often choosing among potential theories for
1225 maximum adversary advantage. They investigate the facts, independently and through discovery,
1226 tailoring the inquiry to the needs of the case as they wish to present it. The different perspectives
1227 offered by an amicus may disrupt the litigation as it would be conducted by the parties, interjecting
1228 new issues. At times, indeed, an amicus may attempt to advance facts not supported by the record
1229 made by the parties. One ploy, noted in the Standing Committee discussion, may be to suggest that
1230 the court take judicial notice of facts not in the record. There is a risk that the court’s decision will
1231 provide an unsatisfactory resolution of the parties’ dispute by shifting the focus of litigation to
1232 tangential issues.

1233 20-CV-G: Court Review of all Actions for Claim Stated. This proposal was to adopt a new Rule
1234 11(e) that would apply to all civil actions the procedure provided by 28 U.S.C. § 1915(e)(2)(B)(ii)
1235 that calls on the court to dismiss an action seeking i.f.p. status if the action “fails to state a claim
1236 on which relief may be granted.” Variations that would confine the rule to some nature of suit
1237 categories are included. The same proposal included a new Appellate Rule 25.1, a suggestion that
1238 has been rejected by the Appellate Rules Committee.

1239 20-CV-CC: Rule 7.1: “Two copies.” Rule 7.1 now requires that a party file two copies of a
1240 disclosure statement. This suggestion that electronic case filing systems obviate the need for two
1241 copies anticipated the deletion of the two copies requirement in the amended version of Rule 7.1
1242 transmitted by the Supreme Court to Congress this April.

1243 21-CV-K, Rule 4: Actual Knowledge, not Service: This proposal urges that since the purpose of
1244 service of process is to give a defendant notice that an action has been filed, service need not be
1245 made on a party that has actual knowledge of the action and either possesses a copy of the
1246 complaint or has PACER access to it. Several difficulties appear. Determining whether a defendant
1247 had actual knowledge will often be difficult. And there are technical problems, involving such
1248 matters as integration with the time-to-serve provisions in Rule 4(m) and the event that triggers
1249 the time for removal from a state court.

1250 21-CV-M: Set Time to Decide: This proposal urged that both Civil and Appellate Rules be adopted
1251 to require that all potentially dispositive motions be decided within a set period after final
1252 submissions are due. The proposal suggests that a period of 30 days, or 60 days, or even 90 days
1253 might be suitable. Time limits of this sort have an unavoidable and inflexible impact on managing
1254 suitable docket priorities for matters that compete for the court’s attention. They have long been
1255 resisted. The Appellate Rules Committee has already rejected this proposal.

1256 21-CV-X: Expanded Initial Disclosures: This proposal, drawing from dissatisfaction with practice
1257 under the initial disclosure provisions of Rule 26(a)(1)(A)(i), suggests that required initial
1258 disclosures be expanded to include a summary of the facts and lay opinions that each “witness”
1259 will provide. It would be difficult to integrate the time for such “initial” disclosures to the progress
1260 of an action. The FJC study of the initial mandatory discovery pilot projects, nearing completion,
1261 will provide a more secure foundation for reconsidering mandatory initial disclosure practice.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE¹**

1 **Rule 15. Amended and Supplemental Pleadings**

2 **(a) Amendments Before Trial.**

3 (1) *Amending as a Matter of Course.* A party
4 may amend its pleading once as a matter of
5 course ~~within~~ no later than:

6 (A) 21 days after serving it, or

7 (B) if the pleading is one to which
8 a responsive pleading is required, 21
9 days after service of a responsive
10 pleading or 21 days after service of a
11 motion under Rule 12(b), (e), or (f),
12 whichever is earlier.

13 * * * * *

Committee Note

Rule 15(a)(1) is amended to substitute “no later than”
for “within” to measure the time allowed to amend once as a

¹ New material is underlined in red; matter to be omitted is
lined through.

2 FEDERAL RULES OF CIVIL PROCEDURE

matter of course. A literal reading of “within” would lead to an untoward practice if a pleading is one to which a responsive pleading is required and neither a responsive pleading nor one of the Rule 12 motions has been served within 21 days after service of the pleading. Under this reading, the time to amend once as a matter of course lapses 21 days after the pleading is served and is revived only on the later service of a responsive pleading or one of the Rule 12 motions. ~~[The amendment could not come “within” 21 days after the event until the event had happened.]~~ There is no reason to suspend the right to amend in this way. “No later than” makes it clear that the right to amend continues without interruption until 21 days after the earlier of the events described in Rule 15(a)(1)(B).

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE¹**

1 **Rule 72. Magistrate Judges: Pretrial Order**

2 * * * * *

3 **(b) Dispositive Motions and Prisoner Petitions.**

4 (1) *Findings and Recommendations.* * * * The
5 magistrate judge must enter a recommended disposition,
6 including, if appropriate, proposed findings of fact. The
7 clerk must ~~promptly mail~~immediately serve a copy ~~to~~on each
8 party as provided in Rule 5(b).

9 * * * * *

Committee Note

Rule 72(b)(1) is amended to permit the clerk to serve a copy of a magistrate judge’s recommended disposition by any of the means provided in Rule 5(b). [~~Service of a notice of entry of judgment under Rule 5(b) is permitted by Rule 77(d) as well.~~]

¹ New material is underlined in red; matter to be omitted is lined through.

TAB 5B

DRAFT MINUTES

**CIVIL RULES ADVISORY COMMITTEE
MARCH 29, 2022**

1 The Civil Rules Advisory Committee met in San Diego,
2 California, on March 29, 2022. One member and consultants
3 participated by remote means. The meeting was open to the public.
4 Participants included Judge Robert Michael Dow, Jr., Committee
5 Chair, and Committee members Judge Cathy Bissoon; Judge Jennifer
6 C. Boal; David J. Burman, Esq.; Judge David C. Godbey; Judge Kent
7 A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi (by remote
8 means); Judge R. David Proctor; Judge Robin L. Rosenberg; Joseph
9 M. Sellers, Esq.; Dean A. Benjamin Spencer; Ariana Tadler, Esq.;
10 and Helen E. Witt, Esq. Professor Edward H. Cooper participated as
11 Reporter, and Professor Richard L. Marcus participated as
12 Associate Reporter. Judge John D. Bates, Chair (by remote means);
13 Professor Catherine T. Struve, Reporter; Professor Daniel R.
14 Coquillet, Consultant (by remote means); and Peter D. Keisler,
15 Esq., represented the Standing Committee. Professor Daniel J.
16 Capra, Reporter for the Evidence Rules Committee, participated by
17 remote means. Judge Catherine P. McEwen participated by remote
18 means as liaison from the Bankruptcy Rules Committee. Carmelita
19 Reeder Shinn, Esq., participated as Clerk Representative. The
20 Department of Justice was represented by Joshua E. Gardner, Esq.,
21 who noted that Hon. Brian M. Boynton could not attend because of
22 international travel. Bridget M. Healy, Esq., S. Scott Myers, Esq.,
23 and Burton DeWitt, Esq. (Rules Law Clerk), and Brittany Bunting
24 represented the Administrative Office. Dr. Emery G. Lee
25 represented the Federal Judicial Center.

26 Members of the public who joined the meeting by remote means
27 are identified in the attached Teams attendance list.

28 Judge Dow opened the meeting with messages of thanks and
29 welcome. He began with thanks to the staff at the Administrative
30 Office who, although shorthanded, did flawless work in arranging
31 meeting logistics and in assembling and disseminating the agenda
32 materials.

33 Judge Dow further expressed great pleasure in having the first
34 in-person meeting since October 2019, and the opportunity to renew
35 acquaintances in the casual committee dinner before the meeting.
36 The remote participants in today's meeting also were welcomed.

37 Four new members have joined the Committee since the most
38 recent in-person meeting: Judges Bissoon, Godbey, and Proctor, and
39 lawyer Burman. Clerk representative Shinn also is new. All have

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40 participated in remote meetings, but it is good to welcome them in
41 person.

42 Two members will be leaving the Committee. Judge Lioi has
43 completed her appointed terms. She has contributed greatly to
44 Committee work, including serving as chair of the subcommittee
45 that generated the pending Supplemental Rules for Social Security
46 cases and another that studied the proposal to amend Rule 9(b) to
47 be discussed later in this meeting. Judge Lioi responded: "It's
48 been a pleasure. I miss you. Keep up the good work." Justice Lee
49 will soon retire from the Utah Supreme Court. He has contributed
50 valuable perspectives on many issues.

51 Another departure was noted. Julie Wilson has left the Rules
52 Committee Support Office to join a firm in private practice. Her
53 unflagging work with the Committee made it seem that she had no
54 other committees to work with.

55 Judge Dow also noted extensive public attendance at this
56 meeting, and welcomed it. "Transparency is our hallmark, and we
57 much appreciate your interest and observation, as well as those
58 who have offered advice and even created programs for the Committee
59 in between meetings."

60 Judge Dow reported on the January 22 Standing Committee
61 meeting. The proposal to publish an amendment of Rule 12(a)(1),
62 (2), and (3) was approved. Most of the discussion focused on the
63 work of the MDL Subcommittee. Standing Committee members, both
64 judges and lawyers, have a lot of MDL experience, and provided
65 valuable feedback. Other parts of this Committee's work were
66 summarized and covered quickly.

67 The Civil Rules "were not high on the agenda" of the March
68 meeting of the Judicial Conference. There were other pressing
69 topics that absorbed their attention.

70 Judge Dow also reviewed the prospective effective dates for
71 Civil Rules amendments that may take effect on December 1 in 2022,
72 2023, and 2024.

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73 *Legislative Update*

74 Burton DeWitt provided a legislative update on pending
75 legislation. Among other topics, he noted that the House has passed
76 a bill that would require the Judicial Conference to promulgate
77 rules to ensure the expeditious treatment of actions to enforce
78 Congressional subpoenas. The amendments would have to be
79 transmitted within 6 months of the effective date of the bill.

80 *October 2021 Minutes*

81 The draft Minutes for the October 5, 2021 Committee meeting
82 were approved without dissent, subject to correction of
83 typographical and similar errors.

84 *Rule 87*

85 Prompted in part by the CARES Act call for consideration of
86 rules that might apply during an emergency declared by the
87 President, all five advisory committees considered the prospect
88 that special emergency rules provisions might be important. The
89 Evidence Rules Committee decided that all of the Evidence Rules
90 are fully adaptable to any emergency circumstances that might be
91 imagined. The Appellate, Bankruptcy, Civil, and Criminal Rules
92 Committees all appointed subcommittees and devoted great effort
93 through the spring and summer of 2020 to begin the process.
94 Recognizing that it is important to achieve as much uniformity as
95 possible among these four sets of rules, Professor Capra, Reporter
96 for the Evidence Rules Committee, and Professor Struve, Reporter
97 for the Standing Committee, undertook active work to coordinate
98 deliberations by the four subcommittees and committees. Much
99 uniformity was achieved in the initial stages, and still greater
100 uniformity was hammered out in refining the proposals that were
101 published for comment in August 2021.

102 The CARES Act Subcommittee began by reviewing all of the Civil
103 Rules to determine which might work to impede the effective
104 administration of civil litigation during an emergency. Early
105 experience during the Covid-19 pandemic showed that the Civil Rules
106 were working well. The rules have been drafted over the years with
107 a purpose to avoid detailed mandates, relying instead on general
108 provisions that set outer limits, identify purpose and direction,
109 and depend on flexible administration by parties and the courts.

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110 That guiding purpose has been tested by the pandemic and the rules
111 have succeeded in almost surprising ways. The Subcommittee
112 eventually hammered out a proposal that depended not on experience
113 of rules failures but on identifying potential roadblocks that
114 appear on the face of the rules. Judge Dow noted special thanks to
115 member Sellers for painstakingly reading through all the rules to
116 identify potential obstacles and then reduce the number by careful
117 analysis.

118 Rule 87 was published with many provisions common to all four
119 sets of rules. It authorizes the Judicial Conference to declare a
120 Civil Rules Emergency and, in the declaration, to adopt all of the
121 emergency rules identified in Rule 87(c) unless the declaration
122 excepts one or more of them. The declaration must designate the
123 court or courts affected, must be limited to a stated period of no
124 more than 90 days, and may be terminated before the stated period
125 expires. Additional declarations may be made.

126 The Emergency Rules included in Rule 87(c) supplement five
127 provisions in Rule 4 and one provision in Rule 6. The Emergency
128 Rules 4 all provide that the court may order service of process by
129 any method that is reasonably calculated to give notice. Emergency
130 Rule 6(b)(2) supersedes the provision in Rule 6(b)(2) that
131 absolutely forbids any extension of the times to make post-judgment
132 rules set by Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and
133 60(b). Somewhat different provisions are made for completing an
134 act authorized under Emergency Rules 4 and 6 after the declaration
135 of a rules emergency ends. The provisions of Rule 6(b)(2) are
136 carefully drafted to integrate with the time-to-appeal limits set
137 by Appellate Rule 4.

138 Judge Jordan introduced the report of the CARES Act
139 Subcommittee by thanking Professors Capra and Struve for their
140 valuable work in enhancing uniformity among the different sets of
141 rules, both before publication and during the period that led up
142 to the present consideration of recommendations to adopt the
143 proposed rules.

144 Some of the comments, although supporting the published
145 proposal, suggest that emergency provisions should be added either
146 by way of more Emergency Rules incorporated in Rule 87(c) or by
147 amending the regular rules. These suggestions draw from fear that
148 the regular rules may not prove adequate to the challenges that

149 could arise from future emergencies unlike the present pandemic.
150 The Subcommittee, however, remains persuaded that the rules are
151 sufficiently flexible to provide all appropriate authority. This
152 view is clearly expressed in the Committee Note.

153 Professor Capra observed that "We're in a good place on
154 uniformity." The differences that remain among the several
155 emergency rules "are easily explained." Professor Struve added to
156 the expressions of thanks for Professor Capra's leadership in the
157 efforts to achieve uniformity.

158 Professor Marcus noted that the Subcommittee had considered
159 the prospect that the provision for court-ordered alternative
160 methods of service in the Emergency Rules 4 might instead be added
161 to the corresponding provisions of Rule 4. When the Committee comes
162 to review Rule 4 some day, this provision will be among the
163 possible amendments.

164 A member asked whether the definition of a rules emergency is
165 too narrow because it focuses on the court's ability to perform
166 its functions without considering the emergency's impact on the
167 parties. If the parties cannot function, the court cannot function.
168 This problem was discussed among the several subcommittees while
169 hammering out the uniform definition. The decision was to exclude
170 it from rule text. But the second paragraph of the Committee Note
171 says that the definition of an emergency is flexible, adding: "The
172 ability of the court to perform its functions in compliance with
173 these rules may be affected by the ability of the parties to comply
174 with a rule in a particular emergency." An example is offered --
175 a court may remain open for business, but an emergency may prevent
176 the parties from coming to it. Another example would be an
177 emergency that disables the parties from complying with a
178 scheduling order.

179 A second question asked whether Rule 87(b)(1)(B) is too
180 confining. It provides that a declaration of a civil rules
181 emergency must adopt all of the Emergency Rules in Rule 87(c)
182 "unless it excepts one or more of them." Why not provide authority
183 to adopt one of them with restrictions? The Subcommittee concluded
184 that the Judicial Conference could not fairly be charged with a
185 responsibility to engage in such fine-grained analysis during an
186 emergency. As the rule stands, the Conference can, for example,
187 decide to adopt the Emergency Rule 4(h)(1) that allows the court

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188 to order a different method of service on a corporation,
189 partnership, or unincorporated association, while not adopting
190 Emergency Rule 4(e) that would allow an order for a different
191 method of serving an individual. Attempting to further narrow the
192 range of methods of service that a court might order under an
193 Emergency Rule would not be feasible. Beyond the difficulty of
194 identifying the impact of the emergency on any particular court
195 included in the definition, too much would depend on the nature of
196 the lawsuit, the character of the parties, the availability of
197 different potential means of service, and perhaps other variables.
198 The prospect of adding "restrictions" to Emergency Rule 6(b)(2) is
199 still less persuasive. The court would retain broad discretion to
200 refuse any extension of time for any post-judgment motion and to
201 define the time for any motion that might be permitted. This
202 provision, further, is tightly integrated with the provisions that
203 govern appeal time under Appellate Rule 4.

204 The remaining discussion addressed several aspects of the
205 Committee Note. The Committee approved an addition to the part
206 that addresses Emergency Rules 4, advising that the court "should
207 explore the opportunities to make effective service under the
208 traditional methods provided by Rule 4, along with the difficulties
209 that may impede effective service under Rule 4. Any means of
210 service authorized by the court must be calculated to fulfill" the
211 fundamental role of service in providing notice of the action.

212 Three other issues involved portions of the Note published in
213 brackets. The brackets were designed to invite comments on these
214 portions, but no comments were received. (1) The final long
215 sentence at the end of the paragraph that explains integration of
216 Emergency Rule 6(b)(2) with Rule 6(b)(1)(A) at page 135 of the
217 agenda materials discusses the circumstances in which Rule 6(b)(2)
218 might authorize an extension of time to make a Rule 60(b) motion.
219 The sentence is intended to explain a complicated issue at the
220 interface of Rule 60(b), Emergency Rule 6(b)(2), and Appellate
221 Rule 4. But it seems better removed. A party confronting such a
222 question cannot be spared the work of careful analysis of these
223 rules. And a party not familiar with these intricacies could easily
224 be confused by this attempt to help. The Committee voted to delete
225 this sentence. (2) The paragraph on item 6(b)(2)(B)(i) at page 136
226 of the agenda materials includes a second sentence advising that
227 a court should act as promptly as possible on a motion to extend
228 the time for a post-judgment motion. This sentence is gratuitous

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229 advice to courts that will understand the competing needs for
230 careful deliberation and prompt disposition. The Committee voted
231 to delete it. (3) The final sentence of the paragraph on the
232 provisions for resetting appeal time that runs from pages 136 to
233 137 notes that under the parallel amendment of Appellate Rule
234 4(a)(4)(A)(vi), a timely motion for relief under Rule 60(b) that
235 is made after the time allowed for a motion under Rule 59 "supports
236 an appeal from disposition of the Rule 60(b) motion, but does not
237 support an appeal from the [original] final judgment." "Original"
238 is meant to remind the parties that complete disposition of a Rule
239 60(b) motion is appealable as a final decision, but does not of
240 itself support appeal from the judgment challenged by the motion.
241 The Committee concluded that this reminder of this distinction may
242 be helpful and voted to delete the brackets.

243 The Committee voted without dissent to recommend Rule 87 for
244 adoption. Judge Dow was joined by Judge Bates in offering thanks
245 and appreciation to Judge Jordan, the CARES Act Subcommittee,
246 Professors Capra and Struve, and the Reporters for their hard and
247 careful work and achievement of as much uniformity as possible
248 with the parallel rules proposed by other advisory committees.

249 *Rule 12(a)(4)(A)*

250 Judge Dow reminded the Committee that the proposal to amend
251 Rule 12(a)(4) came from the Department of Justice. Rule 12(a)(4)(A)
252 sets the time to serve a responsive pleading at 14 days after the
253 court denies a motion under Rule 12 or postpones its disposition
254 until trial. The court can set a different time. The proposal would
255 extend the time to 60 days "if the defendant is a United States
256 officer or employee sued in an individual capacity for an act or
257 omission occurring in connection with duties performed on the
258 United States' behalf."

259 The Committee unanimously recommended publication for
260 comment. Only three comments were received after publication in
261 August 2020. Two of the comments protested that the proposal would
262 further delay the progress of actions by victims of unlawful law
263 enforcement behavior, actions already burdened by official
264 immunity defenses. Committee discussion in April 2021 took these
265 issues seriously. Motions were made to shorten the time to some
266 interval less than 60 days, or to limit whatever extended time
267 might be allowed to actions that include an official immunity

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268 defense. Each motion won significant support, but failed. A motion
269 to recommend adoption was approved by a vote of ten for and five
270 against.

271 The questions raised in the Committee's discussion were
272 explored at length in the Standing Committee in June 2021. The
273 outcome was agreement that this Committee should press for further
274 empirical information to illuminate the arguments that have been
275 made to support the proposal.

276 The empirical questions were renewed and expanded at the
277 Committee meeting in October 2021. They surround the reasons
278 advanced to support the proposal. The Department reports that the
279 complexities of the decision whether to represent a federal agent
280 sued in an individual capacity, coupled with the Department's many
281 other obligations and the inherent complexity of the questions
282 raised by many individual-capacity actions, make it inherently
283 more difficult to prepare a responsive pleading within the general
284 14-day period. These general problems are aggravated in the many
285 cases that include an official immunity defense. An order denying
286 a motion to dismiss that raises an official immunity defense is
287 eligible for immediate appeal under the collateral-order doctrine.
288 The decision whether to appeal, however, is more complicated for
289 the Department than it might be for a private attorney. The
290 Department should authorize an appeal only when there are good
291 reasons to hope for reversal, recognizing that a motion to dismiss
292 on the pleadings may provide an unsatisfactory basis for resolving
293 immunity issues that might better be resolved by motion for summary
294 judgment. An appeal on the pleadings might lead to questionable
295 rulings on the law because the "record" provided by the pleadings
296 is uncertain, and to rulings -- and the delays of appeals -- that
297 are unnecessary because the facts are not as they appear in the
298 pleadings. Any appeal, moreover, must be approved by the Solicitor
299 General, a process that requires all of the 60-day appeal period
300 provided by Appellate Rule 4(a)(1)(B)(iv).

301 These concerns were amplified by observing that the
302 Department routinely asks for an extension of the time to file a
303 responsive pleading in these cases, and regularly wins an
304 extension. An extension to sixty days is common. The Department,
305 however, must proceed to prepare a responsive pleading until it
306 knows whether an extension will be granted. The Department suggests
307 that a pleading prepared within 14 days will not be as useful as

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308 one prepared with greater time. And if the motion to extend has
309 not been resolved and the answer has been filed within 14 days, it
310 may become necessary to launch other pretrial proceedings, even at
311 times to begin discovery. These activities defeat the purpose of
312 the doctrine that permits appeal from denial of the motion to
313 dismiss.

314 These explanations were focused in Committee discussion as a
315 choice between competing "presumptions" that might be embodied in
316 the rule. Given the court's authority to set a longer period than
317 14 days under the rule, or to set a shorter period than 60 days
318 under the proposed amendment, which is better? If indeed courts
319 regularly recognize the need for more time than 14 days, adopting
320 the 60-day period could avoid the burden motions to extend impose
321 on the court and parties. But if practice suggests that extensions
322 are not routinely justified, the 14-day period may be appropriate
323 still. So too it would be good to know how many cases involve
324 official immunity defenses and how often appeals are taken from
325 denials of motions to dismiss.

326 The empirical questions raised by these uncertainties were
327 distilled through the successive discussions in this Committee and
328 the Standing Committee. How frequently does the Department seek an
329 extension of the time to respond? How frequently are extensions
330 granted? How long are the extensions that are granted? How many
331 individual-capacity actions raise official immunity defenses? What
332 is the rate of orders denying the defense? How often are appeals
333 taken from denial of an immunity defense on the pleadings?

334 The Department of Justice has worked diligently to develop
335 empirical information to answer these questions. It has been able
336 to identify the number of individual-capacity actions in which it
337 has provided a defense. Over the period from 2017 to 2021 the
338 number has ranged from a low of 1,226 in 2017 to a high of 2,028
339 in 2021. But it has not been able to move beyond strong anecdotal
340 evidence to more precise empirical answers to the questions raised
341 by the Committees. Given the Department's structure, moreover, it
342 would be at best truly difficult to devise a program for generating
343 the necessary information for future years.

344 In response to a question about what had seemed to be a
345 Department suggestion that the proposal should be withdrawn, the
346 Department continues to believe that the reasons that supported

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347 its initial proposal are sound. It would welcome a Committee
348 decision to recommend adoption of the proposal as published. But
349 it respects the Committee's desire for better empirical
350 information that cannot be obtained. The Department believes that
351 it would be better not to recommend adoption of any revised version
352 that would provide fewer than 60 days to respond, or limit an
353 extended period to cases that include some nature of official
354 immunity defenses.

355 Discussion began with the observation that extending the
356 period to any of the times less than 60 days that were suggested
357 in earlier discussions, ranging from 30 to 35 to 45 days, could
358 make it more difficult to get an extension running beyond the
359 stated time.

360 Another observation was that the proposal has been resisted
361 on grounds beyond the lack of clear answers to the empirical
362 questions. There is some measure of resentment about rules that
363 give the United States advantages compared to other parties -- why
364 should state governments not enjoy comparable treatment to
365 alleviate comparable difficulties? Why exacerbate the difficulties
366 and delays encountered by plaintiffs who confront official
367 immunity defenses?

368 The direction of the discussion led a committee member to ask
369 whether there is a difference between tabling a proposal and
370 removing it from the agenda? A first response was that if the
371 reason for tabling would be to afford the Department more time to
372 develop more precise empirical information, tabling makes sense if
373 there is a prospect that the information can be developed in the
374 reasonably near future.

375 A motion was made to remove the proposal from the agenda
376 without prejudice. The Department knows the Committee's concerns
377 and can renew the proposal when it believes it can present better
378 information to address those concerns. The motion was adopted
379 without dissent.

380 The Committee will recommend that the Standing Committee not
381 approve the published proposal for adoption.

382 Judge Dow thanked the Department for its diligent efforts to
383 develop information to address the Committee's concerns.

384 *Rule 15(a)(1)*

385 The proposal to amend Rule 15(a)(1) published in August 2021
386 addressed an infelicitous choice of words that was not caught in
387 the Style Project. The rule allows amendment of a pleading once as
388 a matter of course "within" (A) 21 days after serving the pleading
389 or, (B) if a responsive pleading is required, 21 days after service
390 of a responsive pleading or service of a motion under Rule 12(b),
391 (e), or (f), whichever is earlier. Read literally, "within" creates
392 a gap that may defeat an amendment as a matter of course during a
393 dead period between 21 days after serving the pleading and 21 days
394 after service of a responsive pleading or one of the designated
395 Rule 12 motions. An easy illustration is provided by an action in
396 which a responsive pleading is due 60 days after service, see Rule
397 12(a)(2) and (3). The time for calculating a period that begins
398 "within" a stated time after an event begins with the event. So
399 the pleading cannot be amended as a matter of course between 21
400 days after serving the initial pleading until service of a
401 responsive pleading or Rule 12 motion starts the additional 21-
402 day period. This result makes no sense. It might be hoped that no
403 one would pause to take it seriously. But litigants who read the
404 rule carefully have been troubled.

405 The published proposal offers a simple correction. "Within"
406 is deleted and replaced by "no later than."

407 There were few public comments. They offered either support
408 or unpersuasive additional suggestions.

409 Brief discussion agreed to simplify the Committee Note by
410 deleting a sentence that was published in brackets, as it appears
411 at lines 702-703 of the agenda materials: "The amendment could not
412 come 'within' 21 days after the event until the event happened."
413 This sentence offers an unnecessary elaboration of the explanation
414 offered by the Note.

415 The Committee voted without dissent to recommend the proposal
416 for adoption, with deletion of the designated sentence in the
417 Committee Note.

418 *Rule 72(b)(1)*

419 The proposal to amend Rule 72(b)(1) was published in August
420 2021. The rule now directs the clerk to "promptly mail" a copy of
421 a magistrate judge's recommended disposition to each party. The
422 amendment would direct the clerk to "immediately serve a copy on
423 each party as provided in Rule 5(b)." Rule 5(b) includes provisions
424 for electronic service that are more convenient and usually more
425 effective than mail.

426 The proposal was presented for a recommendation to adopt as
427 published after deleting the second sentence in the Committee Note.
428 This sentence observed that service of notice of entry of an order
429 or judgment under Rule 5(b) is permitted by Rule 77(d)(1) and works
430 as well. This sentence was designed as a guide for public comment,
431 but it was not needed to explain the amendment.

432 Discussion began with one of the small number of public
433 comments. This comment observed that often mail is the only means
434 of providing notice to a party who is in prison. Rule 5(b) allows
435 mail service. Court clerks are familiar with the need for care in
436 selecting means of notice to prisoners, and will recognize the
437 circumstances that require service by mail. And it does not make
438 sense to make mail the exclusive means of service on prisoners.
439 Parallel questions are being explored in the all-committees
440 project to consider possible expansions of the opportunities for
441 electronic filing by pro se litigants. So here, some courts are
442 eagerly exploring development of systems that will facilitate
443 electronic methods of communicating with parties in prison,
444 recognizing the special problem that a party may be moved from one
445 prison to another and may prove difficult to track.

446 A motion to recommend the proposal for adoption as published,
447 after striking the second sentence from the Committee Note, was
448 adopted without dissent.

449 *Rule 6(a)(6)(A)*

450 The Appellate, Bankruptcy, and Criminal Rules Committees are
451 acting in parallel with this proposal to amend the definitions of
452 statutory legal holidays in the time computation rules to include
453 Juneteenth National Independence Day. This amendment reflects the
454 Juneteenth National Independence Act of 2021.

455 The Committee adopted without dissent a motion to recommend
456 adoption of this amendment without publication. It is a more nearly
457 automatic revision than some "technical" amendments. Publication
458 will be warranted only if some other advisory committee recommends
459 publication, an event that does not seem likely. No committee yet
460 has recommended adoption.

461 *Rule 9(b) Subcommittee Report*

462 Judge Lioi presented the report of the Rule 9(b) Subcommittee.
463 The Subcommittee was formed to study a proposal by Committee Member
464 Dean Spencer that Rule 9(b) should be amended to revise the Supreme
465 Court's interpretation of the rule's second sentence in *Ashcroft*
466 *v. Iqbal*, 556 U.S. 662, 686-687 (2009). The first sentence requires
467 that a party alleging fraud or mistake "state with particularity
468 the circumstances constituting fraud or mistake." The second
469 sentence adds: "Malice, intent, knowledge, and other conditions of
470 a person's mind may be alleged generally." The Court ruled that
471 "generally" does not mean that it suffices simply to plead the
472 words "malice," "intent" "knowledge," or other words such as
473 "purpose." Instead such allegations must satisfy the general
474 pleading standard of Rule 8(a)(2), which requires a short and plain
475 statement of the claim showing that the pleader is entitled to
476 relief. The Court's understanding of the Rule 8(a)(2) standard was
477 itself restated in terms that began with the *Twombly* decision in
478 2007 and have come to be described by many in a shorthand reference
479 to "plausibility."

480 The proposal would amend the second sentence:

481 Malice, intent, knowledge, and other conditions of a
482 person's mind may be alleged generally without setting
483 forth the facts or circumstances from which the
484 condition may be inferred.

485 One part of the proposal draws from the original 1937
486 Committee Note that explained Rule 9(b). The second sentence was
487 modeled on a British rule, indeed is a nearly verbatim version of
488 the British rule. That rule allows conditions of mind to be pleaded
489 as a fact, without more. It is enough to say a party intended a
490 result, or knew something, and so on. Nineteenth Century British
491 cases are explored to show the rule was applied as intended. The

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492 Supreme Court's interpretation in the *Iqbal* case is challenged as
493 a departure from the original intent.

494 The rules law clerk was charged with reviewing cases
495 interpreting the second sentence between the time Rule 9(b) was
496 adopted in 1938 and the *Iqbal* decision. Fewer than 20 cases were
497 found. They do not reflect deliberate consideration of the question
498 as framed in the *Iqbal* opinion. Instead they focus on denying the
499 need for particularity, the obvious contrast with the first
500 sentence. At the same time, some of the cases seem to assume that
501 general Rule 8(a)(2) pleading standards apply. Those standards,
502 however, fluctuated uncertainly around a mean that was raised by
503 the *Twombly* decision in 2007.

504 Professor Marcus added that the agenda materials thoroughly
505 explore the issues, including pre-*Iqbal* decisions that clearly
506 demanded that facts be pleaded to support an inference of intent.
507 It may be significant that in the 1993 decision in the *Leatherman*
508 case the Supreme Court rejected any heightened pleading
509 requirement for cases involving official immunity as inconsistent
510 with the negative implications of the first sentence of Rule 9(b),
511 but at the same time suggested that if heightened pleading
512 requirements are appropriate for some claims they should be adopted
513 through the Rules Enabling Act process. Other opinions in other
514 areas have at times suggested that an interpretation of the Civil
515 Rules might be reconsidered in the Enabling Act process. No such
516 suggestion appears in the *Iqbal* opinion. More generally, the
517 *Twombly* and *Iqbal* opinions caused great perturbation in the
518 academy, and even prompted introduction of legislation designed to
519 restore the pleading standards that had prevailed before 2007. An
520 earlier rules law clerk produced a memorandum reviewing pleading
521 decisions under the new standards that eventually reached more
522 than 700 pages without identifying any clear occasion for rules
523 amendments. The present proposal "is back to the pleading wars."

524 Discussion began with a more general description of the
525 arguments for the proposed amendment.

526 One range of arguments draws from the structure of Rules 8
527 and 9. The various provisions point away from relying on the
528 general direction of Rule 8(a)(2) for pleading claims and toward
529 the more focused provisions that focus on pleading elements of
530 claims. Rule 9(b) is one of those, and the structure does not

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531 support the interpretation of "generally" that invokes Rule
532 8(a)(2).

533 The more fundamental range of arguments, going beyond the
534 original intent and structure of the pleading rules, draw from
535 lower court decisions that apply the plausibility standard in
536 addressing pleadings of such conditions of mind as an intent to
537 discriminate. These decisions are seen to impose unfair obstacles
538 that thwart valid claims, with employment discrimination claims as
539 a leading example. A plaintiff should not lose by dismissal on the
540 pleadings for failure to plead facts supporting an inference of
541 discriminatory intent without an opportunity to discover
542 information available only from the defendant or unfriendly third
543 parties. And there is a risk that reliance on the pleading standard
544 that looks to "judicial experience and common sense" will defeat
545 claims solely because of the necessarily limited experience of any
546 single judge.

547 These functional arguments lend weight to the argument built
548 on original intent. But whatever the original intent may have been,
549 the worlds of law and litigation have changed. Law has
550 proliferated, providing many new and often complex claims that
551 invoke state of mind as a critical ingredient that is not easily
552 inferred even from masses of surrounding circumstances. The Court
553 may well have been right in its apparent intuition that it is not
554 wise to allow simple assertion, as a fact and without more, of
555 such elements as actual malice in defaming a public figure, or
556 intent to discriminate in an RLUIPA claim, or more straightforward
557 discrimination on the basis of race, ethnicity, gender, religion,
558 or other characteristics. So for intent to discriminate on the
559 basis of disability or -- still more complex -- a perception of a
560 disability that does not in fact exist.

561 Dean Spencer said that the Subcommittee had considered the
562 proposal thoroughly. The cases resolved before the *Iqbal* decision
563 are less relevant to the question than the cases decided under its
564 direction. But clearly these are complex questions. It might be
565 better to take them on. But it is understandable that the Committee
566 is not comfortable with the proposal to address them, recognizing
567 that it is too much to ask it to take on the Supreme Court without
568 the kind of invitation the Court has occasionally extended to apply
569 the Enabling Act process to reexamine a procedure rule.

570 Judge Lioi thanked the Subcommittee for its work.

571 Judge Dow observed that every Committee member recognizes the
572 strength of the proposal. But it seems wiser not to pursue it
573 further. He echoed Judge Lioi's thanks to the Subcommittee members,
574 Dean Spencer, and the Reporters for their work, adding that the
575 Committee relies heavily on the lawyer members, there are only
576 four of them, and all contribute many hours to the work of the
577 several subcommittees.

578 *Multidistrict Litigation Subcommittee Report*

579 Judge Rosenberg delivered the report of the Multidistrict
580 Litigation Subcommittee. She began by thanking Subcommittee
581 members for their incredibly hard work and invaluable input.
582 Subcommittee thinking about possible MDL rules has evolved. It has
583 begun to probe what a rule might look like, although there is no
584 consensus whether an evaluation of possible rule approaches may
585 culminate in a conclusion that no rule should be recommended. That
586 question remains open, although the Subcommittee is receptive to
587 the possibility.

588 A variety of reasons may support adopting MDL rules. MDLs
589 comprise a large part of the federal docket, although estimates of
590 the fraction vary. The Judicial Panel on Multidistrict litigation
591 is making a concerted effort to expand the pool of potential MDL
592 judges -- as more new judges are drawn into these proceedings,
593 they may benefit from rules that distill the practices that have
594 developed in the cooperation of experienced MDL lawyers with
595 experienced MDL judges. And some MDL judges are working to
596 diversify leadership teams in several dimensions, especially on
597 the plaintiff side. Rules could provide useful guidance that will
598 help newcomers function effectively. Existing guides to best
599 practices, while providing more detail about best practices than
600 a court rule can provide, are mostly outdated. The Manual for
601 Complex Litigation, for example, dates back to 2004 and the next
602 edition is not likely to appear for at least a few years. A rule
603 could not embrace as many details, but rule text combined with a
604 robust Committee Note might prove useful.

605 Some of the resistance to adopting an express rule focuses on
606 the wide variety of MDLs. Many include a number of cases, parties,
607 and attorneys that can be managed without any separate MDL rule,

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608 and indeed might be impeded by a need to work through a separate
609 rule. This concern is readily met by a flexible rule that is to be
610 invoked only in the MDL judge's discretion. Any rule will have to
611 maintain maximum flexibility even within the provisions that are
612 available for use in a particular proceeding.

613 Recent events that have advanced Subcommittee knowledge
614 include conferences sponsored by Lawyers for Civil Justice, the
615 American Association for Justice, and Emory Law School with
616 Professor Jaime Dodge. "We listen carefully to lawyers." That is
617 why Subcommittee members travel to meet with them. The comments
618 offered at these meetings were rather general. The Emory conference
619 included plaintiff lawyers, defense lawyers, and judges managing
620 small and large MDLs. The most recent Subcommittee meeting followed
621 these conferences, too recently to be reported in the agenda
622 materials for today's meeting.

623 The Subcommittee has come to focus on Rules 16 and 26 as
624 potential focuses for rulemaking. The "high impact" approach of an
625 early Rule "23.3" sketch that drew from analogies to class-action
626 practices is off the table. The Discovery Subcommittee is also
627 considering amendments to Rules 16 and 26 that may need to be
628 integrated with deliberations on possible MDL rules.

629 One question is what can lawyers accomplish in a Rule 26(f)
630 conference before going to the judge? Lawyers at the Emory
631 conference reported that they really do not do Rule 26(f)
632 conferences in MDLs, while others said that Rule 26(f) conferences
633 do occur. It is clear that there are many informal discussions.
634 But who is to represent the plaintiff side in these discussions or
635 conferences? Who the defense side? Rough drafts of possible rules
636 were considered at the conference and then redlined in separate
637 breakout groups. The defense redlines at the conference accepted
638 a Rule 26(f) approach, while the plaintiff redlines deleted it.

639 The focus of the current approach is on what should happen
640 before the lawyers first get to the judge. How far can the lawyers
641 go in helping the judge to develop approaches to designating
642 leadership, schedules, sequencing of issues and discovery, common
643 benefit funds, and other matters that may be addressed in
644 scheduling orders?

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645 Professor Marcus emphasized the reports at the Emory
646 conference that it cannot be assumed that a Rule 26(f) conference
647 will be held before the first scheduling conference in an MDL that
648 includes thousands of cases. What interactions among the lawyers
649 should occur before the judge has to start addressing the
650 proceedings?

651 A related question asked whether it is useful to designate
652 "coordinating counsel" for the first steps, being careful to avoid
653 any presumption that initial coordinating counsel designations
654 will mature into appointments to a leadership team? Judge Dow noted
655 that two judges at the Emory conference emphasized the importance
656 of such steps to enable the MDL judge to create an effective
657 structure for the proceeding. The Judicial Panel on Multidistrict
658 Litigation does not know, when it orders a transfer, what the
659 lawyers will learn about developments after the transfer order but
660 before the MDL judge can begin organizing the proceeding.

661 A committee member observed that the Subcommittee has engaged
662 in a long process, in which he participated as ambassador from the
663 JPML to the Subcommittee. There have been important divisions of
664 thought. Interlocutory appeal opportunities were studied carefully
665 and put aside. A rule for disclosing third party litigation funding
666 was studied and also put aside. Discussions about early examination
667 of individual claims by devices such as plaintiff disclosure forms
668 or an "initial census" continue, reflecting defendant concerns
669 about "inventory" lawyers whose portfolios may include many
670 clients with unfounded claims. Continued focus on those questions
671 is useful. If there is to be an MDL rule, it should emphasize how
672 to get the MDL judge to move the proceedings along promptly. It
673 remains to determine whether these and other questions should be
674 addressed by an MDL rule or by other means. The Emory conference
675 was helpful. The pressure is generated by the big MDLs that include
676 thousands of cases. Can a rule be drafted that will lead to an
677 organized presentation of the proceedings to the judge at the
678 outset? One example is sequencing issues to focus on such
679 potentially dispositive matters as preemption of state law claims
680 or the admissibility of expert testimony on a controlling question
681 such as causation. If we can do it, it will be useful to support
682 a rule that enables the MDL judge to get an early understanding of
683 what procedures will fit the particular proceeding. MDL judges can
684 be heard to lament that "I did not know what I did not know." A
685 rule that identifies and prompts consideration of important

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686 opportunities to manage the proceeding from the beginning will
687 reduce the occasions for concluding that the proceeding would have
688 been managed differently "if I knew then what I know now."

689 A Committee member suggested that it is important to "be
690 particularly mindful of what we're talking about." Is the goal a
691 rule that will provide prompts to the judge without imposing
692 mandates? Or is it a rule that judges will read as directing them
693 to get things done at certain points? "It should not be a rule
694 that a judge reads to require all of a list of things to be done
695 at the first conference." And there is a danger that as we seek to
696 encourage new routes to leadership the old timers will seize an
697 early role under a rule that seems to set progress goals and become
698 the leaders. And more and more, new MDL judges reach out to other
699 MDL judges to learn what works, how and when. "Practices have
700 evolved, and continue to evolve."

701 Another committee member began as "a skeptic whether rules
702 are possible." But as we learn about the broadening circles of MDL
703 judges and lawyers, "I'm moving toward rules drafted in broad
704 contours." We must be careful not to constrain discretion. The
705 three big issues are directing general identification of the issues
706 in the proceedings; early organization, including defining the
707 roles of lead lawyers; and common fund compensation. A rule
708 focusing on a few areas can be workable. Probably it will be
709 located in Rule 16, but we continue to load Rule 16 with more and
710 more distinctive issues -- perhaps it would be better to frame a
711 new MDL rule.

712 Professor Marcus observed that the Subcommittee has begun to
713 think about the possibility of a separate MDL rule, perhaps framed
714 as Rule 16.1, disengaged from the Rule 16(b) and 26(f) sketches
715 that have been prepared but drawing from those sketches. The
716 Subcommittee has not yet seen even a preliminary sketch of this
717 approach. Judge Dow concurred that framing a new rule as Rule 16.1
718 "is just a device" to separate the new rule from the Rule 26(f)
719 discovery conference provisions and Rule 16(b). The purpose is to
720 avoid overloading those rules.

721 Another committee member observed that there was not a huge
722 separation between the plaintiff lawyers and the defense lawyers
723 at the Emory conference. The consensus was that "these are things
724 we deal with all the time." The Rule 16 and 26 drafts include

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725 things they agree are important matters to focus on. Using a rule
726 as a prompt, not directions, could be useful. There is enough here
727 to justify continuing work to draft a potential rule. An analogy
728 may be found in the recent amendments of Rule 30(b)(6) for deposing
729 an entity. The rule that was adopted was pared back from more
730 ambitious and detailed drafts. Some observers thought it would
731 have little effect. But it has had a huge and good effect in
732 practice. And there may not be much reason to be deterred by the
733 prospect of further expanding Rule 16.

734 Another committee member observed that discussion at the
735 Emory conference "was consistent with prompts." It might be
736 worthwhile to consider adding a provision to Rule 26(f) that
737 encourages lawyers to discuss the question whether a particular
738 case that has not yet been transferred for MDL proceedings should
739 become part of an MDL.

740 Judge Dow noted that a recent class-action conference focused
741 on the "front loading" amendment of Rule 23 in 2018. It involved
742 simple rule text and a ton of information in the Committee Note.
743 "We have to be careful with words. We can do that." Rule 23 was
744 amended to help judges and to enable lawyers to help judges. The
745 prospect here is that something similarly useful can be done for
746 MDLs. A flexible rule that relies on discretion can help judges.
747 The MDL bar is experienced -- "even the lower ranks have a pretty
748 good idea of what they're in for." There are good reasons why the
749 Subcommittee has worked for a long time, and will need still more
750 time to consider and develop a possible MDL rule.

751 A judge asked whether these practices are better addressed by
752 court rules or instead by other means of education? The JPML holds
753 an annual conference for all MDL judges, an event all recognize as
754 extremely helpful. Other educational tools are available. It is
755 questionable to adopt a model of "rules that are precatory, a means
756 of encouragement only." When is it appropriate to adopt rules that
757 say only that something "should" be done? The drafts also
758 incorporate "may" as it appears in Rule 16(b)(3)(B). "Rules do not
759 always have to command, but 'should' rules remain a problem." Rules
760 emerge from practice -- the e-discovery rules were informed by
761 developing practice and efforts by the Sedona Conference to
762 identify evolving best practices. "The rules are not to educate
763 people. They are to tell people how to do things."

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764 Another judge observed that there may be a place in a rule
765 for a list of things to be considered broadly in context.

766 Yet another judge said that "may" is a grant of discretionary
767 authority, and is useful when the existence of the authority may
768 not have been apparent. So it is troubling to have practices that
769 judges have had to make up out of whole cloth, such as common
770 benefit funds. "It is properly within a rule to say a judge can do
771 this in appropriate circumstances." The judge who questioned
772 "should" rules agreed that rules to clarify authority are
773 appropriate.

774 This observation was supplemented by noting that the
775 Committee has talked about common benefit funds. Judge Chhabria
776 has observed that in the Roundup MDL no one told him how to do it.
777 "I wish I had known to deal with this at the outset." Still, it is
778 possible that some means other than rules can provide effective
779 guidance. "We're not yet convinced one way or the other."

780 The same question was framed by observing that it is useful
781 to hear from people who have not been engaged in MDL proceedings.
782 "What generally works should not become a mandate." The question
783 still is whether there are better approaches than adopting a court
784 rule.

785 A judge added that the Civil Rules do not specifically
786 prescribe many things that are found in other sources of best
787 practices. Another judge agreed that a book like the FJC book of
788 best practices for patent cases may be all that is needed for MDL
789 proceedings, "but it isn't going to happen soon."

790 Judge Rosenberg focused the discussion by asking whether the
791 Subcommittee should continue to deliberate whether there should be
792 an MDL rule, and what might it look like?

793 A judge answered that the rule question should be kept alive,
794 but the Subcommittee should also consider whether there are better
795 means for what is intended to be an educational function. A rule
796 might be a stronger response than what is called for.

797 Professor Marcus noted that part of the recent drafts say
798 that lawyers "must" do something. That sounds like a rule. The
799 judge agreed that "must" is a rule.

800 Judge Dow returned to the recurring question of scope. MDLs
801 vary in many dimensions. They may include only a small number of
802 cases, or thousands of cases. An MDL rule should be drawn so that
803 it need not be applied at all in the many proceedings that do not
804 need the "prompts" that can be enormously useful in mega-MDL
805 proceedings. "We do want 'must' for lawyers in all MDLs." And we
806 also should consider the prospect that practices appropriate for
807 more complex MDLs may also be useful in sprawling litigation that
808 comes to a single court without a § 1407 transfer. Judge Rosenberg
809 responded by asking whether "should" is enough for rules like this?

810 The Subcommittee will carry on its work.

811 *Discovery Subcommittee Report*

812 Judge Godbey delivered the Discovery Subcommittee Report,
813 beginning with appreciation for the work of Subcommittee members,
814 particularly those in practice.

815 The questions raised by a proposal to develop a new rule that
816 would establish standards and procedures for sealing matters in
817 court files have been deferred while a new Administrative Office
818 project on sealing procedures continues.

819 The focus of this report is on questions that have been raised
820 by "privilege log" practices under Rule 26(b)(5)(A). The
821 Subcommittee has had a lot of robust input from the requester side
822 and the producer side. "We're in a good position to decide on
823 approaches."

824 A starting point is clear. No one thinks it is good to wait
825 until the end of the discovery period to talk about privilege logs.
826 All agree to focus on bringing these discussions up front.

827 The Subcommittee will discuss these issues by developing the
828 rules sketches included in the agenda materials. It may be ready
829 to recommend a proposal for publication by the spring 2023 meeting.

830 Professor Marcus added that the Subcommittee thinks it has a
831 direction in mind. There is something of a divide between plaintiff
832 lawyers and defense lawyers, but they agree that lawyers can frame
833 better solutions for their cases than can be dictated by rule.

834 The Subcommittee has made great progress, and will carry on
835 with its work.

836 *Joint Subcommittee on Appeal Finality After Consolidation Report*

837 Judge Rosenberg reported that the Joint Subcommittee on
838 Appeal Finality After Consolidation -- more familiarly known as
839 the "Hall v. Hall" Subcommittee -- has kept alive the question
840 whether amended rules could, responding to the invitation in the
841 Supreme Court opinion, provide a better integration of appeal
842 finality with the management of proceedings framed by
843 consolidation of initially independent actions. It has been
844 greatly helped by two research projects undertaken by Emery Lee at
845 the FJC.

846 Dr. Lee said that a formal report will soon be available to
847 describe the second project to examine experience with appeals
848 after consolidation of initially independent actions. "It is
849 difficult to find an issue empirically." The work begins with an
850 estimate that perhaps 2% or 3% of actions are consolidated. The
851 consolidated actions are then examined to find an "original case
852 final judgment." Appeal experiences in those cases are then
853 studied.

854 A rough summary of the remaining questions was then offered.
855 The FJC studies show convincingly that it would be difficult to
856 argue for a new finality approach because litigants are losing any
857 opportunity to appeal for want of understanding that appeal time
858 starts to run with a judgment that settles all claims among all
859 parties to what began as an independent action. But the studies
860 have not attempted to explore much more intricate questions that
861 cannot be answered by looking at docket entries. Even far-ranging
862 interviews with many judges across many cases might prove
863 inadequate. The fundamental question is whether the partial final-
864 judgment approach of Rule 54(b) that has proved valuable in
865 individual actions could profitably be extended to consolidated
866 actions. As a simple example, two plaintiffs might join in a single
867 action against two defendants arising out of an automobile
868 accident. If the court finally resolves all claims of one plaintiff
869 against both defendants, the court is authorized to determine
870 whether to enter a partial final judgment to support (and require)
871 an immediate appeal, or instead, by refusing to enter a Rule 54(b)

872 judgment, to defer the opportunity to appeal. Many complex
873 calculations bear on identifying the better appeal time, and Rule
874 54(b) leaves them to the trial judge as "dispatcher." The very
875 same litigation might instead be framed by consolidating two
876 actions, each brought by one plaintiff against the same two
877 defendants and arising out of the same accident. Why should the
878 final-judgment rule have a mandatory and simple answer when the
879 same array of parties and claims is accomplished by consolidation?

880 Drafts that would amend Rules 42 and 54(b) were prepared
881 promptly after the decision in *Hall v. Hall*, 138 S.Ct. 1118 (2018).
882 The Subcommittee will consider them and decide whether further
883 consideration might be useful.

884 *Defining the End of the Last Day for e-Filing*

885 Rule 6(a)(4)(A) defines the end of the last day for filing by
886 electronic means as midnight in the court's time zone. This
887 definition can be changed by statute, local rule, or order. Dr.
888 Lee reported that the FJC examination of local rules will be
889 finished soon. Responding to a question whether the study will
890 pursue other inquiries that were part of the original design, he
891 said that they hope to have a report ready for the June meeting of
892 the Standing Committee.

893 Clerk Representative Shinn reported that her court adopted a
894 local rule setting the deadline at 6:00 p.m. "Then we heard from
895 the lawyers and changed it." A judge said that some lawyers say
896 that a deadline when the clerk's office closes would simply shift
897 their late-night work to the day before the last day.

898 A judge said that midnight filing has seemed inhumane. Other
899 lawyers have preferred the midnight deadline because it enables
900 them to dine at home and put the children to bed before turning to
901 completing the remote filing. But the quality of the work is no
902 better than it would be with a 6:00 p.m. deadline. "We managed for
903 a long time with a close-of-office deadline."

904 Another judge noted an informal practice that prevailed in
905 the Seventh Circuit, at least some years back. If a paper was
906 presented when the clerk's office opened at 9:00 a.m., it would be
907 stamped as filed at 5:00 p.m. the evening before.

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908 *Rules 38, 39, 81(c)*

909 Questions about the procedures for demanding jury trial began
910 with a proposal that asserted an ambiguity was introduced into
911 Rule 81(c) when the Style Project changed one word in the provision
912 for demanding a jury trial in an action removed from state court
913 "if the state law ~~does~~ did not require an express demand for jury
914 trial * * *." "Does not" meant that a jury demand after removal
915 is excused only if state law does not require a demand at any
916 point. The proposal argued that "did not" also excuses a demand
917 requirement when state law requires a demand but allows the demand
918 to be made at a point in the action that had not yet been reached
919 at the time of removal. The Committee reported to the June 2016
920 meeting of the Standing Committee that it was considering a
921 simplification of Rule 81(c) that would require a demand after
922 removal in every case except when a demand was made in state court
923 before removal. Immediately after that meeting then-Judge Gorsuch
924 and Judge Graber, members of the Standing Committee, suggested
925 that the demand requirement should be deleted. A jury trial would
926 be held in every case with a right to jury trial unless all parties
927 agree to waive a jury. This procedure was urged to increase the
928 number of jury trials and further supported as simple, avoiding
929 the trap for the unwary found in the present rules. Some state
930 courts do not require a demand, and there is nothing in their
931 experience to suggest that anything is lost by this procedure.

932 Elaborate drafts of potential amendments of Rules 38, 39, and
933 81(c) were considered at the April 2017 meeting of this Committee.
934 Many questions were suggested for further research. The
935 Administrative Office undertook to begin the research process.
936 Competing demands on limited resources, however, stalled any
937 further work. The topic has remained dormant.

938 These questions remain important. Experience with the Covid-
939 19 pandemic and its impact on jury trials may provide new reasons
940 for careful study.

941 The next steps will be affected by part of the recent Omnibus
942 Budget bill that directs a study of jurisdictions where local rules
943 and litigation practices have the effect of producing a "high
944 number" of jury trials. The apparent purpose is to encourage
945 practices that will increase the number of jury trials.

946 Dr. Lee reported that the FJC has abundant data that describe
947 the frequency of jury trials and identify cases in which a jury is
948 demanded by a plaintiff, by a defendant, by both plaintiff and
949 defendant, or by neither. Beyond that starting point, however it
950 will be very tricky to attempt to identify what practices have
951 what effect on the frequency of jury trials and whether the effect
952 is to increase or decrease jury trials. It is important, further,
953 to remember that the absolute number of jury trials is higher in
954 large districts with many trials than in small districts with fewer
955 trials. The "rate" of jury trials in comparison to total trials,
956 or total filings, is what counts. So high numbers of jury trials
957 in courts such as the Southern District of California and the
958 Northern District of Illinois reflect the high case load. The
959 District of Wyoming, for example, has a higher "rate" of jury
960 trials than those courts, with 9 jury trials in the most recent
961 year. Initial research will identify districts with more jury
962 trials than would be expected from the case load. Work will begin
963 with organizing the available data.

964 These questions will be developed further after the FJC
965 concludes its study.

966 *Rule 41(a)(1)*

967 Judge Furman, a member of the Standing Committee, suggested
968 that this Committee should study the division of opinions on the
969 scope of Rule 41(a)(1)(A). This rule provides:

970 (1) *By the Plaintiff.*

971 (A) *Without a Court order.* Subject to Rules 23(e),
972 23.1(c), 23.2, and 66 and any applicable federal
973 statute, the plaintiff may dismiss an action
974 without court order by filing:

975 (i) a notice of dismissal before the opposing
976 party serves either an answer or a motion
977 for summary judgment; or

978 (ii) a stipulation of dismissal signed by all
979 parties who have appeared.

980 Rule 41(a)(1)(B) provides that the dismissal is without prejudice
981 unless the notice or stipulation states otherwise.

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982 Judge Furman encountered, but was able to avoid answering in
983 the case before him, a question that has produced divided opinions.
984 Does the right to dismiss "an action" permit dismissal of only
985 part of the action, or can it be invoked only to dismiss all claims
986 among all parties?

987 Burton DeWitt provided a detailed research memorandum showing
988 that although courts are divided on how to answer the central
989 questions, and although some courts have not yet even weighed in,
990 there is a clear majority answer to each question.

991 The question that seems to be encountered more often than the
992 others can be identified by a simple example. One plaintiff sues
993 one defendant on two claims. Can the plaintiff dismiss one of the
994 claims without prejudice, while continuing the action on the other?
995 Most courts say no. The opinions seem to rely on the meaning of
996 "an action" without further policy analysis. Part of an action is
997 not the action. The balance of policy considerations may well
998 support this interpretation of the rule text, but there are
999 competing considerations to be weighed.

1000 The next most common question also can be identified by a
1001 simple example. One plaintiff sues two defendants on the same
1002 claim. Can the plaintiff dismiss one defendant without prejudice,
1003 while continuing the action against the other? Here, most courts
1004 say yes. There is little apparent sign that they recognize and
1005 explain the difficulty that this seems no more dismissal of the
1006 "action" than the dismissal of one of multiple claims against a
1007 single defendant. Here too, the balance of policy considerations
1008 may well support this distinction, but again there are competing
1009 considerations to be weighed.

1010 The third question has not been faced by many courts. The
1011 simple example is two plaintiffs join in an action to assert
1012 identical claims against a single defendant. Can one of the
1013 plaintiffs abandon the field by dismissing without prejudice? The
1014 research memorandum reports that when courts face this question,
1015 they "have been unanimous in applying the same law to plaintiffs
1016 and claimants as they do to voluntary dismissal of a defendant."

1017 Some measure of confusion is added to these issues by frequent
1018 observations in the opinions that alternatives are available under
1019 Rule 15 and Rule 21. Rule 15 allows amendment of a complaint once

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1020 as a matter of course within defined limits; within those limits,
1021 it is suggested that the plaintiff can drop a claim or a defendant
1022 simply by amending the complaint. The res judicata-preclusion
1023 consequences are not apparent. Rule 21 allows the court to drop a
1024 party "on just terms." By analogy to Rule 41(a)(2), the terms can
1025 specify whether the dismissal is "with prejudice," establishing
1026 the preclusion consequences.

1027 If these questions are to be reexamined, a variety of
1028 approaches are available. The rule text could be amplified to adopt
1029 the majority approaches to each question, relying simply on the
1030 majority view. Or the underlying policy questions could be
1031 reexamined, seeking to identify the better answers. The difficulty
1032 with taking on the policy questions is that they are hard to
1033 articulate and evaluate. Whichever of those approaches is taken,
1034 it will be appropriate to ask whether a project to amend Rule 41
1035 should take on other questions that appear on the face of the rule.
1036 It is puzzling that the plaintiff's right to dismiss without
1037 prejudice is cut off by an answer or motion for summary judgment,
1038 but not by a Rule 12 motion to dismiss that may involve as much or
1039 more work as an answer. It is not clear how far "plaintiff" should
1040 be read to include others who claim by counterclaim, cross-claim,
1041 or third-party claim (a third-party plaintiff).

1042 Judge Dow framed the question for the Committee: the question
1043 is how ambitious the Committee should be. Are these nuances worth
1044 a lot of effort?

1045 Professor Marcus suggested that these questions may connect
1046 to the decision in *Hall v. Hall* about the effects of consolidation
1047 on appeal finality. In addition, in some cases there may be
1048 extensive proceedings and consequential judicial rulings before
1049 either an answer or a motion for summary judgment is filed. Sixty
1050 years ago the Second Circuit went beyond the rule text to rule
1051 that the right to dismiss is cut off without an answer or motion
1052 for summary judgment by extensive hearings on a motion for a
1053 preliminary injunction. The decision is attractive, but has not
1054 commanded a following. "It is unnerving to see these things all
1055 over the place."

1056 A committee member suggested that "a rule that means
1057 different things to different people should be fixed." Its meaning
1058 should be made apparent.

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1059 Another committee member suggested that this topic merits
1060 consideration by a subcommittee that can decide how far down the
1061 path to go.

1062 Yet another member noted that it is difficult to understand
1063 the apparent contradiction that dismissing one claim among several
1064 is not dismissal of "an action," while dismissing one defendant
1065 among several is.

1066 The conclusion was that a subcommittee will be appointed as
1067 soon as the overall burden of all subcommittee work tapers down to
1068 a level that makes membership resources available.

1069 *Rule 55*

1070 Rule 55(a) directs that the clerk "must" enter a default when
1071 a defendant has failed to appear or otherwise defend. Rule 55(b)
1072 directs that the clerk "must" enter a default judgment when the
1073 claim is for a sum certain or a sum that can be made certain by
1074 computation if the defendant has been defaulted for not appearing.
1075 "Must" was chosen in the Style Project to replace "shall" as the
1076 word of command.

1077 These provisions came to the agenda as some judges observed
1078 that practice in their courts does not seem to comply with the
1079 rule text. A lopsided majority of judges from a small random number
1080 of districts reported that in their courts a default judgment can
1081 be entered only by a judge. Apparently there are at least a few
1082 courts where even a default must be entered by a judge.

1083 These deviations from what seems to be clear rule text suggest
1084 that there may be reasons to reconsider. "[O]therwise defend," for
1085 example, may run into problems when a defendant fails to file an
1086 answer or formal appearance because of ongoing settlement
1087 negotiations that are not known to the clerk or court. What is a
1088 sum certain or a sum that can be made certain by computation may
1089 depend on questions of law, including difficult questions of law,
1090 or facts that do not appear in the complaint or the plaintiff's
1091 affidavit. Examination and decision by the court may be a good
1092 idea.

1093 A good way to open an inquiry into these questions will be an
1094 examination by the FJC to identify actual practices in many
1095 districts, looking to find deviations from the apparent meaning of
1096 Rule 55 and the circumstances that prompt occasional or routine
1097 deviations. A full understanding of present practices and the
1098 underlying reasons will go a long way toward determining whether
1099 Rule 55 should be amended, and how it might be amended.

1100 Dr. Lee reported that he will begin the FJC study by
1101 collecting some data, talking to some people, and will report.

1102 Judge Dow noted that there is a lot of variety, sometimes
1103 within a single district. The FJC "will help us understand what
1104 people do." It is a fair guess that practice is a bit uncoupled
1105 from the rule.

1106 *Rule 63*

1107 Rule 63 allows another judge to proceed when a judge
1108 conducting a hearing or trial is unable to proceed. The second
1109 sentence reads:

1110 In a hearing or nonjury trial, the successor judge must,
1111 at a party's request, recall any witness whose testimony
1112 is material and disputed and who is available to testify
1113 again without undue burden.

1114 This sentence was brought to the Committee by a suggestion
1115 that the rule text be amended to reflect the proposition that the
1116 availability of a video transcript of the witness's testimony may
1117 dispel any need to recall the witness.

1118 Judge Dow noted that a wide range of discretion is built into
1119 Rule 63, beginning with the finding that enables a successor judge
1120 to proceed on determining that the case may be completed without
1121 prejudice to the parties. But the second sentence seems to exert
1122 a strong pressure for recall. Video depositions have become common,
1123 and experience during the Covid-19 pandemic has expanded reliance
1124 on video testimony during a hearing or trial. There are crucial
1125 differences among different types of witnesses. Rehearing an
1126 eyewitness to an unplanned event, for example, may be more
1127 important than rehearing a witness offering routine expert
1128 testimony on fingerprint identification. A memorandum on the case

1129 law is being prepared to help frame possible approaches. It seems
1130 likely that the universe of reported cases will be small, but the
1131 extent to which judges feel restrained by the rule text may remain
1132 uncertain.

1133 A committee member suggested that if a video transcript of
1134 testimony at a hearing or trial is available, the burden should be
1135 on the party who wants the witness to be recalled. But that does
1136 not seem to be a problem under the present rule text.

1137 *Amicus Curiae Briefs*

1138 Three lawyers with a major national law firm have proposed a
1139 new rule to regulate briefs amicus curiae. They report that they
1140 file amicus briefs in courts around the country and find many
1141 courts that have no clear practice to guide them. They also report
1142 an estimate that amicus briefs are far less common in district
1143 courts than in the courts of appeals, perhaps appearing in about
1144 one civil action in a thousand. The relative dearth of amicus
1145 filings may explain the lack of identifiable procedures in many
1146 courts. District court experience, moreover, may be disparate,
1147 with a few districts accounting for a preponderant share of all
1148 amicus filings. Their proposal includes a draft rule, modeled in
1149 part on Appellate Rule 29 and the local rule in the District for
1150 the District of Columbia, that would provide a good start if the
1151 Committee determines to explore the question by considering a draft
1152 that might be developed into a recommendation for publication.

1153 Discussion began with the question whether any rule for
1154 district courts should depart in significant ways from Appellate
1155 Rule 29. The role played by an amicus on appeal is pretty much
1156 defined by the record and decision of the district court. The risk
1157 of disrupting party control of their case is relatively low. In
1158 the district court, however, the parties have primary
1159 responsibility for framing the issues for decision and developing
1160 the fact record to support decision. An amicus might well be useful
1161 to supplement their efforts, particularly by identifying interests
1162 outside and perhaps more important than more narrow adversary
1163 interests. But an amicus might instead confuse and distort the
1164 basis for decision. Identifying a proper role for an amicus in a
1165 trial procedure that remains fundamentally adversary is difficult,
1166 either in general abstract terms or in application to a particular
1167 case.

1168 These distinctions between trial courts and appellate courts
1169 are conveniently illuminated by current efforts in the Appellate
1170 Rules Committee to study Appellate Rule 29. The focus is primarily
1171 on the possibility of expanding disclosure requirements to provide
1172 ever greater identification of the interests that may lie behind
1173 an entity that appears as an amicus. Going beyond contributions to
1174 fund a specific brief, for example, it might be required that the
1175 amicus disclose the identity of anyone that has contributed more
1176 than some stated fraction of its overall budget. Or it might be
1177 required that the amicus disclose its membership, although that
1178 approach would raise sensitive First Amendment issues. Greater
1179 disclosure could help in several ways. Simple identification of
1180 the interests behind an amicus brief may be important. It may be
1181 useful to know that what appear to be a dozen independent amicus
1182 briefs are in fact sponsored by one or only a few sources. And it
1183 may be important to ensure that an amicus filing does not generate
1184 recusal issues. The concern about recusal problems may be
1185 heightened in district courts.

1186 As a separate issue, the proposed rule addresses issues of
1187 brief length and timing. Unless all of these issues are simply
1188 deferred to local practice for briefing in general -- a tactic
1189 that may not work very well -- there are serious issues about
1190 interfering with local briefing practices, matters that the
1191 national rules have not addressed.

1192 Discussion of Appellate Rule 29 in the Standing Committee
1193 lapped over into discussion of the preliminary report on the
1194 possibility of framing a rule for the district courts. The risk of
1195 filings that lead to recusal was emphasized. It was noted that an
1196 amicus may attempt to add materials to the trial record, perhaps
1197 directly or perhaps by suggesting that the court take judicial
1198 notice. The value of amicus briefs in contributing to well-informed
1199 decisions was noted, but there also was a sense of wariness about
1200 attempting to make a rule for the relatively rare events of
1201 district court amicus filings. There was speculation that amicus
1202 filings tend to be concentrated in a few districts; it may be
1203 better to rely for now on those districts to develop their own
1204 practices, based on their greater experience and integrated with
1205 their general briefing practices. The local rule for the District
1206 of Columbia is a good example.

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1207 It was noted that the Department of Justice routinely
1208 encounters amicus briefs. They are not a problem. 28 U.S.C. § 517
1209 provides that the Attorney General may send any officer of the
1210 Department of Justice to any state or district "to attend to the
1211 interests of the United States in a suit pending in a court of the
1212 United States, or in a court of a State * * *." So the Department
1213 often files a statement of interest rather than intervene in
1214 actions that support a right to intervene under Rule 5.1 because
1215 an action challenges the constitutionality of a federal statute.
1216 A uniform rule should take care to ensure that it does not
1217 interfere with the Department's right to file amicus briefs.

1218 Judge Dow reported that discussion in the Standing Committee
1219 suggests that "the appeal world is a lot different." District
1220 courts do get amicus filings, as illustrated by a recent
1221 redistricting case in which an ambiguous filing was treated as an
1222 amicus brief and was not allowed to add to the record.

1223 A committee member suggested that a rule could make amicus
1224 practice more difficult for the district court. It would be
1225 difficult for a rule to prescribe the time for filing the amicus
1226 briefs and the time for responses. Briefing schedules in district
1227 courts are not defined in the way that times are defined for
1228 appeals. And it is difficult to see a need for a systemic national
1229 response. But caution should be taken in approaching the argument
1230 that amicus participation may be less important in a district court
1231 because a district court decision does not have formal precedential
1232 effect. A nationwide injunction can have an impact far greater
1233 than the precedential effect of a single appellate decision.

1234 A district judge observed that an amicus may be a friend of
1235 the court, or may be a friend of a party's position. "I don't know
1236 when it's going to come."

1237 Discussion concluded by voting without dissent to remove this
1238 topic from the agenda.

1239 *In Forma Pauperis Status*

1240 Judge Dow introduced the forma pauperis item by observing
1241 that there are "huge issues." Other committees as well need to
1242 think about the issues. And the Administrative Office has a working
1243 group. If work to develop possible rules proceeds, the Committee

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1244 will have to coordinate with them and also with the Committee on
1245 Court Administration and Case Management. It may well be that
1246 geographical differences make it impossible to establish uniform
1247 national standards for i.f.p. status.

1248 Professors Hammond and Clopton are working with the
1249 Administrative Office working group.

1250 This is an important topic. The Committee should hesitate
1251 about removing it from the agenda just yet.

1252 Judge McEwen asked whether a joint study group might be
1253 established to include the Appellate, Bankruptcy, and Civil Rules
1254 Committees. Brief discussion noted that it may be best to begin by
1255 discussion among the reporters, who can consider whether it would
1256 be useful to create a joint subcommittee. If the work proceeds
1257 that far, means can be found to coordinate with the Committee on
1258 Court Administration and Court Management.

1259 *Rule 4*

1260 Suggestions to revise Rule 4 are submitted with some
1261 regularity. The CARES Act Subcommittee carefully deliberated the
1262 question whether the Emergency Rules opportunity for court-ordered
1263 service by means not specified in Rule 4 should be added to Rule
1264 4 instead of the Emergency Rules 4, but concluded that this
1265 possibility should be deferred for a broader consideration of other
1266 possible changes.

1267 Some of the wide variety of suggestions seem simple and
1268 attractive. Allowing a request to waive service to be delivered
1269 electronically seems in keeping with the pragmatic purposes of the
1270 waiver provision. A more ambitious but still carefully focused
1271 proposal is to streamline the multiple service and notice
1272 requirements of Rule 4(i), perhaps to require only service on the
1273 United States Attorney or agency. There may be good reasons to
1274 maintain the present system, but inquiry is possible.

1275 The careful provisions adopted for the Emergency Rules 4
1276 included in proposed Rule 87(c) might well be studied for more
1277 general adoption. Allowing the court to order service by a means
1278 reasonably calculated to give notice could be as important when
1279 service under general Rule 4 provisions is thwarted by

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1280 circumstances as difficult as a declared civil rules emergency as
1281 when there is a rules emergency.

1282 Expanded opportunities for service by electronic means will
1283 inevitably be considered at some point in the future. A modest
1284 beginning is made in the pending supplemental rules for social
1285 security review actions. This model might be expanded to provide
1286 for electronic service at an address established by the Department
1287 of Justice for actions against the United States, or its agency,
1288 or its officer. It even might be useful to create an opportunity
1289 for frequently sued parties to establish addresses for electronic
1290 service that would facilitate prompt and efficient attention to
1291 all of the actions they face.

1292 More general provisions for electronic service will be
1293 obvious candidates for the agenda as technology continues to
1294 develop and as reliable access to technology becomes nearly
1295 universal. That prospect, however, seems likely to lie years away.

1296 Discussion began with the observation that email service may
1297 be allowed now in action involving real property. More generally,
1298 Rule 4(f)(3) allows service outside the United States "by other
1299 means not prohibited by international agreement, as the court
1300 orders." If that is appropriate for defendants in other countries,
1301 why should it not be equally available to serve defendants in the
1302 United States? We may be approaching that point.

1303 A committee member observed that practitioners are
1304 encountering more and more entities that have no physical presence.
1305 The plaintiff cannot show whether a potential defendant is in the
1306 United States or another country. They are present only in the
1307 ether. In one case the court authorized service by electronic
1308 means; clear proof of actual receipt was provided when the
1309 defendant promptly used a report about the suit in a funding
1310 appeal.

1311 Judge Dow asked whether these questions raise an urgent need
1312 for present consideration. They will require extensive work by a
1313 new subcommittee. Our resource of members' time is limited, and we
1314 have several subcommittees already. A committee member suggested
1315 that the questions are important, but immediate consideration is
1316 not urgent. We will, however, have to begin consideration rather
1317 soon of the problems of serving etherial entities. The member who

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1318 described electronic service on such an entity agreed -- the court
1319 acted within the present rules to authorize electronic service,
1320 even though the lack of any identifiable physical presence impeded
1321 direct reliance on Rule 4(f)(3).

1322 *Pro se e-Filing*

1323 Professor Struve led discussion of the work of the Reporters'
1324 group studying e-filing by pro se litigants, beginning with thanks
1325 to all the reporters and to the FJC for its intrepid work. Dr.
1326 Reagan has collected an impressive set of data, which will provide
1327 the basis for a public report. Several first impressions can be
1328 noted. The courts of appeals seem to be in the vanguard of
1329 permitting e-filing by pro se litigants. Some districts find
1330 difficulties and are reluctant to expand the opportunities for e-
1331 filing available to pro se litigants. Districts that have provided
1332 expanded opportunities find fewer problems. One issue that may be
1333 easily addressed is the apparent requirement of Rule 5 that paper
1334 service is required for a paper filing even when the clerk's office
1335 translates it into the CM/ECF system and provides a notice of
1336 electronic filing.

1337 Broader questions of expanded e-filing should be unpacked.
1338 Apart from access to direct filing with the court's CM/ECF system,
1339 a pro se litigant may be allowed -- as several courts do now -- to
1340 file by email. Notice issues can be considered. Eventually direct
1341 access to CM/ECF may prove workable. Filing in criminal
1342 prosecutions presents obviously distinct questions. Prisoner
1343 litigation is a separate problem. The work continues.

1344 Professor Marcus noted that the most troubling problems seem
1345 to arise with allowing a pro se litigant to open a new file in the
1346 CM/ECF system, a "case-initiating" act. Some districts report that
1347 not even lawyers are allowed to do this.

1348 It was noted that no interest in these questions has yet been
1349 expressed by the Committee on Court Administration and Case
1350 Management. It may be better to inquire into their interest now,
1351 and to coordinate with them if they are interested. These questions
1352 are intertwined with CM/ECF and its "next gen" embodiment. Indeed
1353 one problem has emerged from the need to open a PACER account
1354 before a party can become a registered user of a court's system.

1355 It also may be that these questions will prove of interest to the
1356 technology committee because of security concerns.

1357 *Dismissal of Unfounded Actions*

1358 Agenda proposal 20-CV-G suggests that the court-review
1359 provisions in the forma pauperis statute, 28 U.S.C. §
1360 1915(e)(2)(B)(ii) be generalized into a civil rule that applies to
1361 all actions, including fee-paid actions. The statute provides that
1362 the court shall dismiss an action seeking i.f.p. status if the
1363 action "fails to state a claim on which relief may be granted."
1364 The core argument is that it is unfair, indeed unconstitutional,
1365 to provide automatic review for i.f.p. actions but not fee-paid
1366 actions.

1367 The draft rule submitted with the proposal is direct. If the
1368 court determines that an action is frivolous or malicious, or fails
1369 to state a claim on which relief can be granted, the court shall
1370 dismiss the case, with or without prejudice, or order that summons
1371 not be issued until the matter is resolved. The purpose is stated
1372 in broader terms -- it is to provide pre-filing review of all
1373 actions. An alternative approach also is suggested: the FJC should
1374 survey meritless litigation and identify the nature of suit
1375 categories that have the highest proportion or severity of
1376 meritless actions. Pre-filing review could be limited to cases in
1377 those categories.

1378 The same proposal was made to the Appellate Rules Committee,
1379 framing it as a new Appellate Rule 25.1. That committee has
1380 rejected it.

1381 Brief discussion noted that the Committee should not take it
1382 on itself to assert that a federal statute is unconstitutional. Or
1383 that the Constitution requires that the legitimacy of the rules of
1384 civil procedure be salvaged by expanding the statutory procedure.

1385 This proposal was removed from the agenda without dissent.

1386 *Rule 7.1*

1387 Proposal 20-CV-CC suggested that Rule 7.1 be amended to delete
1388 the requirement that two copies of the disclosure statement be
1389 filed. The suggestion was prescient: the requirement was deleted

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1390 by the amendment proposed for adoption this December 1. Electronic
1391 docket practices have obviated the purpose of ensuring that a paper
1392 disclosure statement is provided for the judge in every case.

1393 *Rule 73(b)(1)*

1394 A second item in proposal 20-CV-CC protests that CM/ECF
1395 systems routinely send notices to chambers when a party consents
1396 to assignment of a case to a magistrate judge, automatically
1397 violating the mandate of Rule 73(b)(1) that a district judge or
1398 magistrate judge may be informed of a party's response to the
1399 clerk's notice of the opportunity to proceed before a magistrate
1400 judge only if all parties consent to the referral. This rule is
1401 anchored in 28 U.S.C. § 636(c)(2), which directs that rules of
1402 courts for reference of civil matters to magistrate judges shall
1403 include procedures to protect the voluntariness of the parties'
1404 consent.

1405 Discussion began with the observation that the statute makes
1406 it important to comply with the means chosen by Rule 73 to protect
1407 the voluntariness of consent. There is a risk that a party who
1408 prefers not to consent may feel a pressure to consent if the judges
1409 know that another party has already consented.

1410 Further discussion described procedures in several districts
1411 that are designed to protect against automatic but inadvertent
1412 notice to the judges. A consent filed by one party may be held
1413 aside and not filed until all parties consent. Or the plaintiff
1414 may be given a consent form and told to file it only if it consents
1415 and wins the consent of all other parties.

1416 These procedures can work well when all parties are
1417 represented by lawyers. It is not easy to be confident that they
1418 can work as well with a pro se litigant.

1419 Further discussion suggested that this may be a matter for
1420 local practice. Some courts automatically assign all pretrial
1421 matters to a magistrate judge; a party has to object. The procedure
1422 that informs the judge only when all parties consent does not work
1423 with pro se litigants.

1424 Another participant observed that some courts automatically
1425 put magistrate judges "on the wheel," assigning cases for trial,

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1426 notifying the parties that they can object. Even if anonymity is
1427 preserved, this practice may exert a pressure to consent when the
1428 parties are concerned that a random reassignment might assign the
1429 case to a district judge considered less favorable than the
1430 assigned magistrate judge.

1431 A committee member suggested that the decision whether to
1432 retain this matter on the agenda depends on whether it reflects
1433 problems deeper than the need to manage consents in a way that
1434 prevents the CM/ECF system from subverting the rule. A suggested
1435 answer was that the problems do run deeper. A judge raised the
1436 question whether practice in one district was inconsistent with
1437 the statute; a local rule was adopted to address the problem.

1438 Another judge noted that the concern is that a party who
1439 prefers to withhold consent may fear that a judge will learn which
1440 party does not like the judge.

1441 The question remains whether any problems that exist should
1442 be resolved by amending Rule 73. The problem may lie in local
1443 practices or rules. A judge observed that the direction in § 636
1444 that "rules of court" should protect the voluntariness of the
1445 parties' consent can include local rules in addition to the
1446 national rules. Another judge suggested that Rule 73 says consents
1447 are not to be disclosed unless all parties consent. The problem is
1448 not with the rule. The problem is with failures to observe the
1449 rule.

1450 A response was that Rule 73 might be amended by adding an
1451 explicit direction that the clerk not accept a consent for filing
1452 until all parties have consented.

1453 Still another judge agreed that this is not a national rule
1454 problem, "but we may not know enough." Rule 73 in its present form
1455 is consistent with the statute. Perhaps we need a rule that makes
1456 sure local practices are consistent with Rule 73 and the statute.
1457 But it was suggested that the Committee should be cautious about
1458 adopting rule text designed only to doubly ensure local compliance
1459 with the rule.

1460 Yet another suggestion returned to the original proposal: the
1461 problem lies with the CM/ECF system.

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1462 A judge suggested that this problem has generated a lot of
1463 Committee discussion. It should remain on the table. If it proves
1464 to be a widespread problem, the Committee should try to find a
1465 rule that brings practice into better compliance with § 636.

1466 A judge suggested that her court has a local rule like the
1467 D.D.C. rule, "but parties find a way to tell you. They put it in
1468 pretrial submissions even though we tell them not to. We see that
1469 with attorneys -- they want you to have that information."

1470 Another committee member offered two observations: (1) Is
1471 this problem susceptible to solution by a national court rule?
1472 "Probably not." (2) But it should remain on the agenda so the
1473 Committee can reach out to those who may be able to improve the
1474 technology. Another member agreed that this topic should remain on
1475 the agenda for further assessment, but asked who should undertake
1476 the task?

1477 A judge suggested that it is a question of gathering
1478 information. "If it's considered a problem, we probably can find
1479 rule language to increase compliance."

1480 Another judge suggested that it may be possible to come up
1481 with rule language that helps court clerks to keep pro se litigants
1482 from violating the anonymity requirement. But a rule cannot stop
1483 lawyers from deliberate disclosures by other means.

1484 Further inquiries were encouraged. Committee members were
1485 encouraged to talk with their own district clerks to see what they
1486 do. Local rules may be assembled. And Judge Boal will reach out to
1487 the Federal Magistrate Judges Association.

1488 *Actual Knowledge, not Service*

1489 Proposal 21-CV-K suggests adding a new Rule 4(c)(4) to provide
1490 that service need not be made on a party that has actual knowledge
1491 of the suit and either possesses a copy of the complaint or has
1492 PACER access to it. The proposal rests on the proposition that the
1493 goal of service is to provide knowledge of the action, and actual
1494 knowledge gained by other means serves that purpose. Confidence is
1495 expressed that courts have ample means to resolve disputes about
1496 actual knowledge. A potential problem of integrating this approach

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1497 with the Rule 4(m) provisions that require service within 90 days
1498 is noted, but not resolved.

1499 Brief discussion reflected deep doubts about the task of
1500 resolving disputes about actual knowledge. And a fine point was
1501 noted -- the time to remove is set by 28 U.S.C. § 1446(b)(1) at
1502 "30 days after receipt by the defendant, through service or
1503 otherwise, of a copy of the initial pleading," etc. In *Murphy*
1504 *Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344
1505 (1999), the Court ruled that delivering a copy of the file-stamped
1506 complaint by fax was not a substitute for formal service in
1507 triggering the time to remove, because relying on this informal
1508 trigger contradicts "a bedrock principle: An individual or entity
1509 named as a defendant is not obliged to engage in litigation unless
1510 notified of the action, and brought under the court's authority,
1511 by formal process." That does not seem to fit comfortably with the
1512 proposal that PACER access can substitute for actual receipt.

1513 The Committee voted without dissent to remove this item from
1514 the agenda.

1515 *Set Time to Decide*

1516 Proposal 21-CV-M, submitted by a dissatisfied litigant,
1517 suggests adoption of Civil and Appellate Rules that require that
1518 all potentially dispositive motions be decided within a set period
1519 after final submissions are due. The proposal would be satisfied
1520 by a particular period, whether it be 30 days, 60 days, 90 days,
1521 or something else. The Appellate Rules Committee has already
1522 rejected this proposal.

1523 Brief discussion noted that a few statutes set time limits
1524 for decisions. They have created genuine problems. Courts believe
1525 that competing docket priorities are far too complex, and that it
1526 is impossible to adjust for the regular but individually
1527 unpredictable emergence of matters that require urgent immediate
1528 attention.

1529 The Committee voted without dissent to remove this item from
1530 the agenda.

1531 *Rule 26(a)(1): Expanded Initial Disclosures*

1532 Proposal 21-CV-X suggests expansion of the information that
1533 must be provided by initial disclosures under Rule 26(a)(1)(A)(i).
1534 The rule now requires a party to disclose "the name * * * of each
1535 individual likely to have discoverable information -- along with
1536 the subjects of that information -- that the disclosing party may
1537 use to support its claims or defenses." The proposal suggests that
1538 the rule provides an incentive, taken up in practice, to name as
1539 many individuals as possible while providing as little meaningful
1540 information as possible, forcing opposing counsel to guess which
1541 witnesses should be deposed. The rule should be amended to require
1542 a summary of the facts and lay opinions that the witness will
1543 provide. Rule 26(g) would be amended in parallel to require
1544 reasonable inquiries be made about a witness before disclosing the
1545 witness.

1546 This proposal would dramatically expand current initial
1547 disclosure practice. Timing it to the progress of an action from
1548 initiation on could be difficult, particularly for defendants who
1549 may have no opportunity to search out witnesses until served with
1550 process. If this topic is to be taken up, it should be as part of
1551 the Committee's study of results from the Mandatory Initial
1552 Discovery pilot projects.

1553 The Committee voted without dissent to remove this proposal
1554 from the agenda.

1555 *Mandatory Initial Discovery Pilots*

1556 Dr. Lee reported that the attorney surveys of experiences
1557 with the mandatory initial discovery pilot projects continue. The
1558 final survey will be launched soon. Not all cases will have closed
1559 by now, but the project will proceed to put together what
1560 information has been gathered.

1561 "There will be a lot of information. We have nearly 3,000
1562 attorney evaluations." And there are extensive data on time to
1563 disposition; in the Northern District of Illinois, where some
1564 judges did not participate in the pilot project, comparisons can
1565 be made between cases in the project and cases not in the project.
1566 All judges participated in Arizona, but before-and-after

1567 comparisons can be made. And there is a lot of docket information
1568 that describes what the cases look like.

1569 Judge Dow concluded the meeting by noting that the next
1570 meeting is scheduled for October 12 at the Administrative Office
1571 in Washington, D.C., and expressing the hope that the pandemic
1572 will have receded to a point that permits another in-person
1573 meeting.

Respectfully submitted,

Edward H. Cooper
Reporter

DRAFT

TAB 6

TAB 6A

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

ROBERT M. DOW, JR.
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on the Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 12, 2022

Introduction

The Advisory Committee on Criminal Rules met on April 28, 2022. We presented draft Rule 62 with the other reports on emergency rules. What remains for this report are one action item and several information items.

I. Action item: Juneteenth Amendments

On June 17, 2021, President Biden signed into law the Juneteenth National Independence Day Act, Pub. Law No. 117–17, 135 Stat. 287 (2021), which amends 5 U.S.C. § 6103(a) to add to the list of legal public holidays “Juneteenth National Independence Day, June 19.”

The Committee has approved two amendments to incorporate the Juneteenth National

Independence Day into the holidays listed in the Rules of Criminal Procedure. At its fall meeting in 2021, the Committee approved an amendment adding Juneteenth to the definition of “legal holiday” in Rule 45(a)(6) (which governs time computation), and by a later email vote the Committee approved an amendment adding it to Rule 56(c), which allows courts to open the clerk’s office except for certain listed federal holidays. The text of the proposed amendments and committee note appear at the end of this report.

II. Information items

A. Rule 49.1

The Committee has begun consideration of Judge Jesse Furman’s proposal to amend Rule 49.1 to address a concern about the committee note. The note quotes a portion of the 2004 Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files. The note and guidance state the “following documents in a criminal case shall not be included in the public case file and should not be made available to the public at the courthouse”—and include in the list that follows financial affidavits filed in seeking representation pursuant to the Criminal Justice Act.

Judge Furman is concerned that this language in the note is contrary to the views taken by most courts that have ruled on the issue. He has proposed that the Committee amend the rule to read as follows:

(d) Filings Made Under Seal. Subject to any applicable right of public access,
The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

The new Rule 49.1 Subcommittee, chaired by Judge André Birotte, met once via Microsoft Teams. There was consensus that the rule and note should not take a position on the substantive legal question whether financial affidavits are judicial documents subject to a public right of access. The subcommittee’s next step will be to draft a truly neutral amendment and committee note that avoids taking a position on substantive law.

Judge Kethledge informed the chair of the Committee on Court Administration and Case Management, Judge Audrey Fleissig, of the proposal, and she saw no impediment to the Committee’s consideration of an amendment.

B. Rule 17

The White Collar Committee of the New York City Bar has suggested a major revision to Rule 17, which governs subpoenas. The purpose of the revision is “to address the systematic impediments to criminal defendants’ ability to obtain documents and objects in support of their defenses and thus to promote fairness and accuracy in criminal adjudication, ensure equal access to justice, and prevent wrongful convictions; at the same time, the amendments have also been

tailored to protect the privacy of individual third parties and empower courts to prevent misuse of the rule.”

The proposed amendment includes the following elements:

- Changes directed to the scope of the items sought;
- Changes in the provisions governing subpoenas for personal and confidential information;
- Changes to the scope of limitations on obtaining witness statements; and
- A new provision authorizing courts to modify orders to require advance approval of subpoenas in individual cases.

At the April Committee meeting, Judge Kethledge named Judge Nguyen as chair of a new subcommittee to consider the proposal.

C. Rule 5

Judge Bruce Reinhart suggested a change in Rule 5(f), which was added by the Due Process Protection Act, Pub. Law No. 116–182, 134 Stat. 894 (2020). The Act requires the court to give a reminder of prosecutorial obligations “on the first scheduled court date when both prosecutor and defense counsel are present.” Judge Reinhart wrote that this wording is confusing because it might refer either to the initial appearance or to a later date. Accordingly, he suggested that it would be preferable to require that the reminder be given at arraignment.

At the April Committee meeting, the Committee declined to pursue the suggestion, which would require that the amendment recently added by Congress be deleted from Rule 5, so that a new amendment could be added to Rule 10, governing arraignment.

D. Rule 62

As noted in our report concerning the draft emergency rule, the Department of Justice’s comments on Rule 62 recommended adding a new paragraph (d)(5) to allow courts to extend the term of sitting grand juries during judicial emergencies. Because the proposed change was not included in the amendment published for public comment, it could not be added without republication of the whole rule, derailing the accelerated schedule set by the Standing Committee for all of the emergency rules.

Accordingly, the Committee is treating the Department’s suggestion as a proposal to amend Rule 62. In order to avoid confusion while the emergency rules are moving through the final stages of the Rules Enabling Act process, the Committee deferred consideration of this suggestion until that process is completed, placing the proposal on its study agenda.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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WASHINGTON, D.C. 20544

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EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Corrective Technical Amendment to Rule 16

DATE: May 16, 2022

Although Rule 16's new amendments on expert discovery are on track to take effect this December, the Department of Justice recently brought to our attention a typographical error in the amendments. This memo adds an action item to the Standing Committee's June 7th agenda, to approve a technical and conforming amendment to correct the error.

The Rule 16 amendments revise both the provision governing expert witness disclosures by the government – 16(a)(1)(G) – and the provision governing disclosures by the defense – 16(b)(1)(C). Both new (a)(1)(G) and (b)(1)(C) contain two exceptions to a new requirement that the expert must approve and sign the disclosure. One exception applies if the disclosing party had previously provided the information in a report signed by the witness.

The text for **government disclosures** – 16(a)(1)(G)(v) – has the correct cross reference. It states that a witness need not approve and sign the disclosure if the government “previously provided **under (F)** a report, signed by the witness, that contains all the opinions and the bases and reasons for them” 16(a)(1)(F) is titled “Reports of Examinations and Tests.”

The text for **defense disclosures** – 16(b)(1)(C)(v) – has identical language, but should have referred to a report previously provided **under (B)**, not (F). 16(b)(1)(B) is the subparagraph titled “Reports of Examinations and Tests” for defendant’s disclosures.

The technical amendment, approved by email vote of the Committee, would correct this typo as shown below:

- (v) **Signing the Disclosure.** The witness must approve and sign the disclosure, unless the defendant:

* * * * *

- has previously provided under (~~F~~**B**) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

As a technical and conforming amendment, this correction would not need to be published. However, it would not take effect until December 1, 2023.

The delay before the correction takes effect is not likely to cause significant problems. The structure of the rule makes it clear that the correct reference should be to (B). Indeed, there is no (F) in the defense disclosure rule; the only (F) is in the prosecution disclosure section. Additionally, we expect that the Department of Justice and the Federal Defenders will inform their attorneys about the error. Finally, if the issue were litigated, judges could apply the doctrine of scrivener’s error to apply the rule as intended, despite the typographical error.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 16. Discovery and Inspection²**

2 * * * * *

3 **(b) Defendant's Disclosure.**

4 **(1) *Information Subject to Disclosure.***

5 * * * * *

6 **(C) *Expert Witnesses.***

7 * * * * *

8 **(v) Signing the Disclosure.** The witness
9 must approve and sign the disclosure,
10 unless the defendant:

- 11 • states in the disclosure why the
12 defendant could not obtain the

¹ New material is underlined in red; matter to be omitted is lined through.

² The changes indicated are to the version of Rule 16 which is scheduled to go into effect on December 1, 2022 if Congress takes no contrary action.

2 FEDERAL RULES OF CRIMINAL PROCEDURE

13 witness's signature through
14 reasonable efforts; or
15 • has previously provided under
16 (~~F~~B) a report, signed by the
17 witness, that contains all the
18 opinions and the bases and
19 reasons for them required by (iii).
20 (vi) Supplementing and Correcting a
21 Disclosure. The defendant must
22 supplement or correct the defendant's
23 disclosures in accordance with (c).
24 * * * * *

Committee Note

The amendment corrects the cross reference, which refers to expert reports previously provided by the defense under Rule 16(b)(1)(B).

TAB 6B

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 28, 2022
Washington, D.C.

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules (“the Committee”) met on April 28, 2022, in Washington, D.C. The following members, liaisons, and reporters were in attendance:

Judge Raymond M. Kethledge, Chair
Judge André Birotte Jr. (via Microsoft Teams)
Judge Jane J. Boyle
Judge Robert J. Conrad
Dean Roger A. Fairfax, Jr. (via telephone)
Judge Michael J. Garcia
Lisa Hay, Esq.
Judge Bruce J. McGiverin
Angela E. Noble, Esq., Clerk of Court Representative
Judge Jacqueline H. Nguyen
Catherine M. Recker, Esq.
Susan M. Robinson, Esq.
Jonathan Wroblewski, Esq.¹
Judge John D. Bates, Chair, Standing Committee
Judge Jesse M. Furman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee (via Microsoft Teams)
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)
Professor Daniel Capra, Reporter, Evidence Committee (via Microsoft Teams)

The following persons participated to support the Committee:

Allison A. Bruff, Esq., Counsel, Rules Committee Staff
Brittany Bunting, Administrative Analyst, Rules Committee Staff
Burton DeWitt, Esq., Law Clerk, Standing Committee
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center
S. Scott Myers, Esq., Counsel, Rules Committee Staff

¹ Mr. Wroblewski represented the Department of Justice.

The following persons attended as observers on Microsoft Teams or by telephone:

Pedro E. Briones	DC Courts
Patrick Egan	American College of Trial Lawyers
Peter Goldberger	National Association of Criminal Defense Lawyers
John Hawkinson	Freelance Journalist
Nate Raymond	Legal Affairs Correspondent – Reuters
Crystal Williams	Public

Opening Business

Judge Kethledge opened the meeting with administrative announcements. He thanked the staff at the Administrative Office for making all of the arrangements, and he expressed pleasure that the meeting was taking place in person for the first time in almost three years, though a few participants were attending virtually.²

Judge Kethledge stated this was his last meeting, and he expressed gratitude for the experience of serving on the Committee for nine years. He characterized the Committee's work as interesting, important, and fulfilling. He called the Committee an exemplary body whose members trust one another and work collectively to identify the best solutions for administration of criminal justice. The Committee, he observed, is an example of the respect and civility that this country should move towards.

Judge Kethledge thanked the Administrative Office again for everything that they had done over many years, as well as the many members with whom he had worked. He expressed special thanks to Judges David Campbell and John Bates for their work as chairs of the Standing Committee, and to prior Criminal Rules Committee chairs whose examples he sought to follow. Finally, Judge Kethledge thanked the reporters, calling their work truly extraordinary and expressing appreciation for their friendship and kindness. He said he would miss the constant interaction he had had with them.

Overall, Judge Kethledge concluded, his overall feeling was one of gratitude for being able to serve here.

Professor King opened her comments on Judge Kethledge's contributions with a photo of him holding a very large fish. Noting that Judge Kethledge is an accomplished fisherman, she described the traits that made him successful as both a fisherman and committee chair: being goal oriented, decisive, and patient. She characterized Judge Kethledge as laser focused on what was most important and willing to go slowly through multiple revisions, forging and maintaining a consensus. She noted that as fisherman and chair Judge Kethledge had to have a sense of humor and the resilience to persist when things go wrong, like the line breaking, the bait falling

² Judge Andre Birotte, Dean Roger Fairfax, and Professors Cathie Struve, Dan Capra, and Dan Coquillette participated virtually.

off, or the Standing Committee sending back a draft rule. She concluded that Judge Kethledge had been an outstanding chair, and the Committee was grateful to have “caught” him.

Professor Beale said that although she had no photograph, everyone on the Committee had observed the three things she wished to speak about: Judge Kethledge’s service, leadership, and his traits as a person. Describing his strong sense of duty and service, she noted that in nearly a decade he never missed a meeting of the Committee or its many subcommittees, and he was always available to the reporters by telephone or email. He placed the Committee’s work high on a busy agenda that included not only his judicial work, but also teaching at the University of Michigan, his own writing, and his family.

Professor Beale said that Judge Kethledge’s handling of the Rule 16 project was an example of his leadership. The Committee received a lengthy and complex proposal from a New York bar group. As he wrote in his book about leadership, Judge Kethledge—and the Committee—took a step back to determine what was most important. We held a miniconference with a wide range of participants to help identify and understand the most important problems. It led to a breakthrough, and with Judge Kethledge’s constant encouragement the participants forged a consensus that all agreed was a significant improvement—though not necessarily everything that each member might want. In this process, Judge Kethledge brought the best in each person. If there is no objection in Congress, the resulting amendment will go into effect December 1, 2022.

Professor Beale also praised Judge Kethledge’s work on the emergency rules. It was an enormous project, which the Committee accomplished because Judge Kethledge created a subcommittee and then divided it into working groups. There were countless telephone meetings, and Professor Beale wished she had a nickel for each call.

Finally, Professor Beale praised Judge Kethledge’s friendship, kindness, and patience. She noted that he always asked the most from each member and reporter, but also recognized their other responsibilities, including to their families. She concluded that she would really miss him.

Judge Bates said that both he and the Committee would greatly miss Judge Kethledge. They had worked together not only on the rules, but also with Judge David Campbell and others on the CARES Act. Judge Bates called that a great exercise that turned out very well. He said Judge Kethledge’s leadership had been crucial for this Committee. The judiciary is the better for it, and we appreciate it.

Mr. Wroblewski said he had had the honor of representing the Department of Justice on this Committee for several decades, and he called Judge Kethledge an extraordinary steward of the Committee and the Federal Rules of Criminal Procedure. He praised Judge Kethledge for recognizing that we have inherited a really fine text in the existing Rules of Criminal Procedure, which he compared favorably to two foundational criminal justice documents—the federal criminal code and the Sentencing Guidelines. But Judge Kethledge had also recognized that the world was changing in ways that required changes in the rules to deal with networks of robots

committing crimes and pandemics, and he guided the Committee to the needed reforms while maintaining the core virtues of the text, the rules that have stood the test of time. Mr. Wroblewski concluded with his mother's advice: when you take on something like this, you always want to leave it better than you found it. He said Judge Kethledge had done just that. Calling Judge Kethledge a man of solitude, grace, humility, principle, confidence, intellect, and common sense, he said it had been a privilege to get to know him over the past decade.

Judge Kethledge responded warmly, thanking Mr. Wroblewski and expressing his respect for him as a professional and person who brought the Department's perspective and represented it well, but always put the nation's interest first. That made the Committee's accomplishments on Rule 16, Rule 62, and all of the other projects possible.

Noting that he would go over everyone's comments later, Judge Kethledge moved to the next items on the agenda. He thanked the members of the public who were observing, noting the Committee appreciated their interest as well as the comments and suggestions they provide. Ms. Bunting provided a quick review of meeting etiquette for those in person and those online.

Minutes and Rules Committee staff report

Judge Kethledge noted the minutes of the last meeting were lengthy, and he thanked the reporters for their work. Hearing no comments or concerns, he called for a motion to approve the minutes. The motion was made and seconded, and the minutes were approved.

The next item was the Rules Committee Staff report. Ms. Healy provided the first portion, drawing the Committee's attention to the fact that Rule 16 would go into effect on December 1, 2022, unless Congress prevented it. Mr. DeWitt discussed the legislation that might affect the Criminal Rules, noting the overarching theme was Congress's interest in virtual proceedings, which is reflected in multiple bills. The Courtroom Video Conferencing Act of 2022, page 98, would make certain provisions of the CARES Act permanent, allowing the chief judge of a district to authorize teleconferencing for a variety of proceedings. This would not require an emergency, and would effectively negate some of the provisions in draft Rule 62. Mr. DeWitt also drew attention to the Protecting Our Democracy Act, pp. 96-97, which passed the House in December 2021. It would prohibit any interpretation of Rule 6(e) dealing with grand jury secrecy that would prohibit disclosure to Congress of grand jury materials related to individuals that the president has pardoned or commuted their sentences. Professor Beale commented that it was somewhat surprising that the bill did not purport to amend Rule 6(e), but rather to prohibit any interpretation that would preclude disclosure to Congress. Professor Beale noted that this was related to a degree to some of the issues considered by the Committee at its last meeting, when it declined to move ahead with amendments to Rule 6(e). Mr. DeWitt stated that the bill passed the House on almost a party line vote in December, and was now before the Senate Judiciary Committee and perhaps some other committees. Finally, Mr. DeWitt noted the Government Surveillance Transparency Act of 2022, p. 98, which would explicitly amend Rule 41(f)(1)(B) regarding what the government must disclose in the required inventory. Mr. DeWitt confirmed that the Administrative Office was closely tracking all of the legislation affecting the rules.

Rule 62

Judge Kethledge began the discussion of draft Rule 62 with a brief description of the process that followed the legislative directive in the CARES Act to prepare amendments that would apply in future emergencies. Judge Dever chaired the Emergency Rules Subcommittee, which broke into working groups. The working groups and the subcommittee had innumerable telephone calls and Zoom meetings, and then the subcommittee held a day long miniconference to get input from all kinds of affected parties, asking how they were faring in the emergency and the particular challenges they were facing with regards to the Criminal Rules. The process for developing the draft rule and repeatedly refining it was lengthy and involved. Eventually the draft rule was approved for publication in August 2021. Despite the breadth of the rule, there were only a modest number of public comments, including the thoughtful comments and suggestions the Committee would be discussing.

Judge Kethledge thanked the reporters for their memorandum and the subcommittee for its thoughtful consideration, but he emphasized that the Committee's review was plenary. He asked Judge Conrad, the subcommittee chair, to begin the discussion.

Judge Conrad stated that after careful review of the public comments the subcommittee was recommending no change in the text of the rule as published but a few changes in the committee note. The Committee would go through each of the issues in the memo, with the reporters describing the comments and the subcommittee's response.

With regard to the process, Judge Kethledge and the reporters stated that motions to make changes in the rule or text could be made during the discussion, which would conclude with a final vote to approve the rule and note for transmittal to the Standing Committee.

Rule 62(d)(1)

Professor Beale began the discussion of the one change the subcommittee recommended, discussed in the memorandum on page 101 of the agenda book. The public comments stated conflicting views regarding the treatment of victims in the committee note for (d)(1), which concerns public access. The Department of Justice expressed concern that the note did not mention the Crime Victims' Rights Act (CVRA) and grouped victims with other members of the public, which might lead courts to take actions that would not be in compliance with the CVRA. Accordingly, the Department proposed adding an explicit reference to the need to comply with the CVRA to make sure it was scrupulously followed.

The National Association of Criminal Defense Lawyers (NACDL) strongly disagreed, stating that the committee note as published was absolutely correct and opposing the Department's proposal.

Finally, Professor Miller and her federal criminal justice clinic students (the FCJC) thought that the text and committee note short-changed the members of the defendant's family and friends, whose support is critical and who should not be placed on a lower priority than victims.

The subcommittee came up with what we think is a very good compromise, quoted on page 104. It draws attention to both sets of interests that courts should consider: both the First and Sixth Amendments (which include the defendant's friends and family) and the Crime Victims' Rights Act (CVRA). It does not try to spell out either the constitutional requirements or those of the CVRA. And it doesn't assume the CVRA is the only possible statutory provision. Although we did not identify other possibilities, the "including" language leaves open room for other statutory directives. After drawing attention to these constitutional and statutory directives, it leaves it to the courts to define what reasonable alternative access would be in particular circumstances. With this new reference to the CVRA, the subcommittee proposed deleting the parenthetical reference to victims in the note as published. Drawing attention to, but not attempting to fully define, the constitutional and statutory provisions that should be considered is consistent with the approach the Committee has historically taken in other committee notes.

Noting that this was one of the more difficult issues raised by the public comment, Professor Beale asked for discussion of the issues and the subcommittee's proposed approach.

Judge Bates asked whether there is a common law right of access in addition to the First and Sixth Amendment constitutional guarantees and the CVRA. If so, he wondered if the failure to reference it might mislead some judges.

Professor King commented that common law rights govern unless modified by statute, so it was something we could consider adding because the proposed note language does list three things and might suggest it is comprehensive.

Judge Kethledge asked what common law would mean in this context. Would common law be the basis for judicial judgment as opposed to informing constitutional analysis?

Professor King responded that the common law analysis came up in connection with the Committee's study of issues raised by efforts to protect cooperators, but could not recall what difference there was between the common law and First Amendment rights of access.

Professor Beale also had some recollection of that research connected to the cooperator proposals, and thought that some courts went to the common law right of access first, before turning to the constitutional analysis. She thought that to the extent there was a body of law recognizing a common right of access it was a helpful suggestion to add a reference in the note listing things courts should be attentive to.

Judge Furman agreed it would be a good idea to mention the common law and suggested that it might be sufficient to refer to "the constitutional and/or common law guarantees of public access." The references to the First and Sixth Amendments could be deleted on the theory that there's no need to specify which provisions of the constitution are applicable. Judge Kethledge responded it might be sufficient to make sure courts do not overlook the constitutional guarantees without being specific.

Professor Beale asked whether there was agreement to add the common law right of access; if so, then it would be necessary to think about the precise wording. Judge Kethledge

responded that if a reference to the common law were added, it would be appropriate to be “agnostic” rather than instructing judges to find such a right.

Professor King reminded the Committee that the FCJC’s concerns centered on the Sixth and First Amendments and the need to follow the constitutional requirements whenever there is some sort of courtroom closure. This proposed mention of the First and Sixth Amendments in the addition to the committee note was as far as the subcommittee went in responding to the FCJC’s comments, which requested many references to the Sixth Amendment test throughout the note. Eliminating the references to the First and Sixth Amendments would be something the FCJC would strongly oppose. They were very focused on bringing judicial attention to the Sixth Amendment.

Professor Coquillette asked whether it would be sufficient to say any applicable statutory provision, rather than mentioning the CVRA. That would avoid any problems down the line if the CVRA were repealed, and he noted it was more likely a statute like the CVRA might be repealed than the constitution be repealed. He suggested that the same arguments made in favor of deleting the references to the First and Sixth Amendments would also favor deleting the reference to the CVRA.

Mr. Wroblewski responded by first putting the discussion in context, noting that no one was suggesting any change in the rule. The only issue under discussion concerned the note language intending to identify the considerations that judges should look at in implementing the emergency procedures. As published, the note referred to both “victims” and the First and Sixth Amendments. In light of the fact that the CVRA is very relevant to who has access to the courtroom and how they have access, the Department thought it was important to refer to the CVRA in the note as one of those considerations. The Department was not trying to determine the priority of access between friends and families, but only to make clear the CVRA should be a consideration. This particular statute is different from all others and should be mentioned within the note. The way the reporters and subcommittee have drafted the note makes it clear that the Committee is not trying to identify relative priorities, but only trying to say to judges these are things you need to consider: the constitution, the common law, statutory provisions and this one in particular—the CVRA—because it specifies access to courts in the statute.

Responding to Professor Coquillette’s concern about citing a statute in the note, Professor Beale commented that other notes specify statutes, such as the Speedy Trial Act. That Act could be repealed, but that is not likely. And it is not likely that the CVRA will be repealed. Because the CVRA directly addresses the victim’s right to address the court and otherwise participate in proceedings, she favored retaining the reference to it in the note (and adding the common law as well as referencing the First and Sixth Amendments). She agreed with Professor King’s comment about the very strong concerns expressed by the FCJC in the public comments that the Sixth Amendment right to public access may be overlooked or not given enough attention in an emergency. The note is listing things for courts to think about, not trying to say one is more important than another. But in saying these things must be considered, the rule does not spell out exactly what kind of access must be provided. So it’s pretty spare, and the question what courts

must consider has been deferred to the note. It was appropriate to identify some of the things they should consider.

Professor Coquillette said he understood that consideration, and he commented that in general the note was very well crafted and struck a good balance.

A member said she liked the language of the proposed note with the addition of any common law. Given the purpose of the note, the specificity of the First and Sixth Amendments gives helpful guidance for courts. She also liked the proposed treatment of victims and deleting the earlier general reference. The proposed language did not seem clunky or awkward.

Another member agreed that we should retain the reference to the Sixth Amendment to provide some guidance to the courts. When we talk about public access, we often think of the First Amendment, and it is useful to have a reminder to consider the Sixth Amendment. If we want to be neutral about the common law, the note could say “the constitutional guarantees of public access in the First and Sixth Amendments, the common law, and any applicable statutory provision” That way we would not be saying there is a common law right of access.

Judge Conrad observed that the subcommittee did not identify any other constitutional or statutory provision. Since the language of the proposed note is “any applicable statutory provision, including the Crime Victims’ Rights Act,” he wondered whether the word “including” should be added before the reference to the First and Sixth Amendments. That would make the provisions parallel.

Professor King said she was struggling to identify other constitutional provisions that might provide a right of access. Perhaps the Eighth Amendment. Or the Due Process Clause.

Professor Beale observed that the question whether there were other plausible constitutional provisions was closely related to the question whether parallel language was appropriate. If there are no other plausible constitutional provisions, then she would not favor the parallel phrasing “including.” She too was uncertain whether there were other constitutional provisions and a need to draw attention to them.

Judge Kethledge commented that if something would be a relatively novel argument, it will arise only if someone makes the argument. In that situation, there would be no concern a court would overlook the issue.

Judge Furman noted that there is an argument that the Sixth Amendment is a trial right that would not apply to various pretrial proceedings governed by Rule 62 (which makes no provision for virtual trials). Without knowing the substantive law, he thought that arguments in that context might rely on the Due Process Clause rather than the Sixth Amendment. That would be a reason to be deliberately indefinite about the constitutional guarantees rather than specifying particular provisions, and to trust judges to understand that generally means the First and/or Sixth Amendments.

Professor King summed up the proposals that had been made:

- Refer to the constitutional guarantees of public access, including those in the First and Sixth Amendments
- Omit the reference to the First and Sixth Amendments
- Retain the reference to the First and Sixth Amendments and add a reference to the common law.

She suggested turning first to the question of references to the constitution, and then to whether to add a reference to the common law.

Judge Kethledge asked for discussion on whether to omit the references to the First and Sixth Amendments. A member who had previously spoken in favor of including them acknowledged the point that the Due Process Clause might be helpful in proceedings not covered by the Sixth Amendment. And if due process protects public access, we don't want to imply we are not protecting that here.

Professor Beale commented that making the reference to constitutional provisions parallel to the phrasing regarding statutes would leave open the possibility that people would litigate and over time a body of law would develop under the Sixth Amendment, the Fifth Amendment, or otherwise.

Another member who had also spoken in favor of including the First and Sixth Amendments in the text said she too had been unaware that there are other rights of public access. She asked whether the subcommittee had researched the due process issue.

Judge Kethledge and the reporters responded that the subcommittee had not done so, though Professor Beale said that due process rights had been discussed a bit in the Rule 49.1 subcommittee. A member of that subcommittee responded that in the context of Rule 49.1 the defense did turn to a due process argument, though not on the question of public access. She agreed that whenever there is a threat to the rights of the defendant you often turn first to due process, so that might be true here as well.

Professor Beale thought there was no need to be too restrictive in what the note suggests courts think about if there was a concern that about misdirection if the note is read as saying these are the only constitutional provisions. That argument had been successful when the subcommittee knew it wanted to cite the CVRA but did not want to signal that there could be no other statute.

Judge Kethledge observed that if we have "including" referring to the statutory but not the constitutional provisions that might suggest that we are certain about identifying the constitutional provisions. So one way to go forward would be "including" referencing the First and Sixth Amendments, adding the common law, and retaining the CVRA reference. But we heard some comments about eliminating the reference. He asked if anyone wished to do so.

Mr. Wroblewski sought clarification of the earlier reference to the First and Sixth Amendments (on the first line of page 140). Professor Beale responded that reference would not be affected by any change being discussed. This portion of the note explains how the Committee

defined the term “public proceeding” in Rule 62, which are the proceedings where there must be access under the First and Sixth Amendments. Judge Kethledge agreed that we were referring to an extant body of case law, which is a little different. Professor King agreed, noting that the first reference at the top of page 140 is to what is meant by public proceedings, and the new paragraph focuses on what judges should think about when they are determining whether alternative access is reasonable. She thought, for example, one might raise an equal protection challenge to alternative access. But that would not affect what is characterized as a public proceeding. Mr. Wroblewski thanked Judge Kethledge and the reporters for that explanation.

Judge Bates suggested that the Committee look ahead to the presentation of the rule to the Standing Committee, and he suggested that it would be helpful to have done research on these issues. If there is any case law on other constitutional bases for access other than the First or Sixth Amendments, that would raise the question whether the note should limit the reference only to those amendments. But it might be unwieldy to start adding other constitutional provisions, which might be a reason to refer only to constitutional guarantees in general.

Judge Kethledge responded that in light of the language at the top of page 140, which Mr. Wroblewski had just asked about, a judge who is reading the note to (d)(1) will just have read the reference to the First and Sixth Amendments. Perhaps the judge does not need to be reminded of them again specifically three paragraphs later in the same note.

Professor King expressed reservations about deleting the references to the First and Sixth Amendments as things the judge should consider in determining reasonable alternative access. Several of the suggestions in the public comments wanted more detail and emphasis on the access guaranteed by these amendments, and the subcommittee declined to add those references in part because of the language proposed here. Judge Kethledge responded that the other reference to the First and Sixth Amendments was in a note to the same paragraph on public access, (d)(1). He returned to a point made earlier: because the law can change over time, our phrasing regarding statutory provisions allowed for others that might be added. He noted members had suggested the defense would turn to due process if they did not have other options. So a parallel treatment of the constitutional and statutory provisions might be appropriate if we were drawing attention to the constitutional provisions we knew should be considered, but trying to signal that we were not saying nothing else mattered.

Professor Beale stated she was not opposed to more research, but she was not sure more research was needed to defend an open-textured way of drawing attention to the provision we are 100% sure courts should be thinking about, but trying to signal that the door is not closed to other kinds of arguments. In response to a question from Judge Bates, she agreed this was an argument in favor of referring to constitutional guarantees of public access, including the First and Sixth Amendments. Judge Kethledge commented that the text might read better using parentheticals.

After clarifying that the reference to the First and Sixth Amendments at the top of page 140 would remain, a member said she was coming around to the position that the references to the First and Sixth Amendments might be confusing. Doing some quick research during the

meeting she had found multiple references that grouped together First Amendment, Due Process, and common law rights of access, all thrown together in one phrase. So it might be desirable to refer to “the constitutional right to public access, the common law, and any statutory provision” (acknowledging that the Justice Department wanted to specifically refer to the CVRA). She was not sure we would lose anything by deleting the reference to the First and Sixth Amendments since they were already in the earlier paragraph in the same note.

Judge Kethledge noted that the Committee seemed to be moving towards consensus. The question was whether to delete the references to the First and Sixth Amendments. He asked if there was a motion to do so. He suggested taking a voice vote on this issue—with those participating on Teams using the raised hand feature—and deferring the question whether to add a reference to the common law. This would be a vote on the concept.

A member asked for clarification, noting that it appeared there was a serious question whether due process might be applicable. Assuming that there might be other constitutional provisions that could provide a right of public access, she thought this would be a way to accommodate them. If we do not know whether or how many constitutional rights there might be, it would be safest not to list only two amendments since that might mislead judges.

The member and the reporters agreed there were two ways to do this: (1) delete the reference to specific amendments and refer only to constitutional guarantees or (2) refer to constitutional guarantees of public access “including the First and Sixth Amendments.”

In favor of the second option, Professor Beale noted that most people have litigated public access under the First and Sixth Amendments, and there is a great deal of case law discussed in the FCJC’s public comment memo. The FCJC urged that these amendments have great significance for the alternative access courts must provide. And if representatives of the press were present, she thought they would like the note to draw attention to the First Amendment. So the note could draw attention to these two amendments and recognize the potential for litigation on other issues (though they had not seen much of that). Or the note could be “short and sweet,” referring simply to any constitutional guarantee of public access.

Noting that there had not been much discussion of the word “any constitutional guarantees,” a member commented that it would be preferable to say “the constitutional guarantees,” since there clearly are constitutional guarantees of public access.

Judge Kethledge suggested that the Committee try to reach agreement on specific language which someone then might move to adopt. In response to a member’s question, he confirmed that the Committee was only considering the new paragraph proposed on page 104, not the reference in the first paragraph on that page.

Professor King stated the following option:

When providing reasonable alternative access, courts must be mindful of the constitutional guarantees of public access....

Someone asked whether this should be “the constitutional and common law guarantees” (emphasis added). Judge Kethledge asked what that would mean, noting that he was not aware of a specific case. How sure, he asked, are we about common law guarantees? Professor Beale responded that the reporters had included the common law in their research memos when the Committee was considering protections for cooperators.

Professor King restated option 1:

When providing reasonable alternative access, courts must be mindful of the constitutional and common law guarantees of public access, and any applicable statutory provision, including the Crime Victims’ Rights Act.

She then stated option 2:

When providing reasonable alternative access, courts must be mindful of the constitutional guarantees, including the First and Sixth Amendments, the common law right of public access, and any applicable statutory provision, including the Crime Victims’ Rights Act.

Judge Bates commented that rather than voting on both options, it might be simpler to vote initially on the first option, which he characterized as making just two simple changes: after “constitutional” deleting the words “First and Sixth Amendments,” and adding the word “common law.”

A motion to adopt option 1 was made, seconded, and passed by a vote of seven to three. Judge Kethledge observed this issue was likely to get attention at the Standing Committee meeting, and Professor Beale added that in writing it up the reporters would determine whether any additional research was needed.

A member raised a stylistic question about the note to (d)(1), which was generally in the present tense but included one verb in the past tense: “The term public proceeding was intended to capture....” Should this be the present tense, defining what the term is intended to capture? Judge Kethledge agreed that would be a good change, and asked whether a motion was necessary. Professor Beale thought not: if no one objected, it could be covered in the final vote to approve the rule and note. That would cover, as well, the strikeout of the words “including victims” on the top of page 140, which was part of the proposal to add the new paragraph the Committee just voted to adopt.

Other comments on Rule 62: No changes recommended

Professor Beale then turned to the discussion of the other comments received, which the subcommittee had considered and declined to make the changes that were proposed. She noted that these were all decisions to be made by the Committee as a whole.

Rule 62(a) – the role of the Judicial Conference

Two comments, described on page 105, addressed the decision to give the Judicial Conference the exclusive authority to declare rules emergencies. Lodging this authority in the

Judicial Conference, she noted, was an important common feature shared by the other emergency rules. The Federal Magistrate Judges Association expressed concern that the Conference would not be able to act quickly enough in different kinds of emergencies. On the other hand, the Federal Bar Association strongly supported this feature.

The subcommittee recommended no change. It understood that this issue had received serious consideration throughout the process. Professor Beale noted that the Committee had strongly favored the Judicial Conference as a single gatekeeper that would have a uniform and fairly strict approach to relaxing the ordinary and important requirements in the Federal Rules of Criminal Procedure for emergency situations. It had been persuaded that the Judicial Conference can act quickly, including through its executive committee as necessary. The Conference has the ability to gain the necessary information and respond quickly. And there is a value in placing this responsibility in the judiciary and in the Judicial Conference exclusively. So the subcommittee was comfortable with this portion of the rule as published, and it also understood that this was a common feature of all the rules going forward.

Professor Coquillette stated his agreement with Professor Beale's comments. Having served as the Standing Committee reporter for many years, he had been able to see the Judicial Conference and executive committee act quickly in emergency situations. They're quite capable of doing it under the leadership of the Chief Justice.

Neither Judge Conrad nor any other member of the Committee wished to add anything more on this issue.

Rule 62(d)(1) – deleting or revising existing references to contemporaneous and audio access

Professor Beale turned next to two comments, both of which expressed concern about the requirement that the reasonable alternative access be “contemporaneous if feasible.” The Federal Magistrate Judges Association expressed concern that saying “contemporaneous if feasible” was too weak. It might signal that contemporaneous access was not important or not necessary, and that language might actually lead to more frequent denial of the right of public access during emergencies. The group from Chicago (abbreviated as the FCJC in the memorandum) wanted to expressly provide that any limitations on public access during rules emergencies must satisfy the *Waller* test, a constitutional decision that spells out multiple criteria.

So the question for the subcommittee—and now the Committee as a whole—was whether the rule struck the right balance. The subcommittee was not persuaded that it would be appropriate for the rule or the note itself to try to spell out the constitutional analysis that courts should apply. That gets into substantive constitutional decision making, and the subcommittee felt that that was not appropriate for the rule or note. The proposal signals to courts that they need to attend to the constitutional principles applicable to public access, but does not try to spell out those provisions. As to the language “contemporaneous if feasible” and whether it might actually undercut and cause courts to provide less rather than more access, the subcommittee

recognized that we don't know what kinds of emergencies courts might be dealing with. Or what would be possible in these unknown future emergencies.

The language "contemporaneous if feasible" was intended to strike a balance, to nudge courts towards understanding that contemporary access should be afforded, though it may not be feasible or possible under all circumstances. There was some debate within the subcommittee about whether "possible" would be better than "feasible." Is it correct to signal that contemporaneous is the goal, though it may not always be possible?

The subcommittee decided to recommend no change. The word "feasible" is used elsewhere in in the notes. The questions for discussion were whether to substitute the word "possible," or—as the Federal Magistrate Judges Association suggested—better to strike it entirely. The subcommittee thought we probably got the balance right.

Professor Beale noted there were two discrete questions here. One is about whether "contemporaneous if feasible" is helpful or harmful, and the other is whether we ought to include an express reference to a particular Supreme Court case as something that the judges should be mindful of.

Judge Conrad stated the approach here was consistent with the earlier discussion. The Committee tries to avoid substantive constitutional analysis in the notes. The subcommittee did try to think of words other than feasible, but it did not come up with anything that expressed it better. That was why, at the end of the day, it recommended retaining those words.

Judge Kethledge responded that reasonable people could differ on "feasible" or "possible," and the subcommittee had talked about that.

A subcommittee member recounted her recollection of the discussion at various stages. She thought when we first discussed alternative access we came up with the idea of requiring contemporaneous alternative access from the courtroom. She thought contemporaneous access is pretty critical when we talk about a public hearing. We want victims to be able to participate in the hearing. We want family members to participate. We want the press to hear as the proceeding is occurring, not to receive a transcript, maybe weeks later. So, she recalled, we discussed contemporaneous alternative access. And then in the subcommittee we wondered if contemporaneous was always possible, and we discussed if it is possible, then is it feasible? Which would be the right modifier? She now agreed with the magistrate judges. By putting a limiter on contemporaneous, we may be signaling that that would be acceptable to provide access that is not contemporaneous. Perhaps we should strike the phrase "contemporaneous if feasible" altogether so that our rule just requires alternative access. That would leave it up to the judges to decide how to interpret what's actually feasible. If we say "contemporaneous if feasible," that would be suggest the Committee thought that it would comply with the constitution and the common law right of public access, because the rule should not allow something that's unconstitutional. We'd want that to develop in the case law. So she proposed that our rule require reasonable alternative access, and we strike "contemporaneous if feasible."

We would not be watering down that important idea, though not requiring it either if the emergency is so great that it couldn't happen.

Professor Beale responded that she thought the history was slightly different. We did not have "contemporaneous" in initially. It was added because there was a strong sense that we should be signaling the importance of access being contemporaneous. (Not, for example, like the Supreme Court recordings and transcripts that are released later.) But we recognized that we couldn't possibly guarantee it would always be possible in future emergencies. So if we were going to reference it, it might be critical to have some recognition of that possibility. But the goal was to at least state the norm while recognizing it couldn't always be met. That's the debate, she said. Is it important to state the norm, even with that limitation?

Judge Kethledge wanted to retrace some of the committee's thinking. He observed that everyone prefers contemporaneous access, and no one thinks later access is better. He thought the emphasis or preference for contemporary access did seem like something that some judges could overlook and not be mindful of during an emergency. So we thought a reference to contemporaneous access was helpful, so that judges don't lose sight of it when they are making these arrangements. If we are going to have a reference to contemporaneous, then the question was would this be "if possible" or "if feasible." "Possible" is somewhat more demanding. If you construe it literally, a lot of things are possible. We could be mandating herculean efforts to have contemporaneous access, and the Committee backed away from that idea, preferring feasible or practicable: do this, if it's feasible. But if it was going to be unreasonable, then the Committee backed away. With that recap, he called for other comments on whether to retain the word "feasible" or have this phrase at all.

Mr. Wroblewski had a question for the member who had expressed support for deleting the phrase "contemporaneous if feasible." He asked if she wanted to keep the paragraph in the note that states alternative access must be contemporaneous when feasible, but take it out of the rule. Or did she want to take it out of both? He wondered where she stood on giving this nudge to the judges that it should be contemporaneous. He agreed there was universal agreement that that is the preference. He understood there may be a negative implication that could be drawn from including the words. So did she want to give the nudge in the note but not the rule, or take it out of both?

The member responded that was a good question. If we took it out of the rule, the rule would no longer suggest it considers non contemporaneous to be appropriate. But if the note still referenced contemporaneous access if feasible, she remained concerned because even suggesting that it doesn't have to be contemporaneous waters down that right. She definitely thought the rule should not include that phrase. And she noted the reporters would probably say if it's not in the rule, it's considered less binding. Judge Kethledge commented that it would be less binding.

Professor Beale stated that reasonable alternative access is a very broad idea. It just tells the judge to figure out what's reasonable. It doesn't say anything about whether it has to be contemporaneous. Judge Kethledge agreed and commented that there was a danger that a judge might think contemporaneous access is going to be a lot of trouble, and I think what I am doing

is reasonable. Professor Beale recalled a prior member who was strongly against including contemporaneous because he was afraid it wouldn't always be possible. The pushback to his argument was that it was not sufficient just to say "reasonable." On its face "reasonable" doesn't give any signal about the importance of it being contemporaneous—none. It suggests to the judge whatever you think is reasonable, so that's the issue. And the member was correct that if you demote it only to the committee note it will have less significance. Judges may not see it. The notes are not in the little yellow pamphlets that they print and provide to the courts.

Judge Kethledge suggested it might be inappropriate to remove the phrase from the rule, but retain a mandate for contemporaneous access in the note.

Professor Coquillette, who called himself a real believer opposed to putting anything in a note that changes the way they understand the rules, said if it's going to be important, put it in the rule. A lot of people don't see the notes, and he thought this was also much better rulemaking.

Judge Kethledge commented that as a judge he found the notes are harder to access than the text. The notes are not in the hard copies distributed to judges. He found accessing the notes tricky, and usually has his clerks do it.

Professor King commented that leaving "contemporaneous if feasible" in the rule on line 39, page 129, elevates this aspect of reasonable alternative access above other aspects of reasonable alternative access. The rule does not say visual if feasible, or anything else about reasonable alternative access except that it must be contemporaneous. It's a choice to take that aspect of what the Constitution requires and say something about it in the rule if you're concerned about singling that out, and not talking about other things as the FCJC advocated. It may also be a problem if you are concerned (as the magistrate judges were) about suggesting the possibility that it would not need to be contemporaneous. Otherwise, it is the subcommittee's recommendation that this particular aspect of reasonable alternative access should be front and center in the rule.

Judge Kethledge responded that sometimes the decision to highlight something or to call it out is not about elevating that thing above other values. Rather, it's based on a fear that judges might forget or overlook it. He thought that was driving the Committee on this issue.

But now, Professor Beale noted, adding "contemporaneous if feasible" was causing concern about negative implications. To the extent the concern is negative implications, the Committee might consider the stronger wording "contemporaneous if possible."

A member who had expressed concern about the negative implications asked whether others thought "contemporaneous if feasible" signaled that access does not have to be contemporaneous. She suggested the alternative of requiring "reasonable contemporaneous alternative access." Perhaps the rule should say that even in an emergency public access must be contemporaneous. Do we think, she asked, that in an emergency a court should be able to have hearings in which there is no contemporary public access? If that would not be feasible, perhaps the court hearing should not proceed. She found herself coming back to that position. If we can't

even have a phone line to allow people to listen in, then maybe they should not have the court hearing even if it's an emergency. Like the magistrates, she was concerned that "contemporaneous if feasible" weakens the requirement of alternative public access significantly. So she preferred either omitting that phrase or substituting "reasonable contemporaneous alternative access."

Professor Beale said that the Committee talked about different kinds of public emergencies. One possibility might involve the grid and a loss of electronic communications, but in that scenario, some members of the public could come into the courthouse and be physically present. She recalled a former member from Judge Furman's court had described that court's experience and the impossibility of providing any kind of alternative at some points: people could not come in physically because of the COVID, and there were so many technology problems that he thought that it might be just impossible. So the question for the Committee is whether there are proceedings that should go ahead when it is not possible to give any kind of alternative public access contemporaneously? Is that a real possibility based on what we know? If so, we have a hard choice. Should the rule say that the court cannot go ahead with that procedure?

Judge Furman agreed this was consistent with his recollection of the prior discussion and his own experience. He would adamantly oppose a change from "feasible" to "possible" because the latter is too restrictive. In his experience, particularly in the early days of the pandemic, they were scrambling to keep the system going and encountering all sorts of practical problems, obstacles, and technological issues. Having some degree of flexibility—mindful of the important principles at stake—was definitely necessary. There were circumstances and proceedings where it was very critical that they go forward. But situations arose where people could only listen in and not be on the video—just more practical limitations than one might think. So based on his experience he definitely supported the "if feasible" language as an important recognition of the needed flexibility.

The clerk of court liaison noted she had spoken to this issue at the last meeting when we were talking about a September 11th situation where phone lines don't work, and Internet service is not available. There will be circumstances where it is important to have a hearing if you can physically do so. For example, if someone's due to be released on bond, you don't want to delay those proceedings if you don't have to just because you don't have a phone line or the Internet so that people can listen in. The rights of the defendant are important, and we need to have the proceedings. She thought it was important to say it should be contemporaneous, but at the same time there may be limitations. So the rules should allow flexibility for judges, but not to say "I don't have to do it," but rather "I can't do it." We should provide contemporaneous public access. We need to do it. But if for some reason circumstances don't allow it, we have to have something in the rule that says it's OK for us to continue. She said 9/11 is a good example. In the Southern District of New York, you could not get to the courthouse because of its proximity to Ground Zero.

Judge Conrad commented that the emphasis on flexibility was very important to the Committee. If we are going to prioritize contemporaneous access, we should also modify it by the flexibility required during an emergency which nobody can predict.

Judge Kethledge asked if there was a motion, and a member moved to strike “contemporaneous if feasible” and instead insert the word “contemporaneous” earlier, so that (d)(1) would require the court to provide “contemporaneous reasonable alternative access.” There was no second, so the motion did not go forward.

Rule 62(d)(1) – adding references to constitutional standards

After a ten minute break, Professor Beale returned to the public comments discussed on pages 109 and 110. These suggestions requested quite a lot of additional detail in the rule and/or the note: the requirement that public access allow participants to see observers, that there be no advance registration, and that there be a requirement of announcement of public access limitations unless *Waller* was satisfied. The subcommittee’s response to all of these was that this level of detail is not appropriate for a rule of this nature, and there are other ways of providing it, such as CACM advisories, the Benchbook, and so forth. Maybe courts require more advice on these matters, but the subcommittee did not think that the rule was the place for it.

Judge Kethledge commented that there is a difference between a rule and an application, and these proposals started to get into applying it to particulars.

Professor Beale drew attention to one additional suggestion at the bottom of 110, barring courthouse-only access. She thought it was interesting that the supporters of contemporaneous access also wanted the right not to be required to come into the courthouse. That was based on a pandemic-type situation where coming in might risk their health. But as noted in the reporters’ memo, that suggestion raised other issues. Rule 53 generally bans broadcasting, and the norm is in-person attendance. That is what these commenters wanted in other contexts: alternative access should be like the ability to walk into a courthouse. The subcommittee did not agree that type of restriction was appropriate for the rule. And it did not agree that the rule should limit how courts could navigate around the prohibition between broadcasting, or that allowing a kind of alternative in-person access would be insufficient. The subcommittee did not think that was something that would be appropriate to put in the rule.

Judge Kethledge commented that as an institutional matter the approach of the rules has been to lay out a principle or a standard. Then the rule leaves it to the District Judge to apply that rule to particular circumstances, and we expect that that District Judge will be reasonable and prudent and wise in doing so. An alternative approach, foreign to the Anglo-American tradition, is to try to codify all the particulars that a judge might face and say you shall do this, or shall not do this or that as to many particulars. The rule-based approach, as opposed to the codification approach, leaves such matters to the judge’s discretion and judgment based on that judge’s greater information about the situation in front of him or her. He thought these suggestions implicate that different approach.

Judge Kethledge asked if there were any comments about these particular suggestions. Hearing none, the reporters moved on.

Rule 62(d)(2) – signing on behalf of the defendant

Professor King began the discussion of comments concerning the provisions on signing or consenting on behalf of the defendant. She drew the Committee’s attention to the comments on (d)(2), discussed on page 111. She read the text of the rule as it went out for public comment (page 129 of the agenda book):

(2) Signing or Consenting for a Defendant. If any rule, including this rule, requires a defendant’s signature, written consent, or written waiver—and emergency conditions limit a defendant’s ability to sign—defense counsel may sign for the defendant if the defendant consents on the record. Otherwise, defense counsel must file an affidavit attesting to the defendant’s consent. If the defendant is pro se, the court may sign for the defendant if the defendant consents on the record.

The committee note explained that the proposed rule recognizes emergency conditions may disrupt compliance with the rule that requires a defendant’s signature, written consent, or written waiver. If emergency situations limit the defendant’s ability sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents to ensure there’s a record of the defendant’s consent to this procedure. The amendment provides two options. Defense counsel may sign for the defendant if the defendant consents on the record. Without the defendant’s consent on the record, defense counsel must file an affidavit attesting to the defendant’s consent. The defendant’s oral agreement on the record alone will not substitute for the defendant’s signature. Both alternatives require defense counsel to do something, to sign and file the consent, or to file an affidavit attesting to the defendant’s consent. It is not something the court can do with one exception. The last sentence of the rule says that if the defendant is pro se, the court may sign for the defendant.

Professor King said that’s what the rule requires. Defense counsel has to file something, and that requirement generated the comments that we received. Judge Cote recommended that the line 45 of the text of the rule, on page 129, be amended to read “defense counsel or the court” may sign for the defendant if the defendant consents on the record. Her concern, articulated on page 111, was that there is an adequate record if the defendant consents on the record, and defense counsel often asked the judge to add the defendant’s signature to the form or expressed relief when the judge volunteered to do so. What is essential, Judge Cote argued, is that the consultation occurred, that was knowing and voluntary, and that there is an adequate contemporaneous record of the consultation and assent. The Federal Magistrate Judges Association agreed and argued that magistrate judges often had to obtain oral consent on the record, especially at first appearances initial presentments. The FMJA urged the committee to consider more flexibility.

One thing to keep in mind when we discuss this, Professor King said, are the various points in the rules that require a defendant to consent in writing or file something that he’s

signed. So we're talking about not just the new rule that requires a written request for video conferencing of pleas and sentencing. We are also talking about existing rules that require the defendant's signature or written waiver: Rule 23 waiver of a jury, Rule 10(b)(2) waiver of appearance at arraignment, Rule 43(b)(2) consent to trial of a misdemeanor by video or in absentia, and Rule 20(a)(1) transfer of case to another district, as well as the written request for video conferencing for pleas and sentences. Those are the situations where the rules now, and the new provisions in Rule 62, would require this to happen.

The subcommittee considered the concerns raised by the commenters and it recommended no change to the published rule, in light of the benefits of having defense counsel sign instead of the judge. Those benefits were articulated by Judge Dever, who then chaired the subcommittee, and were considered at the Fall 2020 meeting. First, the written document creates a record that the defendant consented, a record beyond the transcript of whatever video proceeding is taking place. If the consent is later challenged, there is that written consent signed by defense counsel. Second, insisting on a writing from defense counsel reduces the chance that courts will pressure the defendant into consenting, or that the defendant will perceive such pressure. It ensures that the judge is not in the position of asking a defendant directly for consent but must go through defense counsel.

The subcommittee concluded that these advantages—avoiding later claims that the judge's signature did not reflect consent, ensuring that the judge was not in the position of asking defendant directly for consent but rather must go through counsel, preserving the duty of counsel to determine whether the defendant consented, and avoiding departure from existing rules unless necessary—were more important than the concerns about delay or inefficiency raised by the judges.

The subcommittee also recognized that only judges and not defense counsel seemed concerned about potential difficulties defense counsel would have or have had in providing a written consent or waiver to the court. Defense counsel suggested this rule requiring that counsel sign at the 2020 miniconference, where the practitioners said this is how we are doing this and that it was working well. No one objected then to having the counsel sign. The subcommittee considered that as well when recommending no change in this provision.

Judge Kethledge invited discussion.

One member said she had served on the original subcommittee and was part of the extensive deliberation about this provision. She said she had called a number of magistrate judges in her district and to her surprise two of them were quite open about their frustration and anger about not being able to force a defendant to go forward virtually. It was a very small sample size, but it settled the question for her. (She added later in the discussion that the judges were reacting to what she gathered they thought was an incredibly irrational decision.)

The member also noted that a signature adds a dimension of formality to the conversation that is necessary and prompts a defendant to ask questions. The consent is informed and is of a different quality. Having a client affix a signature on a piece of paper yields a different

conversation. In her view, it is the best way to achieve informed consent. If an emergency creates reasons why that can't happen, the next best thing would be for the lawyer to affix a signature to an affidavit.

The member said she agreed with NACDL's recommendation that informed consent must take place in an unhurried manner, and before a virtual proceeding. Without advocating that the Committee adopt that language, she thought the concept was extremely important. The alternative is a conversation between lawyer and client that takes place while everybody else is waiting, and then they put the consent on the record. She did not think that was appropriate at all.

The member noted, however, that she had also spoken with judges whose districts have a much larger geographic scope than hers. One judge from a very large district said that some of the detention facilities that she works with are over 200 miles away from the court, and that appointed counsel often cut corners and don't go visit. Those state and county facilities are less likely to have any form of acceptable technological access. What then tends to happen is that the informed consent takes place virtually, when the judge and others are waiting and the lawyer scrambles to have the conversation with the client. So that's an infrastructure failing, something the rules do not address. The judge was not optimistic that the infrastructure problems would be solved anytime soon, which is tragic. But in the member's view the rule should not be watered down to accommodate what is a really painful and horrific failing in many places in the country as far as providing defendants and counsel any kind of reasonable access to one another and to the justice system.

Judge Furman spoke in favor of Judge Cote's recommended change, or a variation of that recommendation. He said he shared her experience and definitely found that having the flexibility that she describes was very helpful, if not necessary, particularly in the early days of the pandemic. If it's on the record, he said, it seems far-fetched to imagine a judge overcoming a defendant's lack of consent, because the record would reveal it. Also, this rule would not prevent a judge from finding the defendant consented and directing counsel to sign for the defendant, so it is not a failsafe. As an alternative that would provide additional safeguards, he suggested allowing the court to sign if both the defendant and defense counsel consent on the record. Early in the pandemic, Judge Furman said, there were times when defense counsel was not in a position to sign something or provide it to the court immediately, so having the ability to sign things on behalf of the defendant when that was confirmed on the record and then having it filed was definitely helpful.

Judge Kethledge asked for more explanation of the logistical difficulty, assuming defense counsel is able to consult with the defendant—as mandated in another provision—and there is going to be some remote proceeding in which the defendant is participating, so the defendant can consent on the record to counsel signing. Is the concern about the additional step that counsel then has to submit electronically the document with that signature? That counsel is not going to be able to submit? There is no particular time deadline. If there isn't a time deadline, then what really is the insuperable obstacle to this additional step of counsel electronically submitting something?

Judge Furman explained that there are circumstances in which the court should have the document at the time of the proceeding and be able to say on the record, “I’ve now fixed the defendant’s signature and we’ll file it as part of the record,” as opposed to expecting defense counsel to follow up days or weeks later. But given the flexibility in the rule, he said, he didn’t feel as strongly about this as he did about another comment Judge Cote made that would be coming up later in the meeting.

Mr. Wroblewski stated that one of the reasons that the Department of Justice had not weighed in strongly on this issue was because in their experience the most important thing is actually the colloquy. It’s not the actual piece of paper. The paper without the colloquy is vulnerable to attack. The case law suggests this is pretty ministerial. The most important part is the part that the Department asked for in the note where it mentions the colloquy.

Judge Bates made what he called a broader observation. A big place where this consent is needed is video conferencing. In his district in most cases going to a plea there is a provision in the plea agreement, signed by the defendant, consenting to video conferencing. This will not be something that comes up at the moment of the entry of the plea. It’s something that will occur in the context of entering the plea agreement and will be signed by the defendant. And that’s what we’ll see for the most part. The plea agreement basically says, “I consent to plea and sentencing occurring by video conference.”

Judge Furman said that was not the procedure in his district. Rather, they use a separate waiver form that that the defendant executes.

Judge Bates asked if the signed consent was in the plea agreement, wouldn’t that satisfy the rule? It is a writing signed by the defendant.

Judge Kethledge responded that the defendant would have to consent on the record in a colloquy that he’s OK with the signature.

Professor King noted that the topic of consent for videoconferencing is also addressed later in the reporters’ memo, in connection with the written request for waiver of presence and consent to video conferencing for pleas and sentencing. Section (d)(2) is more general—it is not just for video conferencing. She thought a signed plea agreement would satisfy (d)(2) for some of the other waivers. But the defendant has to request video conferencing for pleas and sentencing. So maybe not if the defendant has to request it. The plea agreement may not satisfy it.

Judge Bates responded that “maybe not” raised concerns if the Department of Justice is going to be applying this rule every day in determining what to enter into a plea agreement. They could word it to say that defendant has requested. Professor King agreed.

Judge Kethledge suggested shifting back to a focus on this (d)(2) requirement that counsel for defendant do the signing rather than the court, noting the conversation about video pleas would be coming up later in the discussion.

Judge Bates suggested you're never going to reach the question of whether defense counsel or the court signs, because in all those cases there will be a signature by the defendant already in the plea agreement. Judge Kethledge said that sounded right. But the question is not whether that satisfies the signature requirement. It's whether it satisfies the request requirement, a different question coming up later. He asked for more comments on (d)(2), and comments about allowing the judge to sign for the defendant rather than counsel.

A member said she was having a very difficult time understanding under what circumstance a judge could have fixed a signature to a document and a defense attorney could not. When would it ever arise, unless maybe there are initial proceedings or initial appearances where some courts don't require defense attorneys to appear?

Mr. Wroblewski commented that his memory of the early part of the pandemic was that the defense attorney is part of the proceeding, but not physically present, and the defendant is part of the proceeding but not physically present. The judge may be sitting in her courtroom watching all of this, and everybody consents on video. But there needs to be a piece of paper and Judge Cote wants to pull out the piece of paper, sign on behalf of the defendant, file it, and it's all done, as opposed to the defense attorney finding the piece of paper, signing it, scanning it, emailing it, or filing it.

The member then asked whether to get to the proceeding in the first instance, doesn't the defendant have to request to proceed remotely?

Judge Kethledge responded that the request requirement applies only to pleas and sentencing. But (d)(2) applies more broadly to instances where a defendant must sign.

Another member added that there are many, many times where the defendant can just consent on the record with no writing, and there are only a few instances where there's a writing. She thought that in a lot of those cases there wouldn't be a court hearing necessarily on the spur of the moment. The waiver of a jury trial seems like something defense attorneys should be able to discuss with their client in advance of appearing for the bench trial and actually sign that. There aren't many that would be spur of the moment. A lot of these documents are available online as PDFs from the Administrative Office or from the Department of Justice. Lawyers had all gotten used to putting our electronic signatures on the form. The defense attorneys are as able to do so as the judges working from their homes. We can download the form, put our signature on it, and file it right then with the court through ECF, so it's not as cumbersome as it used to be where you might have to scan something and copy it.

Keeping the protection that the defense attorney signs is an important protection, she continued. It does avoid some of the problems that were discussed earlier about the appearance that the judge might be somehow interfering with the attorney-client relationship. There aren't that many instances where a form would need to be signed in the courtroom—a Rule 20 transfer or a Rule 5 where the defendant's being prosecuted in a different district and they're agreeing that they want to be kept in this district. But that's an important moment, and the attorney should have talked to the client about that in advance. They're going to plead guilty if they stay in this

district and there's a form they have to sign. She thought the attorney would want to have that form in front of them when they talked to the client even if it's just by phone in the court right beforehand. Again, it is a matter of expediency that maybe isn't worth the possible infringement on rights if we have the judge get involved. The defense attorney should be doing the advising. She agreed with the earlier comments that we shouldn't adopt this change.

Another member offered an example of a scenario she had seen where a lawyer couldn't sign for the defendant. The lawyer didn't have power or electricity to be able to file but could pick up the phone and attend the phone conference and appear in court.

A different member responded that even in that scenario, the judge could grant 10 or 14 days to file the piece of paper. He said he agreed 100% that these protections are important, and he didn't see any gains in efficiency that would countervail them.

Judge Kethledge asked if anyone cared to make a motion as to this suggestion to change (d)(2). Hearing none, he moved on to the next issue—consultation with counsel.

Rule 62(e)(1)

Professor King introduced this issue on page 114 of the reporters' memo and the three comments received. First, the Federal Magistrate Judges Association commented that by adding the requirement to provide an opportunity for confidential consultation for proceedings that already permit videoconferencing under Rules 5, 10, 40, and 43, draft Rule 62 implies that the obligation to provide an opportunity to consult does not exist in non-emergency times. Second, Judge Cote has suggested that the requirement for consultation between counsel and client be changed so that it doesn't require confidential consultation before and during but only requires consultation either before or during, but not both. The concern Judge Cote raised was that during the pandemic it has been difficult for the defendant and defense counsel to arrange for that consultation, and when an adequate opportunity for consultation is provided either before *or* during that should be sufficient. Finally, NACDL supported retaining the dual consultation requirement before and during a proceeding, but specified that the adequate opportunity should be defined to include an unhurried and confidential meeting between the accused and counsel that occurs well before and whenever feasible not on the same day as the preceding itself.

Professor King noted that the subcommittee agreed from the beginning that providing consultation before and during the proceeding was important, this Committee agreed, and the Standing Committee had accepted it. The subcommittee discussed Judge Cote's request to change it and recognized that one consultation would be potentially more efficient, as requiring an opportunity to consult both before and during might mean delay. But the subcommittee didn't think that any difficulty in providing these opportunities justified the change given the important interest at stake. The subcommittee also rejected NACDL's request for more detail about consultation. Although there was sympathy on the subcommittee for this idea, the subcommittee believed judges should have the flexibility to adapt consultation opportunities to varying circumstances.

Professor King asked if anyone shared the concern by the Federal Magistrate Judges Association that adding the consultation requirement for Rules 5, 10, 40, and 43(b) when emergency conditions impair that consultation, implies that it doesn't exist in non-emergency times. There was no response.

Judge Kethledge asked for comments as to whether we ought to require only consultation before or during as opposed to before and during. At the mini-conference we heard an awful lot about problems counsel were having consulting with their clients, and the Committee felt very strongly that that was one of the ways in which the emergency had eroded an important safeguard.

Judge Furman said he was not sure he agreed with his colleague Judge Cote, stating he believed this was important, and wasn't sure that as a practical matter it is a serious obstacle. The experience throughout the pandemic and especially in the beginning is that communication between counsel and defendants who were detained in particular was very difficult and oftentimes impossible to arrange before a proceeding. What they did in those circumstances was not start the proceeding until the lawyer had an opportunity to talk with the client before the proceeding began. That would satisfy the before requirement, assuming that that was adequate to whatever the proceeding was. So in that sense it is not a serious problem, and given the importance of it he thought we should leave the rule as it is.

Judge Kethledge asked if anyone had concerns about the current text of the rule on this point. Hearing none, Judge Kethledge moved to the next suggestion.

Rule 62(e)(3)(B) – requiring a written request from the defendant for video pleas or sentencing proceedings

Professor King introduced the next issue, concerning the written request from the defendant in 62(e)(3)(B), mentioned during the earlier discussion of (d)(2). Judge Cote and Judge Hornak requested changes in this aspect of the rule.

Judge Cote recommended the written request requirement be omitted and urged that if the court finds during the proceeding that the defendant, following consultation with counsel, has requested that the proceeding be conducted by video conferencing then that should be enough. She argued there was no need for a written request before the proceeding, and that the rule should allow the court to sign for the defendant. Professor King noted that the Committee had discussed allowing counsel but not the court sign for the defendant earlier in connection with (d)(2). Judge Cote said even if the rule envisions that defense counsel may sign the written request on behalf of the defendant (which it does), defense counsel may in many emergencies find it difficult to create the writing and transmit it. These issues, Professor King said, we already covered.

Judge Hornak also argued that this was a problem. On page 117, the next to last full paragraph at the end, he concluded that allowing counsel to sign the required writing would not

solve the problem that he identified because the existence of the emergency would almost always impede counsel's access.

Both of these judges raised concerns about the written request requirement, not just on the basis that counsel would not have access to the client, but also that counsel might find it difficult to get that written request filed with the court.

The subcommittee considered the other situations in which counsel signing for the defendant was required and decided that this situation—plea and sentencing by video conferencing—was just as significant as those, and saw no reason to come up with a different solution here than for the other waivers (trial jury and others) that we reviewed earlier. So the subcommittee rejected these requests to scale back on the requirement that the request by the defendant be written and signed.

Judge Kethledge stated that this suggestion raises a concern about the writing requirement here and the ability of counsel to sign and then transmit a writing in which this request would be made. We just covered that same logistical concern. He suggested the Committee set that to one side for the moment, and focus on the new concern as to this provision in particular, which is that the defendant request that the plea or sentencing proceeding be remote.

He emphasized that conducting pleas and sentencing remotely was the biggest concern that the Committee had about these remote proceedings. It was the consensus of the Committee that it is truly a last resort to sentence a man to prison for 20 years through an iPad. The Committee's concern was that the defendant not feel at all pressured to proceed with these exceptionally important proceedings by video, unless the defendant wants to do that, and that there not be a dialogue with the judge, where the person who is going to sentence the defendant proposes that the proceeding be conducted in a certain manner. Our concern was that the judge could be really nice about it and not say anything objectionable when you read the record, but a criminal defendant might feel pressured to agree to do these proceedings remotely, when that defendant otherwise would not agree. The issue here was whether the Committee thought it was important that the defendant must initiate, must make the request or whether that's something that could be initiated by the judge. That was the issue on the table. We received two very thoughtful comments. He asked for additional comments.

Judge Bates began by noting that it is not always going to be a question whether it's the defendant initiating or the court initiating. It's most likely going to be initiated either by the prosecutor or the defense counsel, not by the defendant. Is the contemplation really that it has to be an original idea to the defendant? He thought that was never going to occur. Does request in writing mean something different than consents?

The reporters responded that it is different. As the note states, "the substitution of request for consent was deliberate as an additional protection against undue pressure to waive physical presence."

Judge Bates asked if it has to be the defendant who initiated thinking of it. Can it come initially from the prosecutor, saying to the defense counsel, “Let’s do this by video” and counsel says to the defendant, “I’m gonna suggest that we do this by video, is that alright with you?”

Judge Kethledge thought it was different, because it has to come from the defendant. Request is different than consent.

Judge Bates asked then what is the judge looking for? Is the judge going to say, “Miss Jones, is this your idea? Are you requesting it?”

Judge Kethledge responded that it has to be a document submitted to the court, saying, “I want my proceeding to be remote.” “I request,” or “I want” this, rather than just “I agree.” Consent can be just going along with something, as opposed to wanting it. That is the distinction here. The defendant has to say, “I want this,” not the court, saying “Do you have a problem with this?”

A member stated that he conceived of this requirement as trying to build into the system that the default does not become video hearings. Two years into the CARES Act it would be fair to say that video change of pleas has become the default. He is seeing that a defendant will file a motion saying that I’ve reached an agreement and want to change a plea. The next thing is an order from the court setting a video conference change of plea and making the usual CARES Act finding, and then asking the defendant to say later informed consent. This rule would require the defendant at the beginning to say “I’m the one who wants to have this by video.” This whole mechanism would not start until that happens. If you believe that the default should be in person, then this serves a useful function.

Mr. Wroblewski asked if the reporters had the same understanding, that it needs to be at the beginning? Judge Hornak also says that in his comment. He says the requirement of an advanced writing signed by the defendant. Mr. Wroblewski did not read the rule that way. He read the rule to allow, as Judge Bates said, if the two lawyers get together and they have an agreement, the defense lawyer goes and talks her client and the client says, “Yeah, that’s what I want to do.” Then they set the proceeding for video. They all meet by video proceeding and the defendant’s lawyer gets up and says this is the way we want to proceed. There is a writing that reflects that and does not have to be filed in advance.

A different member commented she agreed with the earlier member who spoke in favor of the requirement. With the really vast improvements in technology, we’re all experiencing during the pandemic some slippage into Zoom court appearances and Zoom arguments. This language signals this last line, that when it comes to plea discussions and sentencings, that should be done in person unless the defendant affirmatively requests it. It’s important in reading this to pull back and read the very beginning of that section under subsection 3, where it says for a felony proceeding under Rule 11 or 32, a court may use video conferencing only if, in addition to the requirements of (2)(B), and then it sets out three things. The first is the chief judge’s finding that this is emergency. Second, the defendant, after consulting with counsel, requests in writing signed by the defendant that the proceeding be conducted by video conferencing. And

third, the court finds that further delay in the particular case would cause serious harm to the interests of justice. Those three subdivisions have to be read together, and they signal the importance of the presumption these proceedings be done in person unless all of the findings are met.

The member added that she did not read the rule as requiring that the defendant has to be the initiator of the idea. If the defendant is not going to serve a whole lot more time and the logistical difficulties are such that everybody's motivated to get the plea agreement on the record as soon as possible, the prosecutor could go to defense counsel and say, "Hey, is he interested in doing it by video? Maybe we need to talk about that? Can you go talk to your client about that?" It doesn't matter who initiated the discussion so long as the request is initiated by the defendant as far as the court is concerned. There has to be a formal request rather than having it come up impromptu during the middle of discussion. In that sense, this requirement, in context, is very different than just consent. This is something that after careful consideration and discussion with counsel, the defendant asks that the court go forward with the video conferencing.

Judge Kethledge said that the defendant has to come to the court with a written request to do this remotely. There's no waiting period. It's not that the request has to come in a certain period of time beforehand. But you can't start a sentencing hearing and then say "OK, do you agree with this? You'll file something afterward." That probably doesn't work.

The member continued that in practice, unless the court has that consent or that request in writing, the court doesn't even schedule the change of plea hearing.

Judge Furman said that comment gets to the heart of his concern, and he felt more strongly about this issue. It's a question of timing and involves the difficulties of arranging for times for counsel to confer with the client in advance of a proceeding. It was often easier to schedule a court proceeding, and then provide time at the outset of the proceeding for counsel to confer with the defendant. He said he was not a big fan of request versus consent. We allow defendants to waive all sorts of rights as long as it is knowing and voluntary. We allow them to waive fundamental rights. The heart of the matter is the timing. He urged the Committee to allow for scheduling the plea proceeding without a written request in advance. At the outset of the proceeding, the writing can be satisfied whether it's called consent or request. That's just a function of what the form says.

Judge Furman proposed that the note be amended to state that as long as the defendant has had an opportunity to consult with counsel, the writing requirement can be satisfied at the outset of a proceeding. It should be at the very beginning, making it clear that the proceeding would not go forward without a request. There were scenarios in the pandemic where it was very difficult to make these arrangements in advance of scheduling. He didn't read the rule to speak to the timing question and thought what he proposed was consistent with the language of the rule itself. He proposed making it clearer in the note that the written request may be signed at the outset of the proceeding itself.

Judge Kethledge said that if a court scheduled something called a plea hearing or a sentencing hearing and the guy hasn't asked for it yet, that would seem to violate what this currently says.

Judge Furman said that as a practical matter the way this often works is counsel speak to one another. They say, "We're prepared to plead," "We're ready to plead," or "We need to plead now." There are circumstances where it's time sensitive and needs to happen quickly. The defendant is prepared to do it remotely, but there is not an ability for defense counsel to confer with the defendant in advance to get the writing signed and filed. Why should a court be prohibited from proceeding if at the outset of the proceeding defense counsel has an adequate opportunity to confer with the defendant and after that opportunity either the defendant or counsel signs a thing that says, "I'm requesting to proceed with this proceeding remotely"? It seemed to him that there are enough circumstances that could arise that we should give that level of flexibility. He stated that before the pandemic the Second Circuit had held that a defendant can actually consent to remote sentencing, and it doesn't need to be in writing, as long as the consent is knowing and voluntary and on the record. It is *United States v. Salim*, where there was a consent through counsel.

Judge Kethledge said Judge Furman's hypothetical involved a discussion between prosecution and defense counsel. What the Committee was concerned about when it came up with this language is the discussion consultation between the *judge* and defense counsel. Something's underway and the judge says "Well, you know why don't we just proceed with the sentencing right now remotely? So why don't you talk to your client for a moment?" Now the client has just heard the judge say this. The judge has put this on the table. The Committee's concern has been that defendant will feel pressured to do what the judge just proposed in a hearing that began about something else. That's the concern.

Professor King asked Judge Furman about the scenario that concerned him. Is it when counsel have met and decided this would be a good idea, then defense counsel discusses it with the client, and the defendant says "Yeah, I want to request this?"

Judge Furman said that was not the scenario. His suggestion was to make clear that the written request can be executed at the outset of the proceeding. What happened very often is defense counsel had no opportunity to speak to his client in advance of the plea proceeding itself. These are detained defendants with practical limitations on communication. They couldn't speak before the proceeding itself. But the court was able to schedule a proceeding. So what would happen in those circumstances is counsel would confer, and say "We're ready to plead, our client is prepared to plead, but I haven't had an opportunity to speak to him about whether he's willing to proceed remotely. I'm quite sure he'll consent but I haven't had an opportunity to confer with him." The only way to confer is to do that at the outset of the proceeding before the proceeding begins. They speak, the defendant says, "Yes, I do want to proceed remotely" with the plea or with the sentencing or whatever.

Professor King said it seemed to her that the rule already allows the written request to be executed after the breakout room and defense counsel could file it then to comply with (d)(2), so no change is needed.

Judge Furman responded he is proposing adding to the note to make clear that the rule does permit that. A judge could read the rule to say it needs to be a written request and that we can't schedule the proceeding unless we have the written request in hand. We should have the flexibility to schedule the proceeding because it's often the proceeding that enables counsel to confer with the defendant to make that request.

A member asked Judge Furman what triggered the court setting a guilty plea hearing.

Judge Furman responded there were many scenarios where the only way of going forward was to do it remotely and the defense lawyer and client had spoken about one thing, but hadn't had an opportunity to speak about the other. There were plenty of scenarios in which the conversation about proceeding remotely happened as part of the proceeding itself.

Judge Kethledge asked in those instances, what was the proceeding on the calendar? What's it called? What brings everyone together?

Judge Furman responded that when he schedules something in a criminal case, he doesn't necessarily call it anything—just says parties shall appear at X date and that's it. What happens in the course of the proceeding is the defendant says "I'm prepared to plead," or "Let's proceed directly to sentencing."

Judge Kethledge asked, so a defendant goes to a hearing that doesn't have a particular agenda and counsel can confer and decide if they want to do something, but defense counsel can't consult with the defendant?

Judge Furman responded he was not advocating getting rid of consultation between client and counsel. But we should allow flexibility so that the consultation, the request, and the proceeding, are all done essentially as part of one scheduled appearance, because in his experience the consultation between counsel and the defendant was *enabled* by the court proceeding.

Another member offered his experience. We'll have a status conference, he explained. For the status conference the lawyer may not have had a chance to speak to this client about whether they agree to proceeding by video. But the lawyers have communicated with the courtroom clerk, saying "We want to talk about a possible disposition." So, it is set for a status conference and before the judge joins, defense counsel will have time with his client alone, to discuss the matter. Then he will come out, and the lawyer will say, "I'm here with so and so who has agreed to appear via video," and then he will confirm that fact. Later on, at least in this member's court, typically the public defender and her AUSA will reach out to the courtroom deputy, and say "We believe we've reached the resolution. We'd like to set this for a change of plea." And again, lawyer and client have time alone beforehand, because in the situation where the defendant is two hours away, and they haven't signed the waiver of video, they will talk

beforehand and confirm that it's OK to do it via video. Then the court will confirm it at the change of plea, and ask defense counsel if counsel can get it signed and put it on the docket at some point thereafter. Those are the scenarios. That's why this member agreed with Judge Furman that there needs to be that flexibility to do it at the time of the hearing because at least during the height of the pandemic, most defense counsel did not necessarily have the time to discuss with their client that specific issue beforehand.

Judge Kethledge said his sense of the current language was that you cannot have a remote sentencing or plea until the court has the request in writing. You can't actually take that step of saying, "Here's your sentence," unless the court has that. It can't be something after the fact.

After a break for lunch, Judge Kethledge continued the discussion on whether (e)(3)(B) or the note needs to be modified, specifically whether a court may schedule a remote plea or sentencing proceeding before the court has in hand a writing in which defendant requests the remote plea or sentencing. As this is currently written, Judge Kethledge stated, the court may use video conferencing only if, among other things, the defendant after consulting with counsel requests in a writing signed by the defendant that the proceeding be conducted by video conferencing. He said that he would read that to mean that you cannot start something that is understood to be a plea or sentencing proceeding until the court has in hand that written request after consultation with counsel. As a practical matter, that will probably prevent a court from on the fly in a status conference saying, "Hey, why don't we just go ahead and enter a plea?" Logistically it may well be hard to do that. And that's by design.

If a judge broaches the question of a remote plea or sentencing, with the defendant observing, during for example a status conference, Judge Kethledge said the concern was that the defendant will feel pressured to go ahead and do that. Frankly, he said, there are many judges who want to do a lot of remote pleas and sentencings. Before the pandemic, the Committee got requests almost every year from judges who wanted to do this for reasons of their own. So that's the concern: if the defendant hears it from the judge first—and then that same day, or after a break, consents, with the document to be filed later—the defendant will have been pressured to plead guilty or to proceed with a sentencing, which are really the two most important things that happen in a United States District Court. He requested comments from the defense lawyers on the Committee, who had not yet spoken on this issue.

A defense member strongly supported the idea that the defendants should be in court for a plea and sentencing. It is an incredibly important moment and the rules require the defendant be present in the courtroom. During the pandemic, we've gotten used to maybe cutting some corners, but that doesn't mean that's the right thing to do. A new rule should try to get back to the formality and the dignity of what happens during a plea and a sentencing. This rule reaches the right balance. It does allow video conferencing, but the court has to make three different findings. Only one is related to the defendant's request and it's really protecting an important constitutional right of the defendant to be represented by counsel and to have counsel advise them of the plea.

If there are districts where the defendant and the defense attorney cannot talk before the plea, the member continued, so the defense attorney is not able to ask, “Do you consent and can I file, can I sign this request in writing and file it with the court?”, then the member was concerned that they’re also not talking about the plea language itself. That is a crisis, and the solution shouldn’t be that we go forward and have the plea anyway after giving the defense counsel some time on video to talk to their client. The solution should be that we can’t have a plea or sentencing in that kind of situation, and we need the court’s help to make sure that defense attorneys can talk to their clients where they’re in custody.

If a client is detained in a place that doesn’t have phone access, the member said, we need the system to jump in and say, “This is not adequate, we can’t have adequate representation, and the court proceedings cannot go forward when the defense counsel can’t talk to their clients.” This is a really important protection. We know from the pandemic that there have been all these structural barriers and there have been problems. But we don’t want to write into a rule a belief that those barriers can exist, or that it’s constitutional or appropriate to hold court proceedings when those barriers exist. We want the rule to protect the fundamental rights that we all want to see protected for the defendant and for the process. It’s an important rule that we’ve written.

The member read the “request in writing” to mean in advance, so that the writing has to be on the docket before the court can set the plea hearing. It’s a protection, so that if a defendant really wants to be in person, and the judges don’t want to have in person hearings, there’s a stalemate where we just say, “We don’t want to have this by video so we’re requesting an in person plea,” and it’s docketed and noted and maybe has to be appealed if that’s where we are, but it’s important.

She responded to the earlier question about how the plea gets set. She said that in her district if the defense wants to enter a change of plea, the defense will email the courtroom deputy, copying the prosecutor and the pretrial service officer, and say “we’re ready in this case to set a change of plea.” And the court will set a change of plea. So this rule would be a change for us, where we would have to say, “and I’m filing the written request to have this be by video” or the presumption would be this is a change of plea that’s happening in person. That is a presumption for her district now, as we move out of the pandemic that if we set a change of plea, it’s in person.

Another defense member said she agreed with everything that the other member just said. As Judge Kethledge mentioned earlier, the Committee has received requests from judges to amend the rules to allow routine video proceedings for the court’s convenience, and she has always spoken against that. That process of taking a plea or sentencing, with a defendant being in the courtroom, being present, we’ve all known of situations where defendants have changed their minds, where circumstances occur, and the defendant is once again reminded of his protections from the court. And all of that being in person. You just cannot capture that on video. She was concerned that the default is moving toward video and we will lose a great deal of that protection for our process, not just for the defendant, who has a right to have counsel representing him or her, but also for the public. It is very important, particularly for those two proceedings, that this

has to be brought up by the defendant. The defendant has to understand he has a right to be there in person, what that means, and that he's giving that up to proceed.

The member explained that the situation early on in the pandemic was more difficult. She said she comes from a rural area where defendants are housed in different states with different rules as to where and how counsel can visit them. It eventually got worked out, after a lot of communication between the courts, between the Marshals Service, even relocating defendants to other prison locations, so that they could have better communications with their attorneys. Functionally how it worked was if one of her clients or a client of another attorney in her district wanted to go forward, because they were facing 6 months, 8 months or whatever and needed to that proceeding to go forward, they entered into a plea agreement through discussions with the government, and they signed that plea agreement. Unless it's signed there's not a plea hearing set. At the moment that the government would file a motion to schedule a guilty plea based on a written plea agreement with the defendant's signature on that plea agreement, defense counsel would file a motion for that plea hearing to be held by video. So that's how the request has worked in her district, and it had not seemed to be a significant impediment.

She concluded by saying that when this first began she was CJA representative for the district, and there was considerable concern among CJA panel members about being pressured by the courts to get their clients in the system, to get them pled, and out of whatever jail system they were in. The attorneys themselves felt that pressure. So having that barrier between the client and the court is a very important protection. She supported not making any changes to the rule as it is currently written.

A third defense member said she echoed what the others have said but wanted to pick up on the concept of pressure. She spoke of the pressure that a defendant feels when he is consulting with counsel in the moments that have been carved out for him or her, knowing that everybody's waiting. To be able to focus on what your lawyer is explaining to you as far as what you're giving up in a plea, that is just not adequate. That pressure, knowing that everybody wants to move this forward is eliminating a really meaningful relationship between the attorney and the client. She said she felt very strongly that establishing some distance between the request in writing and the plea hearing was really important to give the attorney the opportunity to explain to the client what it is the client is about to give up. Because those rights are substantial.

In her district (she said she was basing her comments on what her friends had told her because she had not had anybody who was incarcerated and agreed to this), the government files a change of plea motion, so there's a motion on the docket with a signed plea agreement in hand. So she didn't see a reason, if the defense counsel can provide the government with a signed plea agreement, why there wouldn't easily be an opportunity to request in writing that the process take place virtually.

A judge member added that the committee note emphasizes the seriousness of this and its last resort status. The proposed note says that the Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at a felony plea or sentence only as a last resort in cases where the defendant would likely be harmed by further delay. Accordingly,

the three prerequisites for using video conference are the chief judge's declaration, the written request, and the finding. Then the note goes on to say that "The defendant must request in writing that the proceeding be conducted by video conferencing after consultation with counsel. The substitution of request for consent was deliberate as an additional protection against undue pressure to waive physical presence." The member said those aren't adding to the words of the text other than explaining both its uniqueness, its intended rare use, and the prerequisites that must be done before any hearing gets started. It all supports no change to the language.

Judge Furman said he agreed with most of what the defense counsel said about the importance of physical presence for pleas and sentencings and that this should be a last resort. He said he was not advocating for change of the rule language itself. He wouldn't read the current proposal to preclude what he is suggesting it allows. Namely, at the outset of that proceeding, as long as there was an opportunity for the defendant and counsel to go in a breakout room, speak to one another, then come back into the proceeding, then defense counsel, with the defendant's consent on the record, could say "I'm now signing a written request to proceed with this proceeding remotely." He thought the rule permits that.

Judge Kethledge asked if Judge Furman was envisioning that a request in writing would be filed.

Judge Furman responded that plea agreements are not filed in his district on the docket, they're retained by the government. He did envision that it would be filed, but that goes back to the timing issues discussed before. The rule doesn't require that it be filed in advance of the proceeding. It doesn't say anything about the timing. In his scenario, defense counsel would sign it, and then at some point within 10 days, 14 days, who knows, they would file that on the docket, so the record would be complete. In other words, the writing is done at the time. He wouldn't read the current rule to preclude that. To suggest that the rule shouldn't be changed to allow that, he thought, was reading into the rule things that are not there. The rule ought to be clear.

Judge Kethledge said that if the rule says defendant requests in writing, isn't the implication that the court must have the writing? Request is a transitive verb, you're making a request to an entity.

Judge Furman asked if the judge should not be permitted to proceed if, in the video proceeding, counsel confers with the client and then comes back to the public part of the video and says, "I'm now signing the written request, representing on the record that I've signed the written request." Then the judge says, "OK, file that within the next 3 days." The requirements of the rule have been satisfied. The rule doesn't talk about filing. It doesn't talk about in "advance" or "before" the thing is scheduled that it be signed.

Judge Kethledge said it was an interesting question worth talking about because it affects our respective understandings of whether any change is needed. He said he didn't think one makes a request of a court in writing unless one submits the writing to the court. It's not enough to say, "Judge, I'm writing this down and let's just go ahead." For a felony proceeding to

proceed by video conference, the defendant must request it in writing. He said if he got a case raising this issue, his interpretation would be that you request something in writing, not by writing it at home, not by calling the judge and saying, “Judge, I’m writing a request here.” The whole point of a written request is the court must get the request and have the request in writing rather than somebody telling the judge verbally, “I’m writing a request.”

Judge Furman responded that counsel says, “I’m writing the request. Here’s the written request. I’m showing it to you on the screen.” It’s not in the judge’s hands. It’s not filed on the docket. Yet is that a written request to the court? It is.

Judge Bates asked whether the scenario is one in which they are going into a breakout room to consult beforehand. If so, that means they are probably not in the same location. So there is actually not going to be the signature on a written request at the time because the defendant isn’t with the defense counsel.

Judge Furman responded it would have to be a (d)(2) signature by counsel. He said he agreed about the importance of it not being at the pressure of the court. But what about the following hypothetical: Counsel says, “My client is prepared to plead, but I haven’t had an opportunity to discuss proceeding remotely.” I say, “OK, why don’t you go into a breakout room and discuss that, and under the rule if you make a request then I have authority to proceed.” Is that then impermissible because as the judge I have suggested the idea?

Judge Kethledge responded it was impermissible.

Judge Furman asked is it impermissible forever thereafter, because I raised it?

Judge Kethledge responded that he wouldn’t say that. That scenario is not the one Committee has been worried about. It’s not where counsel comes to the court and says, “Hey, I’ve talked to my guy separately and we want to go ahead and just do a plea.” The concern is where the judge says, “Well, why don’t we just go ahead with the plea now?” He noted that his knowledge was limited because he did not conduct these proceedings himself. But he thought if the rule allows for post hoc filing of the writing, it seems we’re opening the door to the judge bringing this up and saying, “Why don’t you do this, OK? Why don’t we do this, go off and talk.” And then, “OK your honor, I’ll submit it afterwards.” It opens the door to that, whereas if the court cannot commence a plea or sentencing hearing without the writing already, the theory is that it creates a space for that consultation to happen in a more meaningful fashion, likely without the court having in the last 15 minutes told or implied—or at least the defendant perceiving that the court has signaled—that the court wants this to happen. It’s likely to be a less pressured and more meaningful consultation. It’s a kind of prophylactic device in that respect.

Judge Furman agreed that should be the preference and said he had suggested some note language that would make that clear. Let’s say in general that this should occur before the proceeding is even scheduled. The rule right now does not state a preference that it happens in advance unless you read “request” in the way Judge Kethledge was suggesting, which doesn’t necessarily require that reading. We should (1) make clear that it can happen as part of the same proceeding, and (2) make clear the preference that it happen in advance.

Judge Furman said he was not that troubled if defense counsel says, “My guy is ready to plead but we haven’t had an opportunity to discuss proceeding remotely,” and I say, “OK, Why don’t you go in a breakout room. If he’s prepared to make the request, I’m prepared to proceed.” This is where the colloquy is the more important thing. I would say “You understand you have a right to do this in person. You understand that you know you’ve had an opportunity to consult your lawyer. You’ve consulted with your lawyer. After doing that is it your desire to proceed?” We let people waive the right to a jury trial and plead guilty on the record without doing that in writing. We let them waive all sorts of rights.

Judge Kethledge responded that they waive those rights in person.

Judge Furman said not always. In the case of jury waivers, they are not in person.

Judge Kethledge said this is a departure from current practice.

Judge Bates asked if the rules currently prohibit a judge from going forward after a colloquy in which the defendant waives the right to jury trial with the signed waiver of the jury trial being filed by the end of the day or the next day. He thought that happens. And why is this of so much greater concern in terms of getting that filed before the proceeding is over?

Judge Kethledge said that once a person enters a guilty plea, he’s guilty. But if he waives the jury trial, he has a trial in front of Judge Bates. The stakes are just higher if you plead guilty. We’ve all seen the pleader’s remorse cases where they’re trying to get out of that. And if all of this happens within an hour of lunch and then the next morning, the defendant thinks “I made a big mistake.” It started as a status conference and he walked out guilty. That’s the concern. Particularly if the judge was suggesting, “Hey? Why don’t you plead guilty? Why don’t you make yourself guilty before you leave here today?”

The Committee, Judge Kethledge continued, has not been worried about judges like Jesse Furman and John Bates. Institutionally we come with a different perspective. He remembered from his early days on the Committee where we would get these requests, it seemed once a year. He recalled one from a judge in another district who had a lake house in Maine, and he wanted to sentence people when he was in Maine. The Committee has received these requests every year for remote pleas and sentencing. Institutionally it has a sense that there are many judges who want to do this more often than they should.

And, Judge Kethledge commented, the defense bar never came to us with this. The defense bar never came saying, “We’re having a problem. My guy wants to make it a plea and he can’t.” We have never heard a peep along those lines from the defense bar. The Department of Justice hasn’t come to us. It has always been judges who wanted this, and we’re a little paranoid about that. This is the most important thing that happens in a courtroom. It is much more important than what happens in our appellate courtrooms. That, he said, was the concern.

Another member posed a question for Judge Furman. She said she was having difficulty envisioning how often these impromptu change of plea proceedings would come up. Is it in instances where the defendant pleads to the sheet, where there’s no written plea agreement?

Judge Furman said he didn't want to suggest that the scenario where everybody shows up and no one realizes until that moment that it's a plea happens with frequency. The more common scenario is where there's been advanced discussion, some opportunity for defense counsel to speak to the defendant, and they're able to say "I'm prepared to plead guilty." The scenario he was describing, which happened with some regularity, is when counsel comes to a conference and says, "I've had an opportunity to speak to my client. My client is prepared to plead guilty, but I didn't have an opportunity to talk about whether to proceed remotely." He didn't know whether this occurred because counsel neglected to raise the question of proceeding remotely, or because it was in the beginning of the pandemic, or because the opportunity to confer wasn't there, or because the conversation between the defendant and counsel was, "If the government will agree to this then I'm prepared to plead guilty," and they never got to the practicalities of what the proceeding would look like. He was not privy to the reasons why it occurred, but that scenario arose with some regularity.

You might say it shouldn't go forward, Judge Furman continued, that we should wait. But there are many circumstances where there's some time sensitivity to getting a plea done, and we are more often talking about pleas than sentencings. And at least in his district because of the scarcity of resources of court conference time on video and video conferencing or even telephone conferencing between counsel and defendant, if it doesn't happen when you're on the calendar, you have an opportunity to bring everybody together, you have an opportunity to have the defendant speak with counsel before it, if you don't do it all at that one moment, it's going to be another three weeks before you can reassemble and be prepared to go.

A member said she'd never heard of a status conference that turned into a guilty plea.

Judge Furman repeated that was not the scenario. He said he was surprised that defense counsel isn't more supportive of this and would guess if he called their federal defender's office that they would support what he was saying precisely for the reasons that he had articulated—namely that they were many scenarios in which the opportunity to have a meaningful conversation was facilitated by the court scheduling the proceeding itself. Perhaps they had unusually limited resources in New York.

Professor King asked Judge Furman if he thought he could still do what he has been doing under the existing rule language.

Judge Furman said he thought so, but Judge Kethledge didn't agree, so he might be reversed.

Judge Kethledge commented that he thought there is an assumption baked into the idea of making a request in writing to the court that the court receives the request. That's the difference from a verbal request accompanied with a promise to file something later about something that was done three days earlier.

Professor King asked about the situation where that the defendant and counsel are consulting at the beginning of the proceeding, they decide they want it by video conference, and they send the signed request to the court; they don't show it to the court on the video.

Judge Kethledge said that's OK.

Another member agreed that you could always do the proceeding at the beginning. You could call a conference, and you could have a breakout room before the judge even gets on the phone, they can consult, come back, and say it's coming. Is the problem the form? If the defendant is sitting in MCC or whatever and they can't get you the physical form beforehand?

Professors Beale and King said that no, the lawyer can sign it under (d)(2). The defendant does not have to sign. Judge Kethledge agreed.

The member continued saying then he reads the rule to allow what Judge Furman is asking, that there can be a conference at the beginning. Then you just file it. You have to file it.

Judge Furman said it doesn't say filed.

Judge Kethledge said that's where he and Judge Furman disagreed about what written request is.

The member said that if it's unclear and you have an appellate judge thinking it's no good, maybe we want to clarify it.

Judge Kethledge asked for further comments.

Professor Beale confirmed that Judge Furman thought the rule permits what he wants to do but would like to see clarification in the note.

Judge Furman agreed. We should clarify first that what he was describing can occur, but given the concerns that we heard from defense counsel here, we should also articulate that that should not be the preference. Right now, the rule does not state a preference between the two. The better practice is to do it in advance. He wanted to be clear about that. The advantage of writing something into the rule makes that preference clear, but also makes clear that in certain scenarios, in circumstances where it's impractical or otherwise, then the rule does permit what he is describing.

Professor Beale noted that the only public comments we received read it as requiring that the request had to be signed and sent in.

Professor King said she thought that the sending it in isn't the issue. It's the timing of that.

Judge Kethledge said you can't go forward with one of these things unless the court has it in hand. The defendant has filed a writing that requests this. It's got to be on ECF, on the docket.

Judge Furman said in some emergencies ECF may be down. What if the defense signs it and then holds it up on the screen and says, "Look judge. I've now signed the written request." Should he not be permitted to go forward in that scenario? That has complied with the written rule. And when it's filed is not dictated by the rule. The judge would tell defense counsel, "OK, when you can, file that on ECF." But he shouldn't be precluded from proceeding.

Professor Beale repeated that Judge Furman believes the text allows what he wants, but he wants something in the in the note that says that, and that also makes the point that all the defense lawyers have been saying, which is that it normally should be done the other way. She was not sure there is a problem.

A member said that she thought the notes already say that the preference is for in person appearances. She said if we want to be clear that we think it's going to be a filed request we could amend the rule to say the defendant after consulting with counsel files a request in writing. That is consistent with how others have interpreted the rule. Maybe that would require republication, but she did not think so because it has been discussed. With that change, it would be clear that the request must be filed and we won't have to talk about the timing. If in New York they let you file it after you've shown it on the video, we can address that problem when a defendant challenges the constitutionality of it. We could say the defendant after consulting with counsel files a request in writing.

Judge Kethledge offered "files a written request signed by the defendant that the proceeding be conducted," and so forth.

Judge Furman said he would not support that, because it would be even more restrictive.

Judge Kethledge said it would be removing ambiguity.

Judge Bates said he didn't think the rule could be interpreted as requiring a filing without added language, because right now there's nothing that says it has to be filed in advance. And there is something that does have to be filed in advance, and that's if the defense counsel is filing an affidavit with respect to the signature. That has to be filed in accordance with the language of the rule. A fair interpretation would be that filing is not a requirement of this "request." And he agreed with Judge Furman that would be a complication for some cases.

To some extent, Judge Bates said, it is a scheduling issue—having proceedings occur timely and on schedule and not having to reschedule. That's part of the concern here for district judges. Do we have to stop because even though the defense counsel is holding up the form, saying it's all signed and ready to go, but they can't get it physically filed until later in the day or tomorrow morning? If the judge would have to continue the proceeding, as Judge Furman says, in some jurisdictions that might be a several-week continuance.

Judge Kethledge added that the Committee has heard the stories about the difficulty of getting a slot for video and so on. On the interpretive point, (d)(2) does not have the word "request," and "request" is where he saw the idea that it has to be submitted to their court before it's a written request to the court.

Judge Kethledge said it boiled down to a concern about whether a district court can convert a non-plea or -sentencing proceeding more or less on the fly into a plea or sentencing proceeding. There are instances where it seems like everybody wants that conversion. And if the thing needs to be filed in advance, it is going to be inconvenient because you're going to have a second call or video conference to do the plea hearing. It's going to be hard to meet these

requirements and have that continuation of a hearing that then does the plea, if the writing must be submitted to the court before the court can proceed. Yes, we might have to have a second hearing in some instances, where everybody wants to go forward and no one has been pressured.

The concern that has animated this requirement is that there will actually be some forced conversions, pressured conversions that would not otherwise happen, if the defendant had to submit in writing a request before the hearing starts. You would have the space in between, where counsel can talk and the person can think, and it's not 15 minutes. That's the fear. There's an efficiency loss with the inability to convert stuff where everyone wants to convert it. But there's a danger of pressured conversions. That's where it comes out.

Judge Kethledge said our Committee has to make a decision and then the Standing Committee will decide whatever it decides. We are an advisory committee, and he said it was time to give our advice on this point. After asking for further comment and hearing none, Judge Kethledge asked if anyone wanted to make a motion to change the rule or the note with respect to (e)(3)(B).

A member made a motion that language be changed to read that "the defendant after consulting with counsel, files a request in writing signed by the defendant, that the proceeding be conducted by video."

Professor Beale clarified this would be on page 133.

Judge Kethledge suggested "files a written request." If our Committee is going to be clear about what we're recommending, then this would remove the strategic ambiguity that we currently have and clarify what we are really recommending. It's not meant to be provocative towards the folks who have a concern about this position.

The motion was seconded.

Judge Bates raised the question whether this change to the rule would require it to go back out for public comment.

Professor Beale said that to the extent that the comments received from Judge Cote and Judge Hornak essentially read it this way, and thought it was a problem for that reason, it would not require republication. But filing wasn't included.

Judge Bates commented that was the issue: that filing wasn't express in the rule, so is that something that the bar and the public might have a view on? And they have not yet had a chance to voice that view.

Professor Beale added that she thought the timing of when it has to be received is what they were responding to, not filing per se, but receipt in advance. And normally the way a court receives something in advance is it's filed.

Judge Bates said that was not true. Not everything a court receives is filed. The question is how far in advance. Back to that issue of the plea agreement containing the consent, that isn't filed until after the proceeding in his district and none of the plea papers that wind up on the

docket on the record get filed until after the plea is completed. They don't actually get filed in advance. They may be received by him in advance, and he's looking at them and inquiring of the defendant with respect to them and in a remote proceeding maybe holding it up, but they're not actually filed in advance.

The member who made the motion said the intent was to make explicit what he believed was implicit in the rule.

Judge Kethledge noted now we had a distinction between filed and received by the judge. Perhaps, he said, we ought to leave it as it is.

A member said the rule says counsel requests in writing, not files.

Professor Beale wondered if Professor Struve wanted to say something about republication, because that might affect members' view if it would take this out of the queue with the other emergency rules. Judge Kethledge agreed that would be a big consequence.

Professor Struve said that Judge Bates raised a good question because to the extent that commenters were weighing in, they did engage with the practicalities of how things are going to work. So to the extent that the explicit requirement of filing would be added, there was enough of a question about that that she thought it was well worth considering. It struck her as towards the borderline but she didn't have a strong sense of whether it would need to go back. She noted there was hydraulic pressure towards avoiding anything that would need to.

Professor Beale asked Professor Struve if she thought it was at least questionable whether it would require republication.

Professor Struve responded that with differing views on what the published rule text requires, on one hand, you don't want uncertainty persisting that could lead to reversals on appeal. On the other hand, if the concern is there was ambiguity as published and we need to fix it, then that suggests it's a change from the published version. So it's tough.

Professor Coquillette added he completely agreed this is a really close question and will have to be discussed at the Standing Committee. It could go either way.

The member who seconded the motion asked to withdraw the second because she believed the Committee should not separate Rule 62 from the other emergency rules.

Judge Kethledge concluded that the discussion on the subject appeared to be complete. He said it is a hard question, and the Committee had made a lot of progress in understanding it from both the policy and interpretative standpoints. It will be before the Standing Committee, and they can do what they think best.

Judge Kethledge asked the reporters to introduce the next agenda item.

Rule 62(d) – the contents of counsel's consultation

Professor King noted the next issue on page 118 of the agenda book concerns what the defense counsel must explain to the defendant about waiving in-person presence and going remote. She indicated the subcommittee had no interest in dictating what defense counsel should say to their clients, so passed on that recommendation from NACDL to spell that out. Professor Beale added that was consistent with other occasions, where the Committee has declined to try to provide anything in the rules about the content of advice provided by defense counsel. Judge Kethledge asked if there was any interest in discussing that, and hearing none, moved to the next item.

Rule 62(d)(4) – extending the time under Rule 35

Professor Beale said that regarding the provision in (d)(4), which allows extending time under Rule 35, the Department of Justice had expressed concern that there might be essentially frivolous requests to extend time from defendants whose time had run out for example, before the emergency began. The subcommittee thought the rule was clear enough and that possible attempts to misuse the extension language did not warrant express resolution in the committee note.

Mr. Wroblewski said they were satisfied with those deliberations, and he did not intend to renew the request.

A new subdivision to allow the extension of grand jury terms

Professor Beale continued to the last issue concerning Rule 62, the Department's new request to allow grand juries to be extended in emergency situations. Because that would require republication, the subcommittee decided it was not something it could do now. It appears later as a new suggestion in the agenda book. She noted that putting that aside for later consideration put the Committee in a position to make a final motion on Rule 62.

Approval of Rule 62

Judge Kethledge asked Professor Beale to state what the motion would be. Professor Beale stated the motion would be to approve transmittal of Rule 62, as revised, to the Standing Committee, with the recommendation that it move forward.

A member asked about the language added to the note. Professor Beale responded that was the tracked language and there had been a vote on that, so it would be reaffirming that earlier decision, otherwise approving of the rest of the rule as published, and agreeing to transmit it to the Standing Committee.

Professor Struve confirmed, the motion is to approve as published, but with the change to the note. Judge Kethledge agreed and called for a vote.

The motion passed, with one vote against, by a member who then explained her vote. She said that it had been a terrific process, and there are many protections in the rule. But she thought that emergency measures have a tendency to evolve into permanent norms, and we should not

put an emergency rule into our rules. Nonetheless she appreciated the whole process and was objecting only on the basis that she did not want to include any emergency provision.

Judge Kethledge thanked the Committee for its work on Rule 62 and moved to the remaining agenda items.

Rule 49.1

Judge Kethledge provided a status report on Rule 49. Judge Furman suggested an amendment adding an introductory clause “subject to any right of public access” a court may rule that a filing be made under seal without redaction. The committee note currently says “the following documents in a criminal case shall not be included in the public case file and should not be made available to the public at the courthouse,” and then the list that follows includes financial affidavits filed seeking representation pursuant to the CJA. Institutionally, Judge Kethledge said, this Committee should not and does not take positions on substantive questions of law. The suggestion reflects the belief that this current note language does take such a position categorically as to financial affidavits and says that they may be sealed categorically. Judge Furman had a case where he ordered that affidavit be available to the public.

Judge Furman said his suggestion is based on the point that the current note does take a position on a substantive legal issue, and it shouldn't. More to the point, the note is inconsistent with pretty much all the existing case law, which is not uniform but all of which takes a more nuanced approach than the note on the question whether and when these things have to be public. Apropos of our earlier discussion about the constitutional right to public access to proceedings, Judge Furman said, we should avoid a scenario where the rule or the note is a trap for the unwary. As noted in his opinion, there was at least one case where one of his colleagues did go astray because of the note language. The problem is the note. But because we cannot amend the note without amending the rule, he had suggested a slight modification of the rule that would at a minimum just flag that there are concerns and issues that courts need to be sensitive to.

Judge Kethledge said that the subcommittee held one meeting by Zoom a few weeks ago with a decision to work on different options for note language that would try to embody this principle of neutrality, i.e., that the rule ought not to be taking a substantive position about whether this type of document is subject to public access or not. The reporters are going to work on some proposed language, and then the subcommittee will reconvene.

Judge Birotte, chair of the Rule 49.1 Subcommittee, added there had been some discussion about coordinating with the Committee on Court Administration and Case Management (CACM). Judge Kethledge had reached out to Judge Fleissig and fortunately it looks like there isn't any issue with us considering this change. Judge Kethledge agreed, saying that he and Judge Fleissig had a nice exchange, and she appreciated the heads up. CACM was independently looking at that guidance, and it had no objection to us proceeding and considering a change to a criminal rule.

Pro se e-filing

Professor Beale said the next item on page 155 of the agenda book was a brief status report on electronic pro se filing. It lets the Committee know that a working group led by Professor Struve, and involving excellent assistance from the Federal Judicial Center, is compiling data about what's actually occurring with pro se filing. The sense was that with the tremendous development technologically and changes during the pandemic, it was time to look at this rule. Professor Beale reported that the working group was nowhere near any kind of proposal and was still learning about different districts. The most interesting thing to the reporters so far was the practice in many districts of accepting filings from pro se litigants, including prisoners, in forms of electronic submission that are not CM/ECF—email, PDF upload, and so on. It appears that that the limiting factor on these being more generally adopted has been problems in getting the kind of infrastructure needed. So that may be something that we will develop over time, especially if this coordinated look nationwide reveals that these are helpful and working well. Some of the concerns about what might happen have proven to be unfounded in the districts. So there would be more to come on that.

Grand jury extension during rules emergencies

Professor Beale continued to the next agenda item on page 158. At the very end of the memo on Rule 62 the reporters had referenced the Department's request for an additional provision allowing the extension on grand jury terms. It could not be considered as part of the current draft of Rule 62 and would have to be an amendment that would come along later if there were interest in making this change. There is a timing issue. The advice that we have received is that it would be undesirable to muddy the waters to introduce an amendment to a rule that hadn't yet been adopted. That would potentially create some confusion on the part of courts, Congress, and the general public. We should wait on this until Rule 62 moves essentially through the process. That is the advice we received from Professor Struve and from Professor Dan Capra, the reporter responsible for coordinating all of the emergency provisions.

Judge Bates agreed that captured it.

Judge Kethledge agreed that it would go onto the study agenda rather than being taken up by a subcommittee now.

Rule 17

Judge Kethledge described the next item as a serious substantial suggestion by the White Collar Committee of the New York City Bar to overhaul Rule 17. They had obviously put a lot of work into it. Professor Beale noted it was only on the agenda today for determination whether a subcommittee would be appointed. She thought it is such a serious proposal that there will be a subcommittee.

Judge Kethledge asked for comments from the Department of Justice.

Mr. Wroblewski said he wanted everyone to know that a number of the authors of the proposal are former DOJ lawyers, many of whom he had worked with before. Early on several of them contacted the Criminal Division, shared some of the ideas, and actually solicited some of

the Department's views. When that happened, he called the reporters and let them know that that was happening. We had a very candid conversation about the proposal, and we expressed our preliminary view (and it is a preliminary view) that the proposal is no mere clarification. The Department views it as a very dramatic change to federal criminal practice. The proposal deals with the compulsory court process. It would change two things. It would first dramatically change the scope of what could be gathered under the court's compulsory process. There's very clear Supreme Court case law, he said, which is discussed in the letter about Rule 17 and the scope of what can be subpoenaed. It would dramatically change that. Second, and maybe more importantly, it would also take the court out of that process. It would say that that these materials could be subpoenaed without the court being involved at all. And so the Department thinks it's a very, very significant issue and it looks forward to the discussions.

Judge Kethledge commented that this proposal looked like it would be a lot of fun, just like Rule 16 did when it started (though that was not to say it's going to end that way). The first question is whether there is a problem. Is there a problem that needs to be handled? Second, if there is, what's the right way to address it? A lot of times the Committee ends up doing something nobody anticipated at the beginning. He agreed a subcommittee was needed, and said he would like to ask Judge Nguyen if she would chair that subcommittee.

Judge Nguyen said it would be her pleasure. Given the scope of the issues we're discussing here, she expected that it will be a lengthy and interesting time. Judge Kethledge agreed it is a meaty intellectual project and he looked forward to watching from the outside.

Rule 5

Professor Beale said there was just one more item on page 187. Magistrate Judge Bruce Reinhart suggested a change in Rule 5 to respond to the Due Process Protection Act, which now requires a reminder of prosecutorial obligations. The legislation requires the reminder to be given at the first scheduled court date where both the prosecutor and the defense are present. Judge Reinhart suggested this is confusing and it would be better to provide the reminder at the arraignment. As the reporters stated in their meeting memo, that might have been a better idea than what Congress enacted. But Congress did independently amend Rule 5. This suggestion would require us to delete the Congressional amendment to Rule 5 and put something in Rule 10. Even if it might have been a better idea, the reporters asked whether it would be appropriate at this time to try to revise something that Congress had recently enacted. That seemed unwise.

Judge Kethledge added that there's also no indication of any confusion or operational problem with the current language.

A member commented that he did think there has been confusion, but it is not preventing magistrate judges from giving those instructions at some point. He surveyed the other magistrate judges in his district, and if anything, because of the confusion, they are giving it more than once. Professor Beale said Congress would probably be pleased with that.

Professor Kethledge announced the next meeting would be on October 27, 2022, in Phoenix, Arizona.

The meeting ended with a rousing round of applause for the outgoing Chair, Judge Kethledge.

Draft

TAB 7

TAB 7A

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

ROBERT M. DOW, JR.
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Honorable John D. Bates, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 15, 2022

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met in Washington, D.C., on May 6, 2021. At the meeting the Committee discussed and gave final approval to three proposed amendments that had been released for public comment. The Committee also considered and approved six proposed amendments with the recommendation that they be released for public comment.

The Committee made the following determinations at the meeting:

- It unanimously approved proposed amendments to Rules 106, 615, and 702, and recommends to the Standing Committee that they be transmitted to the Judicial Conference.
- It unanimously approved proposals to amend Rules 611 (adding two new subdivisions), 613(b), 801(d)(2), 804(b)(3), and 1006, and recommends to the Standing Committee that these proposed amendments be released for public comment.

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report. The proposed amendments can also be found as attachments to this Report.

II. Action Items

A. Proposed Amendment to Rule 106, for Final Approval

At the suggestion of Judge Paul Grimm, the Committee has for the last five years considered and discussed 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 introduce a completing statement that would correct the misimpression. The Committee has considered whether Rule 106 should be amended in two respects: 1) to provide that a completing statement is admissible over a hearsay objection; and 2) to expand the rule to cover unrecorded oral statements, as well as written and recorded statements.

The courts are not uniform in their treatment of these issues. On the hearsay question, some courts have held that when a party introduces a portion of a statement that is misleading, that party can still object, on hearsay grounds, to completing evidence that corrects the misimpression. Other courts have held essentially that if a party introduces a portion of a statement in a manner that misleads the factfinder, that party forfeits the right to object to introduction of other portions of that statement when that is necessary to remedy the misimpression. As to unrecorded oral statements, most courts have found that when necessary to complete, such statements are admissible either under Rule 611(a) or under the common law rule of completeness.

After much discussion and consideration, the Committee in Spring, 2021 unanimously approved an amendment for release for public comment. The proposal released for public comment allows the completing statement to be admitted over a hearsay objection and covers unrecorded oral statements.

The overriding goal of the amendment is to treat all questions of completeness in a single rule. That is particularly important because completeness questions often arise at trial, and so it is important for the parties and the court to be able to refer to a single rule to govern admissibility.

What has been particularly confusing to courts and practitioners is that Rule 106 has been considered a “partial codification” of the common law --- meaning that the parties must be aware that common law may still be invoked. As stated in the Committee Note, the amendment is intended to displace the common law, just as the common law has been displaced by all of the other Federal Rules of Evidence.

As to admissibility of out-of-court statements, the amendment takes the position that the proponent, by introducing part of a statement in a misleading manner, forfeits the right to foreclose admission of a remainder that is necessary to remedy the misimpression. Simple notions of fairness, already embodied in Rule 106, dictate that a misleading presentation cannot stand unrebutted. The amendment leaves it up to the court to determine whether the completing remainder will be admissible to prove a fact (a hearsay use) or simply to provide context (a non-hearsay use). Either usage is encompassed within the rule terminology --- that the completing remainder is admissible “over a hearsay objection.”

As to unrecorded oral statements, most courts already admit such statements when necessary to complete --- they just do so under a different evidence rule or under the common law. The Committee was convinced that covering unrecorded oral statements under Rule 106 would be a user-friendly change, especially because the existing hodgepodge of coverage of unrecorded statements presents a trap for the unwary. As stated above, the fact that completeness questions almost always arise at trial means that parties cannot be expected to quickly get an answer from the common law, or from a rule such as Rule 611(a) that does not specifically deal with completeness.

It is important to note that nothing in the amendment changes the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a completing statement that in fact corrects the misimpression. So, the mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

The Committee received only a few public comments on the proposed changes to Rule 106. All comments were in favor of the proposed amendment, with a couple of comments providing some suggestions for minor changes. After considering the public comment, the Committee unanimously approved a slight change to the proposal: deletion of the phrase “written or oral,” which makes clear that Rule 106 applies to all statements, including those that are not written or oral. The Committee determined that statements made through conduct, or through sign language, should be covered by the rule of completeness, as there was no reason to distinguish such statements from those that are written or oral. The proposed Committee Note was slightly revised to accord with the change in text.

At its Spring 2022 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 106. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee and referred to the Judicial Conference.

The proposed amendment to Rule 106, together with the proposed Committee Note, the GAP report, and the summary of public comment, is attached to this Report.

B. Proposed Amendment to Rule 615, for Final Approval

Rule 615 provides for court orders excluding witnesses so that they “cannot hear other witnesses’ testimony.” The Committee determined that there are problems raised in the case law and in practice regarding the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or does it extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony? Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of the courtroom, because exclusion from the courtroom is not sufficient to protect against the risk of witnesses tailoring their testimony after obtaining access to trial testimony. But other courts have read the rule as it is written.

After extensive consideration and research over four years, the Committee agreed on an amendment that would clarify the extent of an order under Rule 615. Committee members have noted that where parties can be held in contempt for violating a court order, due process requires that the order be clear if it seeks to do more than exclude witnesses from the courtroom. The Committee’s investigation of this problem is consistent with its ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given the increased possibility of witness access to information about testimony through news, social media, YouTube, or daily transcripts.

At its Spring, 2021 meeting the Committee unanimously voted in favor of an amendment to Rule 615. That amendment, released for public comment in August, 2021, limits an exclusion order to just that --- exclusion of witnesses from the courtroom. But a new subdivision provides that the court has discretion to issue further orders to “(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony.” In other words, if a court wants to do more than exclude witnesses from the courtroom, the court must say so.

The Committee also considered whether an amendment to Rule 615 should address orders that prohibit counsel from referring to trial testimony while preparing prospective witnesses. The Committee resolved that any amendment to Rule 615 should not mention trial counsel in text, because the question of whether counsel can use trial testimony to prepare witnesses raises issues of professional responsibility and the right to counsel that are beyond the purview of the Evidence Rules. Judges must address these issues on a case-by-case basis.

Finally, the Committee approved an additional amendment to the existing provision that allows an entity-party to designate “an officer or employee” to be exempt from exclusion. There is some dispute in the courts about whether the entity-party is limited to one such exemption or is entitled to more than one. The amendment clarifies that the exemption is limited to one officer or

employee. The rationale is that the exemption is intended to put entities on a par with individual parties, who cannot be excluded under Rule 615. Allowing the entity more than one exemption is inconsistent with that rationale.

As noted, these proposed changes to Rule 615 were released for public comment in August, 2021. Only a few public comments were received. All were supportive of the amendment, with two comments suggesting minor changes. In response to the public comment, the Committee made two minor changes the Committee Note to the proposed amendment.

At its Spring 2022 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 615. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee and referred to the Judicial Conference.

The proposed amendment to Rule 615, together with the Committee Note, the GAP report, and the summary of public comment, is attached to this Report.

C. Proposed Amendment to Rule 702, for Final Approval

The Committee has been researching and discussing the possibility of an amendment to Rule 702 for five years. The project began with a Symposium on forensic experts and *Daubert*, held at Boston College School of Law in October, 2017. That Symposium addressed, among other things, the challenges to forensic evidence raised in a report by the President’s Council of Advisors on Science and Technology. A Subcommittee on Rule 702 was appointed to consider possible treatment of forensic experts, as well as the weight/admissibility question discussed below. The Subcommittee, after extensive discussion, recommended against certain courses of action. The Subcommittee found that: 1) It would be difficult to draft a freestanding rule on forensic expert testimony, because any such amendment would have an inevitable and problematic overlap with Rule 702; and 2) It would not be advisable to set forth detailed requirements for forensic evidence either in text or Committee Note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate.

The full Committee agreed with these suggestions. But the Subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic expert testimony --- the problem of overstating results (for example, an expert claiming that her opinion has a “zero error rate”, where that conclusion is not supportable by the expert’s methodology). The Committee heard extensively from DOJ on the important efforts it is now employing to regulate the testimony of its forensic experts, and to limit possible overstatement.

The Committee considered a proposal to add a new subdivision (e) to Rule 702 that would essentially prohibit any expert from drawing a conclusion overstating what could actually be concluded from a reliable application of a reliable methodology. But a majority of the members decided that the amendment would be problematic, because Rule 702(d) already requires that the expert must reliably apply a reliable methodology. If an expert overstates what can be reliably

concluded (such as a forensic expert saying the rate of error is zero) then the expert's opinion should be excluded under Rule 702(d). The Committee was also concerned about the possible unintended consequences of adding an overstatement provision that would be applied to all experts, not just forensic experts.

The Committee, however, unanimously favored a slight change to existing Rule 702(d) that would emphasize that the court must focus on the expert's opinion, and must find that the opinion actually proceeds from a reliable application of the methodology. The Committee unanimously approved a proposal—released for public comment in August, 2021--- that would amend Rule 702(d) to require the court to find that “the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.” As the Committee Note elaborates: “A testifying expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology.” The language of the amendment more clearly empowers the court to pass judgment on the conclusion that the expert has drawn from the methodology. Thus the amendment is consistent with *General Electric Co., v. Joiner*, 522 U.S. 136 (1997), in which the Court declared that a trial court must consider not only the expert's methodology but also the expert's conclusion; that is because the methodology must not only be reliable, it must be reliably applied.

Finally, the Committee resolved to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) --- that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology --- are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. These statements misstate Rule 702, because its admissibility requirements must be established to a court by a preponderance of the evidence. The Committee concluded that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence --- essentially treating these questions as ones of weight rather than admissibility, which is contrary to the Supreme Court's holdings that under Rule 104(a), admissibility requirements are to be determined by court under the preponderance standard.

Initially, the Committee was reluctant to propose a change to the text of Rule 702 to address these mistakes as to the proper standard of admissibility, in part because the preponderance of the evidence standard applies to almost all evidentiary determinations, and specifying that standard in one rule might raise negative inferences as to other rules. But ultimately the Committee unanimously agreed that explicitly weaving the Rule 104(a) standard into the text of Rule 702 would be a substantial improvement that would address an important conflict among the courts. While it is true that the Rule 104(a) preponderance of the evidence standard applies to Rule 702 as well as other rules, it is with respect to the reliability requirements of expert testimony that many courts are misapplying that standard. Moreover, it takes some effort to determine the applicable standard of proof --- Rule 104(a) does not mention the applicable standard of proof, requiring a resort to case law. And while *Daubert* mentions the standard, *Daubert* does so only in a footnote in the midst of much discussion about the liberal standards of the Federal Rules of Evidence. Consequently, the Committee unanimously approved an amendment for public comment that

would explicitly add the preponderance of the evidence standard to Rule 702(b)-(d). The language of the proposal released for public comment required that “the proponent has demonstrated by a preponderance of the evidence” that the reliability requirements of Rule 702 have been met. The Committee Note to the proposal made clear that there is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof to other rules --- emphasizing that incorporating the preponderance standard into the text of Rule 702 was made necessary by the decisions that have failed to apply it to the reliability requirements of Rule 702.

More than 500 comments were received on the proposed amendments to Rule 702. In addition, a number of comments were received at a public hearing held on the rule. Many of the comments were opposed to the amendment, and almost all of the fire was directed toward the term “preponderance of the evidence.” Some thought that “preponderance of the evidence” would limit the court to considering only *admissible* evidence at the *Daubert* hearing. Others thought that the term represented a shift from the jury to the judge as factfinder. By contrast, commentators who supported the amendment argued that the amendment should go further and clarify that it is the court, not the jury, that decides admissibility.

The Committee carefully considered the public comments. The Committee does not agree that the preponderance of the evidence standard would limit the court to considering only admissible evidence; the plain language of Rule 104(a) allows the court deciding admissibility to consider inadmissible evidence. Nor did the Committee believe that the use of the term preponderance of the evidence would shift the factfinding role from the jury to the judge, for the simple reason that, when it comes to making preliminary determinations about admissibility, the judge *is* and *always has been* a factfinder.

But while disagreeing with these comments, the Committee recognized that it would be possible to replace the term “preponderance of the evidence” with a term that would achieve the same purpose while not raising the concerns (valid or not) mentioned by many commentators. The Committee unanimously agreed to change the proposal as issued for public comment to provide that the proponent must establish that it is “*more likely than not*” that the reliability requirements are met. This standard is substantively identical to “preponderance of the evidence” but it avoids any reference to “evidence” and thus addresses the concern that the term “evidence” means only admissible evidence.

The Committee was also convinced by the suggestion in the public comment that the rule should clarify that it is the court and not the jury that must decide whether it is more likely than not that the reliability requirements of the rule have been met. Therefore, the Committee unanimously agreed with a change requiring that the proponent establish “*to the court*” that it is more likely than not that the reliability requirements have been met. The proposed Committee Note was amended to clarify that nothing in amended Rule 702 requires a court to make any findings about reliability in the absence of a proper objection.

With those changes, and a few stylistic and corresponding changes to the Committee Note, the Committee unanimously voted in favor of adopting the amendments to Rule 702, for final approval.

At the Spring 2022 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 702. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee and referred to the Judicial Conference.

The proposed amendment to Rule 702, together with the proposed Committee Note, GAP report, summary of public comment, and summary of the public hearing, is attached to this Report.

D. Possible Amendment to Rule 611 on Illustrative Aids, for Release for Public Comment

At the Spring meeting, the Committee unanimously approved a proposal to add a new Rule 611(d) to regulate the use of illustrative aids at trial. The distinction between “demonstrative evidence” (admitted into evidence and used substantively to prove disputed issues at trial) and “illustrative aids” (not admitted into evidence but used solely to assist the jury in understanding other evidence) is sometimes a difficult one to draw, and is a point of confusion in the courts. In addition, the standards for allowing illustrative aids to be presented --- and particularly whether illustrative aids may be used by the jury during deliberations --- are not made clear in the case law. The Committee has determined that it would be useful to set forth uniform standards to regulate the use of illustrative aids, and in doing so clarify the distinction between illustrative aids and demonstrative evidence.

The proposed amendment would distinguish illustrative aids --- presentations that are not evidence but offered only to help the factfinder understand evidence --- from demonstrative evidence offered to prove a fact. The amendment would allow illustrative aids to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay.

Because illustrative aids are not evidence, adverse parties do not receive pretrial discovery of such aids. The proposed rule would require notice to be provided, unless the court for good cause orders otherwise. The Committee determined that advance notice is important so that the court can rule on whether the aid has sufficient utility before it is displayed to the jury. (After all, you can’t unring a bell.) The Committee Note recognizes that the timing of the notice will depend on the circumstances.

Finally, because illustrative aids are not evidence, the proposed rule provides that the aids should not be allowed into the jury room during deliberations, unless the court orders otherwise. The Committee Note specifies that if the court does allow an illustrative aid to go to the jury room, the court should instruct the jury that the aid is not evidence.

It is important to note that the proposed rule is not intended to regulate PowerPoints or other aids that an attorney uses merely to guide the jury through an opening or closing argument. Again, illustrative aids assist the jury in understanding *evidence*; something that assists the jury in following an *argument* is therefore not an illustrative aid.

The Committee strongly believes that the rule on illustrative aids will provide an important service to courts and litigants. Illustrative aids are used in almost every trial, and yet nothing in the evidence rules specifically addresses their use. This amendment rectifies that problem.

At the Spring 2022 meeting, the Committee unanimously approved the proposed amendment to add Rule 611(d) to regulate the use of illustrative aids at a trial. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to add Rule 611(d), together with the proposed Committee Note, is attached to this Report.

E. Proposed Amendment to Rule 1006, for Release for Public Comment¹

Evidence Rule 1006 provides that a summary can be admitted as evidence if the underlying records are admissible and too voluminous to be conveniently examined in court. The Committee has determined that the courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006 --- and that much of the problem is that some courts do not properly distinguish between summaries of evidence under Rule 1006 (which are themselves admitted into evidence) and summaries that are illustrative aids (which are not evidence at all). Some courts have stated that summaries admissible under Rule 1006 are “not evidence,” which is incorrect. Other courts have stated that all of the underlying evidence must be admitted before the summary can be admitted; that, too, is incorrect. Still other courts state that the summary is inadmissible if any of the underlying evidence *has* been admitted; that is also wrong.

After extensive research and discussion, the Committee unanimously approved an amendment to Rule 1006 that would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006.

The proposal to amend Rule 1006 dovetails with the proposal to establish a rule on illustrative aids, discussed above. These two rules serve to distinguish a summary of voluminous evidence (which is itself evidence and governed by Rule 1006) from a summary that is designed to help the trier of fact understand evidence that has already been presented (which is not itself evidence and would be governed by new Rule 611(d)). The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been

¹ This rule is taken out of numerical sequence, because it is of a piece with the proposed amendment on illustrative aids.

admitted. The Committee believes that the proposed amendment will provide substantial assistance to courts and litigants in navigating this confusing area.

At the Spring 2022 meeting, the Committee unanimously approved the proposed amendment to Rule 1006. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 1006, together with the proposed Committee Note, is attached to this Report.

F. Proposed Rule 611(e), Setting Forth Safeguards When Allowing Jurors to Submit Questions for Witnesses, for Release for Public Comment.

There is controversy in the courts over whether jurors should be allowed to question witnesses at trial. The Committee is not seeking to resolve that controversy in a rule amendment. But the Committee has determined that it would be useful to set forth the minimum safeguards that should be applied if the trial court does decide to allow jurors to question witnesses. Standards regulating the practice can be found in some court of appeals cases, but the Committee has unanimously determined that it would be useful to set forth a single set of safeguards in an Evidence Rule --- specifically, in a new subdivision 611(e). The proposed Rule 611(e) requires the court to instruct jurors, among other things, that they must submit questions in writing; that they are not to draw negative inferences if their question is rephrased or does not get asked; and that they must maintain their neutrality. The proposed rule also provides that the court must consult with counsel when jurors submit questions, and that counsel must be allowed to object to such questions outside the jury's hearing.

The Committee Note to proposed Rule 611(e) emphasizes that the rule is agnostic about whether a court decides to permit jurors to submit questions.

At the Spring 2022 meeting, the Committee unanimously approved the proposed amendment to add a new Rule 611(e). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to add Rule 611(e), together with the proposed Committee Note, is attached to this Report.

G. Proposed Amendment to Rule 613(b), for Release for Public Comment.

The common law provided that before a witness could be impeached with extrinsic evidence of a prior inconsistent statement, the adverse party was required to give the witness an opportunity to explain or deny the statement. Rule 613(b) rejects that "prior presentation" requirement. It provides that extrinsic evidence of the inconsistent statement is admissible so long

as the witness is given an opportunity to explain or deny the statement at some point in the trial. It turns out, though, that many (perhaps most) courts have retained the common law “prior presentation” requirement. These courts have found that a prior presentation requirement saves time, because a witness will almost always concede that she made the inconsistent statement, and that makes it unnecessary for anyone to introduce extrinsic evidence. The prior presentation requirement also avoids unfair surprise and the difficulties inherent in calling a witness back to the stand to give her an opportunity at some later point to explain or deny a prior statement that has been proven through extrinsic evidence.

After discussion at three Committee meetings, the Committee unanimously determined that the better rule is to require a prior opportunity to explain or deny the statement, with the court having discretion to allow a later opportunity (for example, when the prior inconsistent statement is not discovered until after the witness testifies). This will bring the rule into alignment with what appears to be the practice of most trial judges --- a practice that the Committee concluded is superior to the practice described in the current rule.

The Committee unanimously approved the following change:

Extrinsic evidence of a witness’s prior inconsistent statement ~~is admissible only if may not be admitted until after~~ the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, ~~unless the court orders otherwise or if justice so requires~~. This subdivision (b) does not apply to an opposing party’s statement under Rule 801(d)(2).

At the Spring 2022 meeting, the Committee unanimously approved the proposed amendment to Rule 613(b). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 613(b), together with the proposed Committee Note, is attached to this Report.

H. Proposed Amendment to Rule 801(d)(2) Governing Successors-in-Interest, for Release for Public Comment

Rule 801(d)(2) provides a hearsay exemption for statements of a party opponent. Courts are split about the applicability of this exemption in the following situation: a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or defense has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent. Some circuits would permit the statements made by the declarant to be offered against the successor as a party-opponent statement under Rule 801(d)(2), while others would foreclose admissibility because the statement was made by one who is technically not the party-opponent in the case.

At its Spring, 2002 meeting, after previous discussion, the Committee determined that the dispute in the courts about the admissibility of party-opponent statements against successors should be resolved by a rule amendment, because the problem arises with some frequency in a variety of successor/predecessor situations (most commonly, decedent and estate in a claim brought for damages under 42 U.S.C. § 1983). The Committee unanimously determined that the appropriate result should be that a hearsay statement should be admissible against the successor-in-interest. The Committee reasoned that admissibility was fair when the successor-in-interest is standing in the shoes of the declarant --- because the declarant is in substance the party-opponent. Moreover, a contrary rule results in random application of Rule 801(d)(2), and possible strategic action, such as assigning a claim in order to avoid admissibility of a statement. The Committee approved the following addition to Rule 801(d)(2):

If a party's claim or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

The proposed Committee Note would emphasize that to be admissible against the successor, the declarant must have made the statement before the transfer of the claim or defense.

At its Spring 2022 meeting, the Committee unanimously approved the proposed amendment to Rule 801(d)(2). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 801(d)(2), together with the proposed Committee Note, is attached to this Report.

I. Proposed Amendment to the Rule 804(b)(3) Corroborating Circumstances Requirement, for Release for Public Comment

Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide “corroborating circumstances that clearly indicate the trustworthiness” of the statement. There is a dispute in the courts about the meaning of the “corroborating circumstances” requirement. Most federal courts consider both the inherent guarantees of trustworthiness underlying a particular declaration against interest as well as independent evidence corroborating (or refuting) the accuracy of the statement. But some courts do not permit inquiry into independent evidence --- limiting judges to consideration of the inherent guarantees of trustworthiness surrounding the statement. This latter view --- denying consideration of independent corroborative evidence --- is inconsistent with the 2019 amendment to Rule 807 (the residual exception), which requires courts to look at corroborative evidence in determining whether a hearsay statement is sufficiently trustworthy under that exception. The rationale is that corroborative evidence can shore up concerns about the potential unreliability of a statement --- a rationale that is applied in

many other contexts, such as admissibility of co-conspirator hearsay, and tips from informants in determining probable cause.

At its Spring, 2022 meeting, the Committee unanimously approved an amendment to Rule 804(b)(3) that would parallel the language in Rule 807, and require the court to consider the presence or absence of corroborating evidence in determining whether “corroborating circumstances” exist. The proposed language for the amendment, which is recommended for release for public comment, is as follows:

Rule 804(b)(3) Statement Against Interest.

A statement that:

(A) A reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, the court finds it is supported by corroborating circumstances that clearly indicate trustworthiness --- after considering the totality of circumstances under which it was made and evidence, if any, corroborating it. ~~if offered in a criminal case as one that tends to expose the declarant to criminal liability.~~

The Committee believes that it is important to rectify the dispute among the circuits about the meaning of “corroborating circumstances” and that requiring consideration of corroborating evidence not only avoids inconsistency with the residual exception, but is also supported by logic and by the legislative history of Rule 804(b)(3).

At its Spring 2022 meeting, the Committee unanimously approved the proposed amendment to Rule 804(b)(3). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 804(b)(3), together with the proposed Committee Note, is attached to this Report.

III. Minutes of the Spring, 2022 Meeting

The draft of the minutes of the Committee’s Spring, 2022 meeting is attached to this report. These minutes have not yet been approved by the Committee.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE¹**

1 **Rule 106. ~~Remainder of or Related Writings or~~**
2 **~~Recorded Statements~~**

3 If a party introduces all or part of a ~~writing or~~
4 ~~recorded~~ statement, an adverse party may require the
5 introduction, at that time, of any other part—or any other
6 ~~writing or recorded~~ statement—that in fairness ought to be
7 considered at the same time. The adverse party may do so
8 over a hearsay objection.

Committee Note

Rule 106 has been amended in two respects:

(1) First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression. *See United States v.*

¹ New material is underlined in red; matter to be omitted is lined through.

Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (noting that “[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court”). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime—when that is not what he said. In this example the prosecution, which has created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct the misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not usually specified whether the completing remainder may be used for its truth or only for its non-hearsay value in showing context. Under the amended rule, the use to which a completing statement can be put will depend on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party’s state of mind is relevant. The completing statement in this example is admitted only to show what the party actually heard, regardless of the underlying truth of the completing statement. But in some

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cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

(2) Second, Rule 106 has been amended to cover all statements, including oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. Most questions of completion arise when a statement is offered in the heat of trial—where neither the parties nor the court should be expected to consider the nuances of Rule 611(a) or the common law in resolving completeness questions. The amendment, as a matter of convenience, covers these questions under one rule. The rule is expanded to now cover all statements, in any form -- including statements made through conduct or sign language.

The original committee note cites “practical reasons” for limiting the coverage of the rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the rule. *See United States v. Bailey*, 2017 WL 5126163, at *7 (D. Md. Nov. 16, 2017) (“A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove,

others are not—because they have been summarized . . . , or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty.”). A party seeking completion with an unrecorded statement would of course need to provide admissible evidence that the statement was made. Otherwise, there would be no showing that the original statement is misleading, and the request for completion should be denied. In some cases, the court may find that the difficulty in proving the completing statement substantially outweighs its probative value—in which case exclusion is possible under Rule 403.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. *See, e.g., Phoenix Assocs. III v. Stone*, 60 F.3d 95, 103 (2d Cir. 1995) (“While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly.”). Nothing in the amendment is intended to limit the court’s discretion to allow completion at a later point.

The intent of the amendment is to displace the common-law rule of completeness. In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171–72 (1988), the Court in dictum referred to Rule 106 as a “partial codification” of the common-law rule of completeness. There is no other rule of evidence that is interpreted as coexisting with common-law rules of evidence, and the practical problem of a rule of evidence operating with a common-law supplement is apparent—especially when the rule is one, like the rule of completeness, that arises most often during the trial.

The amendment does not give a green light of admissibility to all excised portions of statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106. So, for example, the mere fact that a defendant denies guilt before later admitting it does not, without more, mandate the admission of his previous denial. *See United States v. Williams*, 930 F.3d 44 (2d Cir. 2019).

Changes Made After Publication and Comment

The proposal released for public comment covered “written and oral” statements. The term “written and oral” has been deleted so that the amendment now covers all statements, including those that are neither written nor oral -- such as a statement made through the use of sign language.

A sentence in the committee note regarding the common-law rule of completeness was dropped as unnecessary.

Summary of Public Comment

Victor Glasberg, Esq. (EV-2021-0005-0004) suggests that the amendment allow completeness with a statement “that in fairness ought to be considered at the same time, notwithstanding a hearsay objection.” He states that this language “effectuates the apparent intent of the revised rule without appearing to nullify hearsay as a possibly sufficient objection to the proposed supplementation.”

The Federal Magistrate Judges Association (EV-2021-0005-0013) supports the proposed amendment to Rule 106, stating that the changes are “consistent with the existing purpose of the Rule to avoid misleading use of out-of-court statements offered at trial.

The American Association for Justice (EV-2021-0005-0030) supports the proposed amendment to Rule 106, but suggests that the reference to “oral or written” statements should be deleted, because that term would not cover statements made through sign language. AAJ also suggests a change to the committee note regarding the displacement of common law.

Charles Peckham, Esq. (EV-2021-0005-051) states that the changes to Rules 106 and 615 are “well thought through” and encourages their passage.

The New York City Bar Association (EV-2021-0005-0092) supports the proposed amendment to Rule 106. The Association suggests that the fairness standard that is already in the rule should be reemphasized in the language added concerning hearsay --- so that the amending language should read “If the court finds that fairness requires it, the adverse party may do so over a hearsay objection.”

The Federal Bar Association (EV-2021-0005-0094) approves the proposed amendment to Rule 106.

Dennis Quinlan, Esq. (EV-2021-0005-0096) supports the proposed amendment to Rule 106 as “a clear improvement over the previous iteration.”

Jeremy D’Amico, Esq. (EV-2021-0005-0223) opposes the proposed extension of Rule 106 to oral

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unrecorded statements, on the ground that it may be difficult to prove the exact statement that was made.

The National Association of Criminal Defense Lawyers (EV-2021-0005-0224) strongly supports the proposed changes to Rule 106, noting that the changes would rectify longstanding conflicts in the courts – and they would so consistently with “the stated goal of the rule: fairness.”

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE¹**

- 1 **Rule 615. Excluding Witnesses from the Courtroom;**
 2 **Preventing an Excluded Witness’s Access**
 3 **to Trial Testimony**
- 4 **(a) Excluding Witnesses.** At a party’s request, the court
 5 must order witnesses excluded from the courtroom
 6 so that they cannot hear other witnesses’ testimony.
 7 Or the court may do so on its own. But this rule does
 8 not authorize excluding:
- 9 ~~(a)~~**(1)** a party who is a natural person;
- 10 ~~(b)~~**(2)** ~~an~~ one officer or employee of a party that is
 11 not a natural person, ~~after being~~ if that
 12 officer or employee has been designated as
 13 the party’s representative by its attorney;
- 14 ~~(c)~~**(3)** ~~a~~any person whose presence a party shows
 15 to be essential to presenting the party’s
 16 claim or defense; or

¹ New material is underlined in red; matter to be omitted is lined through.

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- 17 ~~(d)~~(4) a person authorized by statute to be present.
- 18 (b) Additional Orders to Prevent Disclosing and
- 19 Accessing Testimony. An order under (a) operates
- 20 only to exclude witnesses from the courtroom. But
- 21 the court may also, by order:
- 22 (1) prohibit disclosure of trial testimony to
- 23 witnesses who are excluded from the
- 24 courtroom; and
- 25 (2) prohibit excluded witnesses from accessing
- 26 trial testimony.

Committee Note

Rule 615 has been amended for two purposes:

(1) Most importantly, the amendment clarifies that the court, in entering an order under this rule, may also prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony. Many courts have found that a “Rule 615 order” extends beyond the courtroom, to prohibit excluded witnesses from obtaining access to or being provided with trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the one hand, the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent

witnesses from tailoring their testimony to the evidence presented at trial—and that purpose can only be effectuated by regulating out-of-court exposure to trial testimony. *See United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018) (“The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript.”). On the other hand, a rule extending an often vague “Rule 615 order” outside the courtroom raised questions of fair notice, given that the text of the rule itself was limited to exclusion of witnesses from the courtroom.

An order under subdivision (a) operates only to exclude witnesses from the courtroom. This includes exclusion of witnesses from a virtual trial. Subdivision (b) emphasizes that the court may by order extend the sequestration beyond the courtroom, to prohibit parties subject to the order from disclosing trial testimony to excluded witnesses, as well as to directly prohibit excluded witnesses from trying to access trial testimony. Such an extension is often necessary to further the rule’s policy of preventing tailoring of testimony.

The rule gives the court discretion to determine what requirements, if any, are appropriate in a particular case to protect against the risk that witnesses excluded from the courtroom will obtain trial testimony.

Nothing in the language of the rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness. However, an order governing counsel’s disclosure of trial testimony to prepare a witness raises difficult questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, and is best addressed by the court on a case-by-case basis.

(2) Second, the rule has been amended to clarify that the exception from exclusion for entity representatives is limited to one designated representative per entity. This limitation, which has been followed by most courts, generally provides parity for individual and entity parties. The rule does not prohibit the court from exercising discretion to allow an entity-party to swap one representative for another as the trial progresses, so long as only one witness-representative is exempt at any one time. If an entity seeks to have more than one witness-representative protected from exclusion, it is free to try to show under subdivision (a)(3) that the witness is essential to presenting the party's claim or defense. Nothing in this amendment prohibits a court from exempting from exclusion multiple witnesses if they are found essential under (a)(3).

Changes Made After Publication and Comment

References in the committee note to the agent of an entity party were changed to "representative" to track the rule. Also, a case citation in the committee note was dropped.

Summary of Public Comment

The Federal Magistrate Judges Association (EV-2021-0005-0013) supports the proposed amendment to Rule 615. It views the proposed amendment as "largely clarifying existing practice." It states that the amendment "makes clear that mere exclusion does not operate to prohibit disclosure, placing the onus on a party seeking such a prohibition to specifically request one. We agree with this change and the language chosen to implement it."

The American Association for Justice (EV-2021-0005-0030) supports the proposed amendment, especially the specification that a corporate representative is entitled to only one representative that is protected from exclusion. It suggests that the term “representative” should be used consistently throughout the Committee Note. It also suggests that the provision governing orders outside the courtroom specify that the parties may ask for it or the court can order on its own motion. And it suggests that language in the Note explaining the reason for the amendment should be deleted as “superfluous.”

Charles Peckham, Esq. (EV-2021-0005-0051) states that the changes to Rules 106 and 615 are “well thought through” and encourages their passage.

The Federal Bar Association (EV-2021-0005-0094) approves the proposed amendment to Rule 615.

Dennis Quinlan, Esq. (EV-2021-0005-0096) supports the proposed amendment to Rule 615 as “a clear improvement over the previous iteration.”

The National Association of Criminal Defense Lawyers (EV-2021-0005-0462) supports the proposed amendment, while suggesting a few changes. Those suggestions include: 1) deleting a reference to a case in the Committee Note that could be read to allow a witness to be designated as “essential” without an inquiry by the court; 2) deleting the proposed change in subdivision (c) to “any” person; and 3) clarifying the limits on the exception to exclusion provided in subdivision (d).

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE¹**

1 **Rule 702. Testimony by Expert Witnesses**

2 A witness who is qualified as an expert by
3 knowledge, skill, experience, training, or education may
4 testify in the form of an opinion or otherwise if the proponent
5 demonstrates to the court that it is more likely than not that:

6 **(a)** the expert’s scientific, technical, or other
7 specialized knowledge will help the trier of
8 fact to understand the evidence or to
9 determine a fact in issue;

10 **(b)** the testimony is based on sufficient facts or
11 data;

12 **(c)** the testimony is the product of reliable
13 principles and methods; and

14 **(d)** the ~~expert has reliably applied~~ expert’s
15 opinion reflects a reliable application of the

¹ New material is underlined in red; matter to be omitted is lined through.

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16 principles and methods to the facts of the
17 case.

Committee Note

Rule 702 has been amended in two respects:

(1) First, the rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. *See* Rule 104(a). This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (“The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.”); *Huddleston v. United States*, 485 U.S. 681, 687 (1988) (“preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard”). But many courts have held that the critical questions of the sufficiency of an expert’s basis, and the application of the expert’s methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that

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rule. Nor does the rule require that the court make a finding of reliability in the absence of objection.

The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000—requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard. But it remains the case that other admissibility requirements in the rule (such as that the expert must be qualified and the expert’s testimony must help the trier of fact) are governed by the Rule 104(a) standard as well.

Some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds it more likely than not that an expert has a sufficient basis to support an opinion, the fact that the expert has not read every single study that exists may raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert’s basis always go to weight and not admissibility. Rather it means that once the court has found it more likely than not that the admissibility requirement has been met, any attack by the opponent will go only to the weight of the evidence.

It will often occur that experts come to different conclusions based on contested sets of facts. Where that is so, the Rule 104(a) standard does not necessarily require exclusion of either side’s experts. Rather, by deciding the disputed facts, the jury can decide which side’s experts to credit. “[P]roponents ‘do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of

reliability is lower than the merits standard of correctness.” Committee Note to the 2000 amendment to Rule 702, quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994).

Rule 702 requires that the expert’s knowledge “help” the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert’s testimony to “appreciably help” the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.

(2) Rule 702(d) has also been amended to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert’s basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert’s basis and methodology may reliably support.

The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error. In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of

features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

Nothing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify that Rule 104(a)'s requirement applies to expert opinions under Rule 702. Similarly, nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make claims that are unsupported by the expert's basis and methodology.

Changes Made After Publication and Comment

In response to the public comment expressing concern about the reference to proof by a preponderance of the evidence, the text was changed to require the proponent to demonstrate to the court that it is "more likely than not" that the reliability requirements of Rule 702 have been met.

The text was changed to emphasize that the more likely than not showing is made to the court.

The committee note was altered to account for the changes made to the text. In addition, a sentence was added to the Note to emphasize that the rule does not require the court to make a finding of reliability in the absence of an objection. Certain stylistic improvements were also made. Finally, a paragraph in the committee note addressing the

need for the gatekeeping function under subdivision (d) was altered slightly to explain more specifically why gatekeeping is necessary.

Summary of Public Comment

Louis Koerner, Esq., (EV-021-0003) supports the proposed amendment to Rule 702, stating that it will “provide certainty that may have been lacking and may have produced inconsistent results.”

Lawyers for Civil Justice (EV-021-0007) supports the proposed amendment to Rule 702, while advocating some adjustments. It states that the amendment is needed because there is “widespread misunderstanding of Rule 702’s requirements.” LCJ also concludes that the proposed amendment helpfully addresses the problem of experts overstating their conclusions, and that the pertinent text and committee note “will be helpful to courts and counsel alike.” LCJ suggests that the amendment “would be even more effective if it expressly stated that the court must determine admissibility—a clarification that would directly address the caselaw’s core confusion about the Rule’s allocation of responsibility between the judge and the jury.”

Lawyers for Civil Justice (EV-021-0008) submitted a study of reported case law applying Rule 702 in 2020. The study concludes that the “inconsistent application of the preponderance standard in 2020 cases demonstrates that Rule 702 is not applied the same way throughout the country, or even within the same federal circuit or judicial district. Further, the number of courts that acknowledge the preponderance standard but still adopt a ‘liberal thrust’ favoring admissibility may reflect larger confusion among federal courts about how to apply Rule 702.”

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James M. Beck, Esq. (EV-021-0005-0009) states that the proposed changes to Rule 702 “are long overdue and should be more effective in enforcing Rule 702’s gatekeeping requirements, particularly with the accompanying notes expressly repudiating reliance on anachronistic, pre-2000 holdings.”

The Colorado Civil Justice League (EV-021-0005-0010) believes the proposed amendment “will go far to correct widespread misunderstandings about how courts should address challenges to the admissibility of opinion testimony, and will promote a uniform approach to the gatekeeping function.” The League asserts that in Federal courts in the Tenth Circuit, “[a]lthough the Rule 104(a) preponderance of proof standard sometimes is applied, with troubling frequency courts employ different, more permissive tests.” It concludes that “[r]evisions to insert within the text of Rule 702 an explicit reference to the court as the decision-maker, and to bolster the draft Note to clarify the rejection of cases that have described perspectives inconsistent with the rule and incorporate examples of incorrect statements of law would make the amendment even more effective.”

Anonymous (EV-021-0005-0011) states that “it is not clear that the proposed amendment is needed and it may result in overly strict application of the gatekeeping function.”

Shook, Hardy & Bacon, LLP (EV-021-0012), supports the proposed amendment to Rule 702 and the committee note, contending that under current law, there is inconsistent application of the gatekeeper standards and that many courts erroneously consider the reliability requirements of Rule 702 to be questions of weight and not admissibility.

The Federal Magistrate Judges Association (EV-2021-0005-0013) supports the proposed changes to Rule 702. It notes that these are “clarifying amendments” that “should improve decision making and reinforce the court’s gatekeeping role in evaluating opinion testimony.”

The Federation of Defense and Corporate Counsel (EV-2021-0005-0014) supports the proposed amendment to Rule 702. The Federation states that the proposed amendment to Rule 702(d) is “necessary to ensure that District Courts enforce their gatekeeping function.” It also states that “[i]t is imperative then that this Committee clearly state the burden of proof within Rule 702 so that District Courts properly and consistently apply the standard.” The Federation concludes that the proposed changes are a “necessary response to common misconceptions held by some courts regarding the admissibility standards applicable to expert opinions and are an important step to ensure that verdicts do not rely on unproven science or invalid data.”

The Washington Legal Foundation (EV-2021-0005-0015) supports the amendment while suggesting slight modifications. It states that many courts misapply Rule 702, by considering its requirements to present questions of weight rather than admissibility, and that the proposed change eliminates any confusion about the burden of proof. The Foundation also asserts that the amendment “fixes the problem of expert opinions unmoored from the application of reliable methods and principles to the facts of the case” because it “explicitly requires that the expert’s testimony be based on sound application of reliable methods and principles to these facts.” The Foundation suggests that the text of the proposal be changed to specify that it is the court that must determine that the admissibility factors are met. It also suggests that the Note should “specifically disavow bad

case law” as well as specifically state “that there is no presumption that district courts should admit expert evidence.”

Hughes Hubbard and Reed, LLP (EV-2021-0005-0016) supports the amendment, stating that “it is now clear that further attention to and clarification of Rule 702 is necessary amidst the increasing divergence of federal court rulings concerning the interpretation of Rule 702 and application of the preponderance standard when assessing the admissibility of expert testimony.” It concludes that the amendment “would offer clear guidance to the courts that the sufficiency of the basis for an expert’s opinion and his or her application of the principles and methods to the facts of the case always go to the question of admissibility, and not to the weight of the evidence.”

A group of senior legal officers of organizations that frequently litigate in the Federal courts (EV-2021-0005-0017) state that the proposed amendment addresses the significant problem of a widespread misunderstanding about Rule 702’s requirements, which “frequently results in the admission of factually unsupported or otherwise unreliable opinion testimony that misleads juries, undermines civil justice, and erodes public confidence in the courts.” The officers conclude that the proposed amendment “is a much-needed clarification that will help both courts and counsel adhere to the rule, particularly in jurisdictions where courts have erroneously characterized Rule 702 as reflecting a ‘presumption of admissibility.’” They suggest that the committee note expressly state that the amendment rejects the pre-*Daubert* case law relied on by some courts to establish a presumption of admissibility of expert testimony.

Phil Cole, Esq. (EV-2021-0005-018) opposes the proposed amendment, contending that it will lead to judges

rather than juries weighing expert evidence. He states that “[t]he exposure of an expert’s errors is the job of the opposing lawyers not the courts.”

Attorneys Information Exchange Group (EV-2021-0005-0019) contends that the current rule has worked well, and that the amendment would change what it asserts to be the existing law that “Rule 702 represents a liberal standard of admissibility for expert opinions.”

Greg Allen, Esq. (EV-2021-0005-0020) is concerned that “the proposed change may lead to confusion that could result in the exclusion of qualified experts.” He would argue “leave well enough alone.”

Robert M.N. Palmer, Esq. (EV-2021-0005-0021) states that Rule 702 is functioning as intended and there is “no need to fix it.” He contends that changing the language of the rule may mislead trial courts into thinking that “their role as gatekeeper has somehow changed.”

The International Association of Defense Counsel (EV-2021-0005-0022) supports the proposed amendment to Rule 702. It notes that a number of circuit courts have incorrectly stated that expert testimony is presumptively admissible. It concludes that “[a]dding language to Rule 702 specifically referencing the preponderance standard . . . should prevent courts from continuing to misapprehend the standard. It should also encourage both sides to brief the issues in terms of the preponderance of available evidence and encourage courts to make findings on each factor.”

Andre Tennille, Esq. (EV-2021-0005-023) states that “the proposed changes do nothing to change the law--but, if adopted, they will spawn more *Daubert* motions, more inconsistency in evidentiary rulings, and more confusion

among judges about whether the rule authorizes them to play scientist.” He fears that judges will take the amendment as license to usurp the jury's role “and in some cases depriving parties of their right to a jury trial.”

Bruce Robert Pfaff, Esq. (EV-2021-0005-0024) contends that an amendment to Rule 702 is unnecessary. He states that “[t]he current version of FRE 702 is perfectly acceptable and capable of fair understanding by lawyers and fair application by judges” and that the proposed amendment “will encourage legal uncertainty and excessive judicial activity and appeals.”

The Coalition for Litigation Justice (EV-2021-0005-0025) supports the proposed amendment, stating that “inconsistency among individual district courts emphasizes the need for a clear statement in the Rule that a preponderance of the evidence standard applies to Rule 702 determinations.” The Coalition suggests an addition to the committee note instructing that a review under Rule 702(b) is insufficient “if it merely cites to the experts’ self-serving testimony as a basis for letting the expert testify.” It also suggests that the committee note should cite case law that provides illustrations of proper applications of Rule 702 gatekeeping.

The Attorneys’ Information Exchange Group (EV-2021-0005-0019--comment submission -- and EV-2021-0005-0026 -- public testimony) opposes the proposed amendment, arguing that the rule is operating properly and that the amendment “would have the effect of hugely altering the proponent’s burden of proof and it would convert the trial judge into a 13th juror.”

Thompson Hine LLP (EV-2021-0005-0027) supports the amendment, contending that there are a number

of courts that incorrectly reject or ignore the preponderance of the evidence standard when applying Rule 702. It states that “[b]y expressly requiring the proponent of the expert testimony to establish the required factors (sufficient factual foundation, reliable principles, and methods that are reliably applied to the facts of the case) by a preponderance of the evidence, the rule text of the Proposed Amendments dispels any doubt about the required assessment of proffered opinion evidence before a jury ever hears the testimony.” It argues that the proposal could be improved by adding language to the committee note that would expressly reject incorrect precedent. It predicts that the amendment could have a salutary effect on state practices under state counterparts to Rule 702.

Lee Mickus, Esq. (EV-2021-0005-0028) supports the proposed amendment to Rule 702. He contends that many courts are holding that the questions of sufficiency of facts or data and reliability of applications are generally questions of weight and not admissibility. He states that “[a]mending Rule 702 to incorporate the preponderance of evidence standard into the rule will better convey that the elements of Rule 702 are all admissibility issues.” He contends, however, that the amendment “would benefit from additional language to focus attention on the court as the decisionmaker” by including language in the text to specify that the court must decide whether the admissibility requirements are met. He rejects the concern that adding “the court determines” to the text would create the inference that the court must decide the admissibility factors even in the absence of an objection. He concludes that “[i]ncluding these words in Rule 702 should not change the expectation, inherent within the adversary system, that an opponent must object to admission of an expert’s testimony to initiate the court’s scrutiny.”

The DRI Center for Law and Policy (EV-2021-0005-0029) supports the proposed amendment to Rule 702. The Center “applauds and supports this Committee’s effort to improve the rule (the “FRE 702 Amendment”) to achieve a necessary uniformity of application.” The Center states that the proposed amendment “does so not by changing the intent or purpose of the rule.” It notes that “the amendment reminds the judge of the responsibility to make sure that the proponent of the expert’s opinion testimony has satisfied the court that not only is the testimony the product of reliable principles and methods, but also that the expert’s opinion reflects a reliable application of those principles and methods to the facts of the case.” The Center concludes that these clarifications are necessary because, with some regularity, “courts elide both the preponderance standard and the reliability standard when ruling on proffered FRE 702 evidence.”

The Center states that the Rule could be improved by specifying that expert evidence is not admissible unless the court finds that the reliability requirements have been met by a preponderance of the evidence.

Duane Morris LLP (EV-2021-0005-0031) supports the proposed amendment to Rule 702. It states that “the proposed changes will help to minimize jury exposure to speculative or unreliable expert testimony.” It concludes that “language forcing the expert’s proponent to prove the testimony’s admissibility by a preponderance of the evidence will reemphasize the trial court’s ability to declare unreliable expert testimony inadmissible before trial under Fed. R. Evid. 104(a), rather than send the testimony to the jury to determine its weight.”

Bayer US LLC (EV-2021-0005-0032) supports the proposed amendment to Rule 702, concluding that it “has a

critical purpose: halting reliance on caselaw statements that misunderstand the courts' role in determining the admissibility of expert testimony under Rule 702 and unifying the federal courts behind the analytical standard and approach to gatekeeping that the rule expects." But Bayer suggests that "[b]y leaving out a direct statement that the court must determine the admissibility elements of Rule 702, the amendment does not sufficiently communicate its purpose" and that "[i]ncluding within the text of Rule 702 an explicit indication that the court is the decision-maker for the rule's admissibility elements would overcome this weakness." It also proposes that the Note should "unambiguously declare" rulings that failed to apply the preponderance of the evidence standard to be incompatible with Rule 702. Finally, it suggests that "[i]ncorporating the burden of production into the rule will resolve the misunderstanding about the standard that seems to exist among courts and litigants."

Maria Diamond, Esq. (EV-2021-0005-033) opposes the proposed amendment, expressing concern that it "will create confusion and inconsistency, undermine judicial discretion, and demean the rule of juries." She argues that the changes "encourage judges to become fact finders when determining the admission of expert testimony while having the appropriately more limited traditional rule of being just the judge, not the jury as to all other evidentiary rulings."

Sean Domnick, Esq. (EV-2021-0005-034) opposes the amendment, arguing that expert opinion should be tested through cross-examination and that the proposed changes threaten the right to jury trial.

Nathan VanDerVeer, Esq. (EV-2021-0005-035) contends that the phrase "the preponderance of the evidence"

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threatens the right to a jury trial, and recommends that it be changed to “the preponderance of available information.”

Richard Hay, Esq. (EV-2021-0005-036) states that “[i]ntroducing a preponderance standard would seem to allow, or require, the trial court to hear from opposing experts outside the presence of a jury, and then limit expert testimony to the court's perceived ‘winner.’” He contends that the amendment is “unnecessary, expensive and subject to much abuse.”

Tom Antunovich, Esq. (EV-2021-0005-037) opposes the amendment and contends that “the text of Rule 702 should NOT be changed but rather the Rule should continue to be refined and developed through case law based on real world application.”

The Pharmaceutical Research and Manufacturers of America (EV-2021-0005-038) urges the Committee to adopt the proposed amendment to Rule 702. It asserts that the proposed amendment “will clarify and reinforce federal courts’ fundamental obligation to keep scientifically unreliable expert testimony out of the courtroom.” It concludes that the amendment “provides much-needed direction that courts cannot simply pass along questions of expert admissibility to the jury” and that if the amendment is adopted, “the benefits may be significant—to biopharmaceutical innovation, to the patients who rely on those medications, and to the overburdened federal judiciary.”

The American Institute of Certified Accountants (EV-2021-0005-039) supports the proposed changes to Rule 702. It believes that “these modifications will improve the quality of the judicial process surrounding expert opinions.”

William Schmitt, Esq. (EV-2021-0005-0040) states that he has litigated in federal and state courts for over 40 years, and supports the proposed amendment to Rule 702.

The New York State Crime Laboratory Advisory Committee (EV-2021-0005-041) states that New York State crime laboratories follow the suggestions in the Committee Note to the proposed amendment regarding testimony by forensic experts --- “including the recommendation that forensic experts avoid assertions of absolute or one hundred percent certainty where the method is subjective.”

Jed Barden, Esq (EV-2021-0005-0042) states that the amendment is “not needed” because “Judges already make it too hard for evidence to be admitted.”

The California Society of Certified Public Accountants (EV-2021-0005-0043) states that the proposed changes to Rule 702 “are likely to improve the reliability of admitted expert testimony and thereby improve the quality of the judicial process.”

The Product Liability Advisory Council, Inc. (EV-2021-0005-044) states that many courts have applied a presumption of admissibility to expert testimony that is contradicted by *Daubert* and by the 2000 amendment to Rule 702; that courts have misread a statement in the 2000 committee note (observing that most motions to exclude expert evidence are rejected) as a statement that there is a presumption of admissibility of expert testimony; that courts incorrectly rely upon pre-2000 case law to hold that the sufficiency of an expert’s opinion is a question of weight and not admissibility; and that many courts incorrectly consider a misapplication of methodology to be a question for the jury, not the court. The Council states that the proposed

amendment is likely to have a beneficial effect, given the “lengthy gestation and voluminous debate” surrounding the amendment, and its “unequivocal intention to change the way courts are approaching the challenges to expert testimony.” It concludes that the changes are “well-targeted to fix specific, demonstrable errors in the regulation of expert testimony.”

Brenden Layden, Esq. (EV-2021-0005-045) objects to the amendment to Rule 702 as an “unnecessary further intrusion into the jury's role as fact finder.”

Anonymous (EV-2021-0005-046) states that if a change to Rule 702 should be made, it should read, “preponderance of the available information” because “[d]joining otherwise makes the judge a finder of fact.”

Daniel Horowitz, Esq. (EV-2021-0005-047) opposes the amendment, stating that “[t]he trial judge's role should be that as a gate keeper, but not as a fact finder when it comes to expert testimony” and that the amendment “takes the fact finding role away from the jury (trier of fact) and instead overturns years of established case law.”

Scott Brazil, Esq. (EV-2021-0005-048) states that the change is unnecessary and will be confusing to the courts and counsel.

David Sheller, Esq. (EV-2021-0005-0049) states: “The rule does not require changes. The proposed rule change requires the judge to be a fact finder which violates the right to trial by jury.”

Amy Gunn, Esq. (EV-2021-0005-050) that the proposed amendment to Rule 702 is unnecessary and

impinges on the factfinding role of the jury in violation of the Seventh Amendment.

Charles Peckham, Esq. (EV-2021-0005-051) states that the changes to Rules 106 and 615 are “well thought through” and encourages their passage. He opposes the changes to Rule 702 as unnecessary and as changing the judge from a legal arbiter to a factfinder.

Michael Phifer, Esq. (EV-2021-0005-052) states that “[i]f any change is made to Rule 702, I would respectfully suggest that the change be made to ‘preponderance of the available information’ to again combat the endless gamesmanship and arguments over what is and is not evidence.”

John Kirtley, Esq. (EV-2021-0005-053) argues that the proposed amendment to Rule 702 “will effectively allow the judge to occupy both the bench and the jury box - anathema to the Constitution.”

Mickey Das, Esq. (EV-2021-0005-054) argues that any change is unnecessary, and that if any change is made it should require proof of a “preponderance of the available information.”

Robert Snyder, Esq. (EV-2021-0005-00055), opposes the amendment to Rule 702 on the ground that “the Rule works fine as is.”

Joshua Hilbe, Esq. (EV-2021-0005-00056) states that “[b]y using the ‘preponderance of the evidence’ standard to rule on mere issues of admissibility, you transform the Federal Judge from a gatekeeper to a factfinder” which “conflicts with the 7th Amendment.”

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Reginald McKamie, Esq. (EV-2021-0005-00057) argues that any change is unnecessary, and that if any change is made it should require proof of a “preponderance of the available information.”

Ryan Wham, Esq. (EV-2021-0005-00058) contends that the proposed amendment to Rule 702 “would inappropriately put district judges in a factfinder role at preliminary, evidentiary hearings, would require a challenged expert's proponent to marshal additional evidence, and would encourage challengers to introduce additional extraneous evidence.”

John McCraw, Esq. (EV-2021-0005-059) argues that any change is unnecessary, and that if any change is made it should require proof of a “preponderance of the available information” rather than a “preponderance of the evidence.”

Elizabeth Sanford, Esq. (EV-2021-0005-060) opposes any change to Rule 702 as unnecessary, and contends that the term “preponderance of the evidence” turns a judge into a factfinder.

Richard Stuckey, Esq. (EV-2021-0005-061) argues that any change is unnecessary, and that if any change is made it should require proof of a “preponderance of the available information.”

Robert Kisselburgh, Esq. (EV-2021-0005-062) objects to any change as unnecessary and states that “the use of ‘preponderance of the evidence’ as opposed to ‘preponderance of the available information’ takes the decision away from the jury and puts it in the hands of the Judge as fact finder.”

William Leader, Jr., Esq. (EV-2021-0005-063) sees no reason to make a change to Rule 702.

Dana LeJune, Esq. (EV-2021-0005-0064) argues that any change is unnecessary, and that if any change is made it should require proof of a “preponderance of the available information.”

George Farah, Esq. (EV-2021-0005-0065) argues that any change is unnecessary, and that if any change is made it should require proof of a “preponderance of the available information.”

Joel Grist, Esq. (EV-2021-0005-066) objects to any change as unnecessary and states that the use of “preponderance of the evidence” as opposed to “preponderance of the available information” turns the judge into a factfinder.

David Mestemaker, Esq. (EV-2021-0005-067) states that “the standard should be ‘preponderance of the available information’ not ‘preponderance of the evidence’ as the second standard puts the Judge in the role of a factfinder in violation of the 7th Amendment.”

Kacy Shindler, Esq. (EV-2021-0005-068) states that any change to Rule 702 is unnecessary and that “the addition of language to the preponderance standard allows the judge to invade the providence of the jury and serve as a fact finder--which is a violation of the 7th Amendment.”

Stephen Barnes, Esq. (EV-2021-0005-069) opposes the amendment on the ground that it will add to the expense of proving an expert’s reliability.

Scott Davenport, Esq. (EV-2021-0005-0070) argues that any change is unnecessary, and that if any change is made it should require proof of a “preponderance of the available information.”

Matthew Menter, Esq. (EV-2021-0005-0071) contends that under the proposed amendment, “the judge would become a fact finding gatekeeper that would remove much of that function from the jury.”

Steve Waldman, Esq. (EV-2021-0005-0072) opposes the amendment, arguing that under the preponderance of the evidence standard, “it will be argued that experts can no longer rely on inadmissible matters.”

Ryan Babcock, Esq. (EV-2021-0005-0073) states that the amendment is unnecessary and that allowing the court to make its determination by a preponderance of the evidence “would require, or tend to encourage, the judge to act as a finder of fact, imposing a duty contrary to the Seventh Amendment.”

Francisco Medina, Esq. (EV-2021-0005-0074) states that the “preponderance of the evidence” standards turns the judge from a gatekeeper to a factfinder, in violation of the Seventh Amendment.

Joe McGreevy, Esq. (EV-2021-0005-0075) argues that the proposed amendment will take factfinding away from the jury, and that it will create confusion in state courts.

Andres Alonso, Esq. (EV-2021-0005-0076) argues that [t]he proposed amendment is yet another step towards removing jurors from actually deciding cases.”

Stephen Higdon, Esq. (EV-2021-0005-0077) states that “no change is necessary to this rule” and that “[w]hatever possible benefit it could add will be substantially outweighed by the burden and cost it will impose.”

Richard Neville, Esq. (EV-2021-0005-0078) argues that any change is unnecessary, and that if any change is made it should require proof of a “preponderance of the available information.”

Joseph Hillebrand, Esq. (EV-2021-0005-0079) states that there is no reason for the amendment and that “[i]f the bar, and the public, cannot trust the judiciary to reasonably and properly apply the rules of evidence, perhaps the wrong persons are being elevated to the federal bench.”

Spencer Farris, Esq. (EV-2021-0005-0080) contends that the proposed amendment to Rule 702 “is not only unnecessary but prone to cause confusion and reaction far beyond that which the members of the committee supporting it intend.”

Troy Stafford, Esq. (EV-2021-0005-0081) states that Rule 702 has worked “very well” and that if the rule is changed it should be to “preponderance of the available information” and not so “narrowly” to “preponderance of the evidence.”

Jay Murray, Esq. (EV-202100005-0082) argues that any change is unnecessary, and that if any change is made it should require proof of a “preponderance of the available information.”

David Sleppy, Esq. (EV-2021-0005-0083) does not believe a change to Rule 702 is needed, and contends that

inclusion of the standard of preponderance of the evidence “will remove the jury from the job of fact finder by encouraging trial courts to do that job for them.” He states that the standard should be “preponderance of the available information.:

Garry Whitaker, Esq. (EV-2021-0005-0084) contends that the proposed amendment to Rule 702 “would move the function for weighing the evidence from the jury to the bench.”

Charlie Nichols, Esq. (EV-2021-0005-0085) argues that the proposed amendment’s standard of preponderance of the evidence “is an invasion of the factfinding prerogative of the jury” in violation of the Seventh Amendment.

Timothy Garvey, Esq. (EV-2021-0005-0086) states that “not one proponent for amending Rule 702 considers how these amendments will encourage judges to encroach on the peoples’ near-sacred right to a trial by jury.” He states that “[i]nclusion of the phrase ‘by a preponderance of the evidence’ encourages judges to remove from the jury its job of determining disputed facts.”

Benjamin Baker, Esq. (EV-2021-0005-0087) contends that the proposed amendment to Rule 702 is unnecessary and that “[a]mending the rule for ‘clarification’ purposes will only provide another opportunity to cause confusion and more appellate decisions that disagree with one another on the purpose of the change.”

Anonymous (EV-2021-0005-0088) opposes the proposed amendment, arguing that “it violates the Constitution and turns the judge into a fact finder and therefore jury.”

Matthew Christian, Esq. (EV-2021-0005-0089) states: “This new standard will only create more issues, more confusion, and prevent testimony that would otherwise assist a trier of fact in making an informed decision/verdict.”

Terrence McCartney, Esq. (EV-2021-0005-0090) opposes the proposed amendment, contending that the current rule works “just fine” and that “the proposed amendments will undermine the constitutional role of juries by usurping a jury’s duty to weigh the evidence and determine the facts by making the presiding judge a ‘super-juror.’”

Robert Pedroli, Esq. (EV-2021-0005-0091) opposes the proposed amendment, arguing that it will turn the judge into a trier of fact; that it will create confusion in state courts that apply a version of Rule 702; and that adding the preponderance standard to only one of the Evidence Rules will sow confusion as well.

The New York City Bar Association (EV-2021-0005-0092) supports the proposed changes to Rule 702 “because they will provide needed clarity to litigants and courts that are addressing issues relating to expert testimony.” As to the proposed addition of the preponderance standard, the Association comments that “Rule 104(a) is meant to govern questions of preliminary admissibility and it does appear that not all courts are following this standard, perhaps because of the mixed message sent by the *Daubert* opinion.” With respect to the amendment of Rule 702(d), the Association states that “it is appropriate for the rules to confirm what *Daubert* and its progeny were meant to accomplish: that judges act as gatekeepers who make sure that juries only hear from expert witnesses whose testimony meets a baseline standard. Not

everything is a matter of weight.” The Association concludes as follows:

In recent years, the issue of “junk science” has been one of particular concern in criminal prosecutions, where there are concerns about the scientific validity of many types of “feature-comparison” methods of identification, such as those involving fingerprints, footwear and hair. Such expert testimony gives the impression of scientific certainty, and often leads to convictions later found to be unwarranted. . . . Before expert testimony is presented to the jury, a judge ought to make sure that the expert’s opinion reflects a reliable application of scientific principle. . . . The amendment to Rule 702(d) should reduce the incidence of incorrect jury determinations based on unreliable scientific opinion.

The Atlantic Legal Foundation (EV-2021-0005-0093) supports the proposed changes to Rule 702 “because they emphasize the importance of district judges’ gatekeeping authority.” The Foundation states that the rule changes will “(i) explicitly clarify that the admissibility requirements set forth in Rule 702 must be satisfied by a preponderance of the evidence, and (ii) emphasize that a trial judge must exercise gatekeeping authority with respect to testifying experts’ opinions.”

The Federal Bar Association (EV-2021-0005-0094) approves of the proposed amendment to Rule 702.

The Civil Justice Association of California (EV-2021-0005-0095) supports the proposed amendment to Rule 702. It states that “[a]dding language to Rule 702 specifically referencing the preponderance standard, instead of leaving it in the Notes, should prevent courts from continuing to misapprehend the standard. It should also encourage both

sides to brief the issues in terms of the preponderance of available evidence and encourage courts to make findings on each factor.” In addition, the Association supports restoring the previously proposed language emphasizing that it is the court that must determine whether the proponent has met the evidentiary burden as it “would ensure that the reliability determination is made by the judge, rather than left to the jury.”

Dennis Quinlan, Esq. (EV-2021-0005-0096) supports the proposed amendment to Rule 702, opining that the change is simply clarifying the standard that already exists.

Michael Stevenson, Esq. (EV-2021-0005-0097) opposes the amendment to Rule 702. He concludes that “[w]ith the proposed modification to Rule 702, judges will eliminate jury trials and become the fact finder with respect to expert testimony.” He contends that the preponderance of the evidence standard would “virtually require the presentation of the entire evidence of the case before a decision could be made” on the admissibility of the expert’s testimony.

Lawyers for Civil Justice (EV-2021-0005-0098) provided a supplementary submission in support of the rule, in response to the comments criticizing the preponderance of the evidence standard. It asserts that the preponderance standard “is a well-established term that courts have used for many years in deciding the admissibility of evidence, including expert opinions offered under Rule 702.” It states that the alternative suggested by some --- a preponderance of the available information --- “would dislodge developed caselaw and sow significant uncertainty.” It states that there is no basis for thinking that “preponderance of the evidence” is limited to admissible evidence, as the very language of

Rule 104(a) belies that notion. It concludes that “the amendment’s action to promote consistency and completeness in the application of Rule 702 supports, rather than undermines, litigants’ right to have the legally cognizable claims and defenses determined by a jury.”

The American Association for Justice (EV-2021-0005-0099) “is concerned that the changes sought will not be recognized by the judges who need a correction, but that the proposed amendment may unnecessarily limit the admissibility of plaintiffs’ experts.” It asserts that including the preponderance of the evidence standard “has the unintended potential for causing the court to believe that the court, and not the jury, must weigh and decide the correctness of the scientific evidence, which will intrude and diminish the role of the jury.” The Association recommends that a reference to the court determining the issue not be brought back into the rule, and that the phrase “preponderance of the evidence” should be changed to “preponderance of the information.” As to the change to Rule 702(d), the Association does not disagree about its overall purpose but declares that “it is not evident that courts or parties will find the direction provided in the rule text helpful.”

Scott Lucas, Esq. (EV-2021-0005-0100) declares that “Judges should not take the place of juries. It is not their job to judge the ‘preponderance of the evidence.’”

Nicole Snapp-Holloway, Esq. (EV-2021-0005-0101) states that adding the preponderance of the evidence standard “will imply that the court should weigh the expert’s testimony - but there is nothing concrete to be weighed against.”

Douglas McNamara, Esq. (EV-2021-0005-0102) is concerned about the amendment to Rule 702(d), because the requirement that the opinion reflect the basis and methodology “may suggest that that court must determine not whether the expert used a reliable application, but whether the expert’s work product manifests or appears to be something reasonable to the court. This could move the court from assessing the soundness of methodology to soundness of the result.”

John Truskett, Esq. (EV-2021-0005-0103) states that no change to Rule 702 is needed and that the proposed amendment “usurps the role of the jury as the fact-finder.”

Anonymous (EV-2021-0005-0104) contends that a change to Rule 702 is not necessary and that the proposed addition of the preponderance of the evidence standard “will result in the court weighing the evidence in the case before the jury hears the case.”

The National District Attorneys’ Association (EV-2021-0005-0105) is opposed to the proposed amendment to Rule 702(d) and the accompanying portion of the committee cote. It contends that “[t]he proposed substantive change to Rule 702(d) conflicts with *Daubert* and infringes on the province of the jury because it requires trial judges to assess and assign weight to an expert’s opinion, even if that opinion results from the reliable application of reliable principles and methodology.” And it states that the proposed committee note “inappropriately singles out ‘forensic experts’ and expert opinion testimony related to feature comparison evidence, and urges application of additional and specific admissibility standards not required by the text of Rule 702 or *Daubert* for these categories of evidence.”

State Trial Lawyers' Associations (EV-2021-0005-0106) do not believe that Rule 702 should be amended. The members are concerned that the proposed amendment would: “(1) create confusion and inconsistency for state rules modeled after FRE 702, but which have not to date incorporated the committee note; (2) undermine the judicial discretion currently employed under FRE 702; and 3) demean the role of juries.”

Mariano Acuna, Esq. (EV-2021-0005-0107) states that the proposed amendment to Rule 702 “imposes an undue burden on litigants, increases the costs of litigation, and adversely affects a litigant's right to trial by jury.”

Dakota Iow, Esq. (EV-2021-0005-0108) argues that the proposed amendment to Rule 702 “would result in the Court weighing the evidence before it has been heard by the jury” and “would cause the Court to overstep into the Jury's domain.”

Brett Agee, Esq. (EV-2021-0005-0109) states that the proposed amendment to Rule 702 “will result in the court weighing the evidence in the case before the jury hears the case” and “require a party to show by preponderance of the evidence that the expert is right.”

James Neal, Esq. (EV-2021-0005-0110) concludes that an amendment to Rule 702 is unnecessary and would “necessitate additional litigation over new terms.”

Anonymous (EV-2021-0005-0111) asks the Committee “why don't you just abolish jury trials and be done with it?”

DLA Piper LLP (EV-2021-0005-0112) supports the proposed amendment to Rule 702. It argues that “[t]he

changes are critical to clear up any lingering judicial misapprehension that the reliability of an expert's ultimate opinion is merely a question of weight for the factfinder to decide and to emphasize the judge's gatekeeper role in determining whether the expert's ultimate opinion is within bounds based on a reliable application of the expert's methodology to the facts of the case." It states that the proposed amendments are especially important for assuring that Multidistrict Litigation proceeds in an orderly and uniform fashion. It notes that the proposed change to Rule 702(d) "is designed to prevent experts from exaggerating the reliability" of their testimony, and concludes that "this is an important concern because jurors who might lack basis to understand and evaluate the reliability of scientific or technical methodology will likely also lack basis to assess an expert's extravagant claims that are unsupported by the expert's basis and methodology."

The New Jersey Civil Justice Institute (EV-2021-0005-0113) supports the proposed amendment to Rule 702, stating that it "is necessary to ensure clear, predictable, and consistent application of the law." It states that the amendment "resolves misunderstandings about how Rule 702 should be applied in conjunction with: (1) Rule 104(a), which requires trial courts to decide the preliminary questions of whether a witness is qualified and evidence is admissible, and (2) Rule 104(b), which allows the jury to determine what weight to give the evidence *after* the court has admitted it." The Institute sees the amendment to Rule 702(d) as "necessary to ensure that juries hear only reliable expert testimony, not exaggerated claims or untested conclusions" and concludes that the change is essential to emphasize that it is the role of the trial court, not the jury, to determine whether an expert's conclusions are supported by the expert's basic and methodology." The Institute suggests that the proposal would be improved by restoring the

language requiring the court to find the admissibility standards are met, and by rejecting specific case law in the committee note.

Rex Travis, Esq. (EV-2021-0005-0114) declares that the proposed amendment “is a solution in search of a problem.”

Henry A. Meyer, III, Esq. (EV-2-21-0005-0115) contends that the proposed changes to Rule 702 “will take away historical duties and rights from the jury and is a threat to our present system.”

Michael Denton, Esq. (EV-2021-0005-0116) states that the proposed amendment to Rule 702 is “nothing other than a thinly disguised attempt to have the trial court do the Jury's work for it --- determine what weight and credibility an expert's testimony should be given.”

Wyatt McGuire, Esq. (EV-2021-0005-0117) opposes the proposed amendment, arguing that it “ties the hands of judges who understand the significant overlap between questions of ‘weight’ and ‘admissibility’ which plague expert witness considerations.”

Keith Reed, Esq. (EV-2021-0005-0118) states that the proposed amendment “would result in an unnecessary hurdle” that removes from the jury a question of fact.

Shane Davis, Esq. (EV-2021-0005-0119) opposes the proposed amendment on the ground that “it would improperly force judges to be fact-finders relating to the qualifications of an expert.”

Michael Cok, Esq. (EV-2021-0005-0120) opposes the amendment on the ground that it “would make the judge an

arbiter of fact and further abrogate the 7th amendment's right to a jury trial.”

The Innocence Project, together with a coalition of public interest organizations and legal scholars (EV-2021-0005-0121) supports the proposed amendment to Rule 702, emphasizing “the importance of amending Federal Rule of Evidence 702 to bring scientific integrity to proceedings in which life and liberty are at stake.” It states that “because indigent people and people of color are disproportionately prosecuted in criminal courts, we also consider the proposed amendment to Rule 702 to be a critical economic and racial justice issue.” The submitting parties “commend the Committee’s recognition that courts have often neglected to faithfully apply the reliability requirements of Rule 702 to proffers of expert testimony—and, crucially, that courts have erroneously concluded that such requirements go to the weight of the proposed testimony, rather than to its admissibility.” The parties further “commend the Committee on expanding Rule 702(d) to emphasize that the methodology at issue must not only be reliable, it must be reliably applied.” The submitting parties express deep concern about incorrect statements concerning error rates in forensic testimony, noting that such overstatements are often admitted by courts.

The submitting parties suggest a change to Rule 702(c), to provide that: “the testimony is the product of reliable principles and methods *and includes the limitations and uncertainty of those principles and methods.*” The submitting parties also suggest an additional sentence emphasizing the preponderance of the evidence standard to the committee note.

Donald H. Slavik, Esq. (EV-2021-0005-0122) states that the preponderance of the evidence standard in the

proposed amendment “would remove the jury as a factfinder, essentially eliminating the right to trial by jury.”

Chris Knight, Esq. (EV-2021-0005-0123) argues that the proposed changes to Rule 702 shift factfinding from the jury to the judge, and that it is for the jury to decide whether the reliability requirements of Rule 702 are met by a preponderance of the evidence.

Joseph Gates, Esq. (EV-2021-0005-0124) opposes the proposed amendment to Rule 702, arguing that it “forces the Court to usurp the jury’s province of finding facts and making credibility decisions as it relates to expert witnesses.”

Douglas B. Abrams, Esq. (EV-2021-0005-0125) opposes the proposed amendment to Rule 702, arguing that the current system is working well and the amendments would “require two trials for every products liability case.”

Cohen, Placitella & Roth, P.C. (EV-2021-0005-0126) contends that the “preponderance of the evidence” standard in the proposed rule means that the trial judge in a *Daubert* hearing will --- despite the contrary language in Rule 104(a) --- be limited to considering only evidence that would be admissible at trial. It suggests that the problem is solved if “evidence” is changed to “information.” The firm contends that the proposed change to Rule 702(d) has “the unintended potential for causing the court to mistakenly believe that it, not the jury, must decide the correctness of scientific evidence, which invades the jury’s province and decision-making role.”

Austin Easley, Esq. (EV-2021-0005-0127) opposes the proposed amendment on the ground that it “further erodes the role of the jury, and invades their province by

asking the trial court to judge credibility issues, over and above the preliminary gatekeeping function.”

Anonymous (EV-2021-0005-0128) opines that the proposed amendment “is totally unnecessary and solely an effort by corporate defendants to have Judges usurp the role of jurors.”

Paul Redfearn, Esq. (EV-2021-0005-0129) is opposed to the amendment, arguing that it will “demean the function and role of juries, a fundamental Constitutional principle that should not be diminished or devalued.”

Micha Brierley, Esq. (EV-202100005-0130) is opposed to the amendment, and claims that “[i]nclusion of the phrase ‘by a preponderance of the evidence’ will remove the jury from the job of being the fact finder by encouraging trial courts to do that job for them.” He suggests that a preponderance of the “information” would be a material improvement because the preponderance of the evidence standard is associated with factfinding; and, according to him, judges do not determine facts at a *Daubert* hearing.

Patrick Mause, Esq. (EV-2021-0005-0131) states that the amendment is unnecessary and “invites courts to aggressively usurp the jury’s role of weighing evidence.”

Jason M. Hatfield, Esq. (EV-2021-0005-0132) opposes the amendment, arguing that it is unnecessary and that it turns a judge into the factfinder.

Jessica Mallett, Esq. (EV-2021-0006-0133) opposes the proposed amendment to Rule 702 on the ground that it pushes the court’s “gate-keeping authority too far as this forces the Court to make a ruling on the admissibility of evidence prior to expert witness testifying to the jury” and

“essentially forces the Court to usurp the jury’s province of finding facts and making credibility decisions as it relates to expert witnesses.”

George R. Wise, Jr. Esq. (EV-2021-0005-0134) opposes the amendment because it “creates a problem where one does not exist” and would usurp the factfinding authority of the jury.

Alan Lane, Esq. (EV-2021-0005-0135) opposes the amendment as unnecessary. He contends that the proposed change takes away from the jury the responsibility to weigh the evidence.

Michael Perez, Esq. (EV-2021-0005-0136) states that the proposed amendment fixes a problem that does not exist and that it erodes the right to a trial by jury by “inviting judges to weigh the evidence as part of the decision process of excluding expert witness testimony.”

Paul N. Ford, Esq. (EV-2021-0005-0137) states that the proposed amendment pushes the court’s gatekeeping authority too far and impinges on the constitutional right to a jury trial.

Rusty Mitchell, Esq. (EV-2021-0005-0138) opposes the amendment because it pushes the court’s gatekeeping authority “too far” and “forces the Court to make a ruling on the admissibility of evidence prior to expert witness testifying to the jury. This essentially forces the Court to usurp the jury’s province of finding facts and making credibility decisions as it relates to expert witnesses.”

Patrick Kirby, Esq. (EV-2021-0005-0139) opposes the proposed amendment, arguing that it “would likely create a series of mini trials within the already rigorous time

constraints that come with the Scheduling Orders that apply to all phases of the litigation of a case.”

Keith Givens, Esq. (EV-2021-0005-0140) states that the proposed amendment to Rule 702 is “unnecessary and very unreasonable.”

Jonathan Hutto, Esq. (EV-2021-0005-0141) opposes the amendment, stating that it changes the trial court’s gatekeeping responsibility to one of factfinding.

Weinberg, Wheeler, Hudgins, Gunn & Dial (EV-2021-0005-0142) supports the proposed amendment to Rule 702. It states that “there is a trend to defer the critical question of the sufficiency of an expert’s basis and application of the expert’s methodology to being questions of weight rather than admissibility.” It contends that the amendment “adds a layer of protection that is desperately needed at the gatekeeping stage of the proceedings.” It concludes that a “revised federal standard, guided by a preponderance standard, will ensure only reliable and relevant expert testimony is admitted, thereby improving the judicial system and jury outcomes.”

Nicholas Verderame, Esq. (EV-2021-0005-0143) opposes the amendment, opining that it would “allow judges to encroach on the jury’s job” and that the amendment “attempts to eliminate trials through motion practice and amending Rule 702 to have the trial judge become the fact finder with respect to expert testimony.”

Leslie O’Leary, Esq. (EV-2021-0005-0144) objects to any attempt to call out specific case law in the committee note as being wrongly decided. She states that the Advisory Committee is “not a court of law” and should “decline to act as a judicial tribunal and hold that appellate court decisions are wrong as a matter of law.” Declaring cases wrongly

decided would “dishonor the judiciary and do irreparable harm to the Committee’s venerable role as a neutral advisory body.”

Altom M. Maglio, Esq. (EV-2021-0005-0145) opposes the amendment on the ground that it will “do nothing but delay and increase the costs of litigation.”

John Hickey, Esq. (EV-2021-0005-0146) argues that the proposed changes to Rule 702 “are a solution in search of a problem” and that “the end result will be to tie the hands of the District Court judges in regard to determining exclusion of expert testimony.”

John Restaino, Jr., Esq. (EV-2021-0005-0147) opposes the amendment and contends that the rule “should not encourage the courts themselves to find facts.”

Nicholas Timko, Esq. (EV-2021-0005-0148) opposes the amendment and states that “the proposed rule would needlessly tie up court resources and lead to court delays.”

Alyssa Baskam, Esq. (EV-2021-0005-0149) asserts that the proposed amendment would require courts to “go beyond their role as gatekeepers and instead take up the mantle of juror.” She states that the Committee should “leave Rule 702, an entirely effective rule, as it is -- doing what it already needs to do to ensure that jurors consider only relevant, reliable expert testimony.”

April Stratte, Esq. (EV-2021-0005-0150) opposes the amendment, concluding that it “should not encourage courts to find facts. This will require expensive and time consuming hearings that will clog dockets and increase costs.”

John Hickey, Esq. (EV-2021-0005-0151) states that the proposed changes “are a solution in search of a problem”

and that the “increased burden of proof will increase the costs of litigation for already burdened litigants.”

Nick Cron, Esq. (EV-2021-0005-0152) states that the proposed amendment “will dilute juries and undermine the importance and efficacy of jury trials and by extension erode our last true democracy.”

Abrams & Abrams (EV-2021-0005-0153) contends that the proposed amendment is a “serious attack on every American’s Constitutional right to a jury trial.” The firm concludes that the amendment “would require the Plaintiff to have to try their case twice—once to the Judge and then once again to the jury.”

Parker Miller, Esq. (EV-2021-0005-0154) argues that the proposed changes to Rule 702 “violate the 7th Amendment right to a trial by jury, because they impermissibly usurp the sovereign authority of the jury and place this critical role in the hands of one person - the trial judge.”

Lee Steers, Esq. (EV-2021-0005-0155) states that “the rule should not encourage courts to find facts” because “that’s unconstitutional.” He also contends that the proposed changes to Rule 702 “will require expensive and time consuming hearings that will clog dockets and increase costs.”

Cristina Perez Hesano, Esq. (EV-2021-0005-0156) opposes the amendment, arguing that “juries will be stripped of their ability to hear and weigh evidence.”

William Carr, Esq. (EV-2021-0005-0157) contends that the proposed amendment to Rule 702 “would adversely affect people trying to get their day in Court by encouraging

Courts to make factual determinations regarding expert opinions, which is simply not constitutional.”

Clinton Richardson, Esq. (EV-2021-0005-0158) contends that a change to Rule 702 is unnecessary and that it would “require courts to go beyond their role as gatekeepers and instead take up the mantle of juror.”

Donald Smolen, Esq. (EV-2021-0005-0159) thinks that the proposed changes to Rule 702 “encroach upon the province of the jury” because it would “turn our judges into fact finders as opposed to gatekeepers.”

Theodore Stacy, Esq. (EV-2021-0005-1060) thinks that the proposed amendment “furthers the intrusion of the judge into the province of the jury.”

Jere Beasley, Esq. (EV-2021-0005-0161) opposes the amendment, contending that it “would only further erode a jury’s ability to weigh evidence and render a true verdict as envisioned by the 7th Amendment.”

David M. Damnick, Esq. (EV-2021-0005-0162) opposes the proposed amendment. He states that the “greater restriction” on Rule 702 evidence will “deprive the courts and juries of legitimate facts and evidence.” He can find “absolutely no support for the claims that the Courts have been lax in their administration of expert testimony.”

Raymond Hawthorn, Esq. (EV-2021-0005-0163) states that the proposed amendment to Rule 702 is unnecessary: “It was intended to keep out bad science, and Rule 702 as written already does that.”

Michael Carter, Esq. (EV-2021-0005-0164) concludes that the proposed amendment to Rule 702 is unfair

to plaintiffs and will result in extensive proceedings that would increase the costs of litigation.

S. Scott West, Esq. (EV-2021-0005-0165) objects to the proposed amendment, stating that “[f]actual findings generally are founded in ‘preponderance of the evidence’ and reside wholly within the purview of constitutionally guaranteed JURIES. Any shifting of the powers and responsibilities of a JURY to a JUDGE is an erosion of those powers and responsibilities and is improper.”

H. Clay Barnett, Esq. (EV-2021-0005-0166) states that “the suggested amendments invite additional pretrial entanglements that reduce judicial efficiency, not enhance it.”

Kelli Alfreds, Esq. (EV-2021-0005-0167) contends that the proposed amendment to rule 702 “is unnecessary and inefficient” and that it also violates the 7th Amendment.

Lauren James, Esq. (EV-2021-0005-0168) contends that the proposed changes to Rule 702 “violate the 7th Amendment right to a trial by jury because they take away the jury’s role of analyzing the weight and credibility of an expert” and that they will increase the expense of litigation.

Dena Young, Esq. (EV-2021-0005-0169) opines that Rule 702 “should not encourage courts to find facts. That’s unconstitutional.”

Frank Verderame, Esq. (EV-2021-0005-0170) opposes the amendment on the grounds that it will increase the costs of litigation and will transfer factfinding authority from the jury to the judge.

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Anonymous (EV-2021-0005-0171) contends that the change is unnecessary and that it will transfer factfinding from the jury to the judge in violation of the 7th Amendment.

David Kwass (EV-2021-0005-0172) opposes the proposed amendment, arguing that it is “unnecessary to safeguard fair trials, invades the traditional province of juries, and makes civil justice slower and costlier.”

Kasie Braswell (EV-2021-0005-0173) opposes the proposed amendment on the ground that it will increase the cost of litigation and transfer factfinding authority from the jury to the judge.

Frank Woodson, Esq. (EV-2021-0005-0174) opposes the proposed amendment to Rule 702. In language identical to several other public comments, he states that the amendment “would require courts to go beyond their role as gatekeepers and instead take up the mantle of juror.”

Dee Miles, Esq. (EV-2021-0005-0175) states that the rule is unnecessary because the current standards keep junk science out of the trial.

Ryan Duplechin, Esq. (EV-2021-0005-0176) states that a change to Rule 702 is unnecessary and would increase the expense of litigation.

Warner Hornsby, Esq. (EV-2021-0005-0177) states that a change to Rule 702 is unnecessary and would increase the expense of litigation.

Molly McKibben, Esq. (EV-2021-0005-0178) states that the proposed changes to Rule 702 are unnecessary and would increase the costs of litigation for plaintiffs.

Mitch Williams, Esq. (EV-2021-0005-0179) opposes the amendment because “[u]ltimately, the credibility and weight of the evidence should be decided by the jury, not the judge.”

Richard Stratton, Esq. (EV-2021-0005-0180) contends that the proposed amendment would negate the right to trial by jury.

Raeann Warner, Esq. (EV-2021-0005-0181) opposes the proposed amendment, contending that it will lead to minitrials on expert testimony and it will make it harder for individual plaintiffs to get a jury trial.

Demet Basar, Esq. (EV-2021-0005-0182) replicates a comment used by others: “This rule change would require courts to go beyond their rule as gatekeepers and instead take up the mantle of juror.”

Leigh O’Dell, Esq. (EV-2021-0005-0183) submitted the same statement in opposition as others (e.g., 0182), concluding that: “This rule change would require courts to go beyond their rule as gatekeepers and instead take up the mantle of juror.”

David Byrne, Esq. (EV-2021-0005-0184) states that “the proposed amendment is unnecessary; will further burden our already overworked judiciary; and, potentially undermine the 5th and 7th amendment rights of litigants.”

Joseph VanZandt, Esq. (EV-2021-0005-0185) states that “this rule change would require courts to go beyond their rule as gatekeepers and instead play the role of the jury.”

James Eubank, Esq. (EV-2021-0005-0186) states that to the extent the proposed amendment is intended to regulate

overstatement by experts, “a better amendment would be to add an additional subpart stating that expert testimony may be excluded if the opponent of such evidence demonstrates by a preponderance of the evidence that the conclusions reached by the expert, within the bounds of 702(a)-(d) are not supportable by the methodology employed.”

Drew Ashby, Esq. (EV-2021-0005-0187) argues, in language replicated in other public comments, that the phrase “preponderance of the evidence” is “inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis.”

Anthony Bolson, Esq. (EV-2021-0005-0188) opposes the amendment, asserting in language identical to other comments, that the rule “should not encourage courts to find facts” and that “the proposed change to Rule 702 will require expensive and time consuming hearings that will clog dockets and increase costs.”

Roger Smith, Esq. (EV-2021-0005-0189) objects that the proposed amendment would violate the 7th Amendment and would increase the costs of litigation.

Davis Vaughn, Esq. (EV-2021-0005-0190) objects that the proposed amendment would threaten 7th Amendment rights and would increase the costs of litigation.

Robert Lewis, Esq. (EV-2021-0005-0191) complains that the proposed amendment “gives one person, the judge, the ability to reach factual determinations based on the preponderance of the evidence; giving the judge the power to determine the outcome of the case under the guise of a 702 ruling.”

Elizabeth McLafferty, Esq. (EV-2021-0005-0192) opposes the amendment on the ground that it will lead to clogged dockets and increased costs of litigation.

Lauren Miles, Esq. (EV-2021-0005-0193) opposes the amendment with language identical to many other comments, including 0182, 0183, and 0189.

Spencer Pahike, Esq. (EV-2021-0005-0194) states, identically to other comments, that Rule 702 “should not encourage courts to find facts” and that the proposed amendment “will require expensive and time consuming hearings that will clog dockets and increase costs.”

Joseph Kramer, Esq. (EV-2021-0005-0195) opposes the amendment on the ground that the preponderance of the evidence standard “will prompt arguments that plaintiffs cannot rely on a handful of studies to support their claims when far more than the preponderance of published research contradicts that position.”

Frank Fraiser, Esq. (EV-2021-0005-0196) opposes the proposed changes to Rule 702 because they “will require already overworked Federal Judges to conduct ‘mini trials’ before conducting the trial itself.”

Anthony Baratta, Esq. (EV-2021-0005-0197) states that preponderance of the evidence “is a phrase used to describe how juries are to weight facts”; that a trial judge “is a gatekeeper, not a factfinder”; and that “[t]his phrase, if added, would allow for a trial judge to usurp the role of a jury.”

Tony Graffeo, Esq. (EV-2021-0005-0198) concludes that there is “[n]o need to change a Rule that works perfectly well for all sides.”

William Hammill, Esq. (EV-2021-0005-0199) states, identically with other comments, that the preponderance of the evidence standard “is inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis.”

Jeff Helms, Esq. (EV-2021-0005-0200) states that the preponderance standard “presents a jury question for a jury to decide” and that “judges should not sit as a fact-finder on these issues, just on whether the expert opinion is reliable enough for the jury to consider.” In language identical to other comments (including 0199) he concludes that the preponderance of the evidence standard “is inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis.”

Donovan Potter, Esq. (EV-2021-0005-0201) states, identically with others, that the preponderance of the evidence standard “is inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis.”

Michael Watson, Esq. (EV-2021-0005-0202) submits a comment identical to that of Donovan Potter, #0201.

Gary Bruce, Esq. (EV-2021-0005-0203) states that the preponderance of the evidence standard “seems to put an unnecessary factual determination on the presiding judge” and that “the weight of the evidence should be considered by the fact finder, not filtered out entirely by a trial judge.”

Joseph Fried, Esq. (EV-2021-0005-0204) opposes the proposed amendment on the ground that it will turn the judge into a trier of fact and will create more work for the courts.

Chad Cook, Esq. (EV-2021-0005-0205) opposes the amendment, arguing that it will increase costs and “diminish the vital role of the jury in the judicial process.”

William Sutton, Esq. (EV-2021-0005-0206) replicates a number of other comments about the judge taking up “the mantel of juror” under the proposed amendment.

Geoffrey Pope, Esq. (EV-2021-0005-0207) echoes the comments of others that the preponderance of the evidence standard “is inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis.”

Benjamin Keen, Esq. (EV-2021-0005-0208) is opposed to the proposed amendment to Rule 702.

David Dearing, Esq. (EV-2021-0005-0209) concludes that Rule 702 “is already adequately stringent and provides adequate safeguards against unsupported science.”

Christopher Glover, Esq. (EV-2021-0005-0210) states that the proposed amendment “is violative of the of the Seventh Amendment to the Constitution because it removes from the jury evidentiary issues and facts giving the role of juror to judges.” He also contends that the amendment “puts a higher work load on our federal judges and will greatly increase the cost of litigation.”

Protentis Law LLC (EV-2021-0005-0211) opposes the amendment and declares that “[j]udges should not sit as fact-finders on preponderance of evidence issues, and the language of the rule should never encourage them to do so, whether explicitly or implicitly.”

Catherine O’Quinn, Esq. (EV-2021-0005-0212) objects in line with other comments that the rule change would require the judge to take up the “mantel” of juror.

Mike Andrews, Esq. (EV-2021-0005-0213) argues that the amendment would require the judge to take up the “mantel” of juror and would cause a “waterfall” of state amendments.

Scott Shipman, Esq. (EV-2021-0005-0214) argues that the amendment would require the judge to take up the “mantel” of juror and would cause a “waterfall” of state amendments.

Quinton Spencer, Esq. (EV-2021-0005-0215) replicates other comments in stating that the preponderance of evidence standard is “inextricably intertwined” with jury factfinding, “which judges must not do in this analysis.”

Anthony Stastny, Esq. (EV-2021-0005-0216) replicates other comments in stating that the preponderance of evidence standard is “inextricably intertwined” with jury factfinding, “which judges must not do in this analysis.”

Soo Seok Yang, Esq. (EV-2021-0005-0217) opposes the amendment. He asserts that it “will only lead to clog the dockets with more hearings and increase expenses to all parties while adding no meaningful benefit in helping resolve any existing issues.”

Susan Cox, Esq. (EV-2021-0005-0218) states that since the 2000 amendment to Rule 702, “a substantial body of law has developed on the role of the trial judge as the gatekeeper and the standards needed for expert testimony to be admissible to the jury.” She contends that the amendment “will undermine the substantial guidance currently in existence.”

Connor Sheehan, Esq. (EV-2021-0005-0219) asserts that “[t]here is no reason to change the scope of the Rule to create a new legal standard that better-assists insurance companies and tortfeasors in avoiding civil liability for serious harms.”

Kenneth R. Berman, Christine P. Bartholomew, William T. Hangle, Paul M. Sandler, Ronald J. Hedges, and Michael P. Lynn (EV-2021-0005-0220) oppose the amendment in a 17-page report. They conclude that the proposal “articulates an admissibility standard that cannot be effectively applied to a great deal of legitimate expert opinion that ought to go to the jury” and that it “will unfairly deny juries and litigants the benefit of juryworthy testimony needed for fair adjudication, critical to resolving their factual and legal disputes.” The report concludes: “The question should not be whether a challenged opinion is reliable or unreliable but whether it is reliable enough for the jury’s consideration or, stated conversely, too unreliable for the jury to consider it. That is the Rule 104(b) standard. It provides a logical, fair, and objective threshold, like a summary judgment standard. That is very different from, and considerably more appropriate than, the preponderance of the evidence standard now under consideration.”

Patrick Dawson, Esq. (EV-2021-0005-0221) states that the rule should not encourage courts to find facts, and that the amendment will “require expensive and time consuming hearings that will clog dockets and increase costs.”

Anonymous (EV-2021-0005-0222) states that the amendment violates the 7th Amendment and will lead to injustice.

Jeremy D’Amico, Esq. (EV-2021-0005-0223) opposes the preponderance of the evidence standard, arguing

that it would lead to a situation in which only one side's experts would be allowed to testify --- if the plaintiff's expert satisfied a preponderance of the evidence standard, the defendant's could not, and vice versa.

Matthew Stoddard, Esq. (EV-2021-0005-0224) argues that the proposed amendment "encourages the judge to find facts, and finding facts should be the role of the jury -- not the judge."

Rebecca Gilliland, Esq. (EV-2021-0005-0225) opposes the amendment, contending that it will lead to the following: "7th amendment rights will be impacted, defendants will be given a massive power shift and opportunity to avoid liability where that opportunity should not exist, [and] a large impact on state-law rules that will further bog down a struggling system."

Jonathan Hayes, Esq. (EV-2021-0005-0226) states: "The proposed amendment furthers the intrusion of the judge into the province of the jury. Cross examination is the appropriate remedy for an ill-advised expert opinion, not a judge's opinion."

Josh Wages, Esq. (EV-2021-0005-0227) contends that under Rule 702, the trial judge does not weigh evidence: "That is the role of the jury. Thus, there is no basis for imposing a 'preponderance of the evidence' standard. The witness either satisfies the Rule 702 criteria or not."

Shane Bartlett, Esq. (EV-2021-0005-0228) states, identically with other submitted comments, that the preponderance of the evidence standard is "inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis."

Ryan Beattie, Esq. (EV-2021-0005-0229) contends that the proposed amendment would add costs to litigation and “will expand the courts role and effectively give them the role of the jury.”

James Lampkin, Esq. (EV-2021-0005-0230) states, identically with other comments that the proposed amendment will end up with the judge taking up the “mantel of juror” and that it would lead to a “waterfall” of state amendments.

Melanie Penagos, Esq. (EV-2021-0005-0231) argues that the preponderance standard “would allow, or more likely require, the trial court to hear from opposing experts away from the jury and then the courts would thereby limit expert testimony to their selected expert.”

Benjamin Locklar, Esq. (EV-2021-0005-0232) opposes the proposed amendment, contending that under it “the barriers to obtaining justice for our clients will be greater than ever.”

Jeff Bauer, Esq. (EV-2021-0005-0233) opines that the amendment will increase the costs of litigation, that it will have a negative effect on state rules of evidence, and it will “encourage Courts to find facts, which is solely the role of the jury.”

George Tolley, Esq. (EV-2021-0005-0234) opposes the amendment, arguing that it will create uncertainty and will make it more difficult for malpractice claims to get to the jury.

Luke Trammell, Esq. (EV-2021-0005-0235) states that the amendment proposes a solution where there is no problem, and that it creates an “onerous” standard that will clog dockets and increase the cost of litigation.

Matt Griffith, Esq. (EV-2021-0005-0236) states, identically with other comments, that the amendment will require the judge to “take up the mantel of juror” and that it will lead to a “waterfall” of state amendments.

Anonymous (EV-2021-0005-0237) states: “It is a mistake to have the rule encourage courts to find facts. This will slow down an already backlogged system with expensive and time consuming hearings.”

Bryan Comer (EV-2021-0005-0238) opposes the amendment, arguing that it will “take away the fact finding from the trier of fact, the jury, and place it in the trial court's hands” and will lead to “more lengthy, time consuming hearings, which will unduly clog the courts' dockets and increase costs for plaintiffs and defendants.”

Anonymous (EV-2021-0005-0239) submitted the form statement submitted by many others, which states in its entirety: “The amendment to Rule 702 is unnecessary. Rule 702 captures the *Daubert* standard, which was never intended to be an exacting standard through which courts find facts and throw out evidence. Instead this standard was intended to keep out junk science, and Rule 702 as written already does that effectively. The desire to change an effective rule can only be for some unproductive and unwarranted purpose. This rule change would require courts to go beyond their rule as gatekeepers and instead take up the mantel of juror. Making this standard more exacting will result in even more clogged dockets and more expenses to all parties, an uneconomical and counterproductive inefficiency that resolves no existing problem. It will also result in a waterfall of state law amendments, which generally track this rule, and vitiate well-established precedent, again to no productive or reasonable end. I hope the committee will reconsider this proposed rule, and leave

Rule 702, an entirely effective rule, as it is - doing what it already needs to do to ensure that jurors consider only relevant, reliable expert testimony.”

Anonymous (EV-2021-0005-0240) submitted the form statement as set forth in comment #239.

David Boohaker, Esq. (EV-2021-0005-0241) opines that “[i]ncreasing the ability of the court to weigh in on factual evidence, especially in a scientific scenario, impermissibly allows the court to act as a fact finder instead of the jury.” He also contends that the amendment will lead to expensive hearings that will clog dockets.

Stewart Eisenberg, Esq. (EV-2021-0005-0242) claims that the amendment “will prevent good claims from being heard by juries.” He argues that the rule “should not encourage courts to find facts, and that the rule will “require expensive and time consuming hearings that will clog dockets.”

Mike Crow, Esq. (EV-2021-0005-0243) filed the form comment set forth in its entirety in the summary to Comment 0239.

Margaret M. Murray (EV-2021-0005-0244) declares, identically with other comments, that the proposed amendment to Rule 702 “would circumvent the law, the judiciary, and the very purpose of the rules and should be rejected entirely.”

James Matthews, Esq. (EV-2021-0005-0245) objects that the amendment allows the judge to weigh the evidence and so “may be unconstitutional.” He also sees problems if the court tells the jury that it has made a finding that the expert’s testimony is reliable.

Evan Allen, Esq. (EV-2021-0005-0246) states that “[c]hanging an effective rule is unnecessary and I fear that it would further clog dockets and increase expense to all parties. More importantly, it would require judges to take on the role of jurors in determining what likely are questions of fact.”

Dana Taunton, Esq. (EV-2021-0005-0247) claims that the proposed amendment “would require courts to go beyond their rule as gatekeepers and instead usurp the role of the jury” and that “[m]aking this standard more exacting will result in even more clogged dockets and more expenses to all parties.”

Robert Register, Esq. (EV-2021-0005-0248) uses the template set forth in the summary of comment 0239.

Anonymous (EV-2021-0005-0249) posted the template set forth in the summary of comment 0239.

Dylan Martin, Esq. (EV-2021-0005-0250) posted the template set forth in the summary of comment 0239.

Jaime Jackson, Esq. (EV-2021-0005-0251) states: “The proposed amendments will require expensive and time consuming court hearings that will clog dockets and increase costs. The amendments will also impact State law which should be left to the States. The rule should not encourage courts to find facts as this has always been the sacred province of the jury.”

Gregory Shevlin, Esq. (EV-2021-0005-0252) opposes the amendment on the grounds that it favors corporate interests and it makes the judge a factfinder.

Steven Newton, Esq. (EV-2021-0005-0253) opposes the amendment, arguing that it is “contrary to the principles

in *Daubert* and its progeny and alters the gatekeeping function of the judge somewhat” while also intruding upon the jury’s function.

Josh Branch, Esq. (EV-2021-0005-0254) echoes other comments stating that the preponderance of the evidence standard is “inextricably intertwined” with a jury determination.

Gregory Cusimano, Esq. (EV-2021-0005-0255) opposes the amendment on the ground that adding further restrictions on expert testimony will increase costs, so that many meritorious claims will never get to the jury.

Ryan Kral, Esq. (EV-2021-0005-0256) contends that the amendment “will require courts to go beyond their role as gatekeeper and will usurp the role of the juror to consider relevant and reliable expert testimony.” He predicts that the amendment will “clog dockets” and increase the expense of litigation.

Eddie Schmidt, Esq. (EV-2021-0005-0257) states that the amendment “is unfair, opens the door to activist judging, needlessly time consuming and will increase litigation costs.”

Rachel Minder, Esq. (EV-2021-0005-0258) declares that “Rule 702 does not need to be amended to be an exacting standard through which courts find facts and throw out evidence” because to do so “would only take away the jury’s role of analyzing the weight and credibility of an expert, violating the 7th Amendment’s right to trial by jury.”

Clifford Horwitz, Esq. (EV-2021-0005-0259) concludes that the amendment would “take away the jury’s role of analyzing the weight and credibility of an expert, violating the 7th Amendment’s right to trial by jury.”

Brittany Scott, Esq. (EV-2021-0005-0260) states that the Rule 702 standard is effective as currently written, and that the proposed changes “allow judges to do more than their gatekeeping responsibility and violate plaintiffs' right to trial by jury.”

Kendall Dunson, Esq. (EV-2021-0005-0261) believes that a rule change is unnecessary and that the amendment “would add too much responsibility on the judge and violate the 7th Amendment right to a trial by jury.”

David Bullard, Esq. (EV-2021-0005-0262) tracked the language of a number of other comments in stating that the preponderance of the evidence standard is “inextricably intertwined” with jury factfinding, and the amendment would improperly transfer factfinding from the jury to the court.

Neil Alger, Esq. (EV-2021-0005-0263) declares that the court “should not (as the amendment proposes) weigh the preponderance of the evidence and make evidentiary findings before allowing the admission of the opinions. This would invade the jury's sacred duty.”

Shawn Daniels, Esq. (EV-2021-0005-0264) opposes the amendment, contending that it improperly shifts factfinding power from the jury to the court.

David L. Diab, Esq. (EV-2021-0005-0265) believes that the amendment violates the 7th Amendment because it transfers the power to find facts and determine credibility from the jury to the court.

Jeff Price, Esq. (EV-2021-0005-0266) states that changes to Rule 702 are unnecessary, and that the amendment would result in a “waterfall” of state law amendments.

Ronnie Mabra, Esq. (EV-2021-0005-0267) opines that Rule 702 is working well, that there is no need for an amendment, and the amendment will lead to more work for courts, clogged calendars, and more litigation expense.

Mark Pettit, Esq. (EV-2021-0005-0268) submitted the template that is set forth in the summary of Comment 0239.

Mark Weissburg, Esq. (EV-2021-0005-0269) stated: “This will require expensive and time consuming hearings that will clog dockets and increase costs. State law will be affected too.”

Elliot Bienenfeld, Esq. (EV-2021-0005-0270) claims that Rule 702 currently works well to screen out junk science, and the amendment “would require all parties filing suit to jump through additional hoops and incur extra costs on litigation just to utilize expert testimony.”

Julia Merritt, Esq. (EV-2021-0005-0271) submitted the template reproduced in the summary of Comment 0239.

Thomas Kelliher, Esq. (EV-2021-0005-0272) objects that the amendment will encourage courts to find facts, and that it will also require expensive and time-consuming hearings that will clog dockets and raise the expenses of litigation.

David Wenzholz, Esq. (EV-2021-0005-0273) states that the rule should not encourage courts to find facts; that the amendment will lead to greater expense and clogged dockets; and that “states will be affected too.”

Michael Silverman, Esq. (EV-2021-0005-0274) states: “This is wrong and thwarts the entire purpose of a jury deciding a civil case. It is denying people justice that the law

guarantees and is the foundation of the civil justice system. Let a jury decide the merits of a case.”

Jeff Gutkowski, Esq. (EV-2021-0005-0275) argues that the amendment “will result in the removal of a question of fact from the provenance of the jury and instead require judges to weigh facts and evidence, requiring plaintiffs to prove not only that their expert testimony is reasonably reliable and compliant with *Daubert* and Rule 702, but that plaintiffs' expert's testimony is superior to defendants' expert's testimony, before every trial.”

Lindsey Macon, Esq. (EV-2021-0005-0276) declares that the use of the preponderance of the evidence standard in the proposed amendment would violate the 7th Amendment, because “the preponderance standard is a standard by which juries are to decide questions of fact.”

Bobby Johnson, Esq. (EV-2021-0005-0277) states that the preponderance of the evidence standard is “inextricably intertwined” with juror factfinding and that “Judges should not sit as factfinders on these issues.”

Kevin P. O'Brien, Esq. (EV-2021-0005-0278) opposes the amendment on the grounds that 1) judges and not juries should decide facts, 2) the amendment will clog dockets and lead to greater costs of litigation, and 3) the states will be negatively affected.

James B. Ragan, Esq. (EV-2021-0005-0279) argues that over the years the Federal Rules have been modified to increase the advantage of defendants in Federal court, and that the proposed changes to Rule 702 “are simply another step in that march.”

Joel Wooten, Esq. (EV-2021-0005-0280) declares that “the most likely effect of these changes is to muddy the

waters and create a new cottage industry that attacks every existing, rational interpretation of expert testimony and causes undue and unnecessary delays in litigation and increased attorneys fees and costs over the future meaning these confusing proposed changes to Rule 702.”

William Atkins, Esq. (EV-2021-0005-0281) concludes, identically to other comments: “The phrase ‘preponderance of the evidence’ is inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis.”

Zbigniew Bednarz, Esq. (EV-2021-0005-0282) posted a comment identical to others, which states: “This change will prevent good claims from being heard by juries. The impact on our clients will be unfair. The rule should not encourage courts to find facts. This will require expensive and time consuming hearings that will clog dockets and increase costs.”

Wayne Hogan, Esq. (EV-2021-0005-0283) believes that the preponderance of the evidence standard will mean that judges at a Rule 104(a) hearing may only consider evidence that is admissible; he believes that this mistake will be corrected if the text of the proposed amendment is changed to “preponderance of the information.”

Elizabeth Eiland, Esq. (EV-2021-0005—0284) posts, with minor variations, the template reproduced in the summary to Comment 0239.

Caroline Monsewicz, Esq. (EV-2021-0005-0285) asserts that the preponderance of the evidence “is a question of fact for a jury to determine” whereas judges “are tasked with making rulings of law, not fact.” She concludes that “[l]anguage to the effect of encouraging and shifting a judge's role to that of a fact-finder will be detrimental to the

judicial process for Article III courts, which is unfortunately what this proposed change seeks to do.”

Graham Esdale, Esq. (EV-2021-0005-0286) posts the comment identical to that set forth in the summary of Comment 0239.

Anonymous (EV-2021-0005-0287) opposes the amendment, arguing that it will lead to costly hearings that clog the courts, it will turn judges into jurors, and it will have negative effects in the states.

Nolan E. Murray, Esq. (EV-2021-0005-0288) states, identically to other comments, that “[t]he proposed amendments and the comments would circumvent the law, the judiciary and the very purpose of the rules and should be rejected entirely.”

Seth Lowry, Esq. (EV-2021-0005-0289) opines that the preponderance of the evidence standard is “inextricably intertwined” with juror factfinding, and so should not apply to a judge’s determinations under Rule 104(a).

Anonymous (EV-2021-0005-0290) states, identically to other comments: “This will prevent a good claim from being heard by juries. The impact on our clients will be unfair. This will also require expensive and time consuming hearings, causing delays and increased costs. State law will be affected too.”

Pierre Ifill, Esq. (EV-2021-0005-0291) states, identically with other comments, that the preponderance of the evidence standard is “inextricably intertwined” with juror factfinding, and so should not apply to a judge’s determinations under Rule 104(a).

Cary Wiggins, Esq. (EV-2021-0005-0292) provides the same comment as that set forth in the summary of Comment 0239.

James Roth, Esq. (EV-2021-0005-0293) provides the same comment as that set forth in the summary of Comment 0239.

R. Dean Hartley, Esq. (EV-2021-0005-0294) states that Rule 702 is working well and should not be changed, and that the proposed amendment improperly shifts factfinding from the jury to the judge.

Eric Croon, Esq. (EV-2021-0005-0295) states that the proposed amendment is “bad” for the citizens of Georgia, and that the Committee should leave Rule 702 alone.

John Herman, Esq. (EV-2021-0005-0296) states that “[t]he appropriate standards are already captured in the rule and this seems to be yet another attempt to increase unnecessary litigation issues that will make it more time consuming and burdensome on the parties and the courts.”

Warren Hinds, Esq. (EV-2021-0005-0297) believes that the proposed amendment to Rule 702 “impinges upon the right to a trial by jury and would require courts to go beyond their role as gatekeepers and instead make factual findings, clog up the dockets, and cost all parties more.”

Robert Hammers, Esq. (EV-2021-0005-0298) asserts that the preponderance of the evidence standard “is meant for the fact-finder to weigh evidence on an issue of fact” and that “Judges should not sit as a fact-finder when evaluating admissibility under FRE 702: they should take the expert’s disclosed opinions and data and apply the formulaic analysis in concert with the respective circuit court’s interpretation of *Daubert* and its progeny.”

Richard Mitchell, Esq. (EV-2021-0005-0299) contends that the proposed amendment will be harmful to litigants. He states, identically with other comments, that “*Daubert* was never intended to be an exacting standard through which courts may find facts and disallow evidence.”

Andrew Fulk, Esq. (EV-2021-0005-0300) posted the comment set forth in the summary of Comment 0239, with minor variations such as changing “waterfall” to “deluge.”

Leon Hampton, Esq. (EV-2021-0005-0301) states that the current system works well to screen out junk science, and that an amendment to Rule 702 is not necessary.

Marc A. Perper, Esq. (EV-2021-0005-0302) states: “This rule will prevent good claims from being heard by juries. The impact on injured people and consumers will be unfair. The rule will require expensive and time consuming hearings that will clog dockets and increase costs. It will also affect state law, which implicates considerations of federalism.”

Joshua Samuels, Esq. (EV-2021-0005-0303) argues that the preponderance of the evidence standard “is a fact finding standard that goes to the weight of the evidence rather than its sufficiency. These are fact issues that are traditionally left to a jury, not admissibility of evidence.”

David Zagoria, Esq. (EV-2021-0005-0304) states that the proposed amendment to Rule 702 is unnecessary and harmful, and will slow down litigation.

Anonymous (EV-2021-0005-0305) contends that the proposed amendment “will increase costs to both sides of a case,” requiring “expensive and time-consuming hearings and clog dockets at a time when we should be doing the opposite.”

Anonymous (EV-2021-0005-0306) declares that the proposed amendment “would augment the role of the courts from gatekeepers to factfinders. It would create the need for more hearings and vetting of experts by the courts, slowing down an already indolent pace of litigation and burdening parties with higher expenses.”

Austin T. Osborn, Esq. (EV-2021-0005-0307) contends that the preponderance of the evidence standard converts the court into a factfinder in violation of the 7th Amendment, but that the term “preponderance of the information” would preserve the 7th Amendment.

Richard J. Zalasky, Esq. (EV-2021-0005-0308) states that the conflict in the courts about Rule 702 should be handled by the Supreme Court, not by a rule change. He also contends that the proposed amendment would increase the costs of litigation.

Andrea Sasso, Esq. (EV-2021-0005-0309) argues that the proposed amendment would have a detrimental effect on plaintiffs’ claims, that it would improperly allow the court to be a factfinder, and that it would clog courts.

Robin Clark, Esq. (EV-2021-0005-0310) opposes the proposed amendment, contending that “Judges should not sit as a fact-finder on these issues, and the language of the rule should never encourage them to do so, whether explicitly or implicitly.”

Anonymous (EV-2021-0005-0311) states: “This rule will prevent valid claims from being heard by juries. It benefits only defendants and is an injustice to plaintiffs.”

Terrence Croft (EV-2021-0005-0312) states that the proposed amendment is “unnecessary and harmful.”

Christopher Stuckey, Esq. (EV-2021-0005-0313) submits the same statement as Austin Osborn, Comment 0307.

Richard Crowson, Esq. (EV-2021-0005-0314) argues that the proposed amendment “usurps the role of the jury in findings of fact, which is a direct affront to the 7th Amendment right to a trial by jury, which I believe is sacrosanct to the concept of justice in this country. The judge is supposed to play a gatekeeping role to keep junk science out of a trial, not to sit as finder of fact.”

Lisa Edwards, Esq. (EV-2021-0005-0315) states that the proposed amendment “would effectively throw out valid claims &/or slow court dockets” and “impinges upon the 7th amendment right to a trial by jury” because it “would require courts to go beyond their rule as gatekeepers and instead act as factfinders/ jurors.”

Keith Evra, Esq. (EV-2021-0005-0316) opposes the addition of the preponderance of the evidence standard to Rule 702. He argues that “a jury of 6-12 people are far more capable than 1 person to thoroughly evaluate and weigh evidence under a burden of proof standard because so many people are able to weigh in, not just a singular person.”

Greg A. Thurman, Esq. (EV-2021-0005-0317) opposes the proposed amendment, arguing that it will shift factfinding authority from the jury to the court.

Joey M. Chindamo, Esq. (EV-2021-0005-0318) opposes the amendment, arguing that it will lead to a flood of litigation in both state and federal courts. He also claims that the amendment is contrary to *Daubert*, which stated that courts should focus only on the expert’s methodology, not on the expert’s opinion.

Shane Lazenby, Esq. (EV-2021-0005-0319) states that the proposed amendment makes “the Judge the deciding arbiter of the admissibility of expert testimony beyond the current confines of Rule 702” and therefore infringes on the 7th amendment, because “Courts are meant to be gatekeepers and not fact finders on the admissibility of evidence.”

Daniel Thistle, Esq. (EV-2021-0005-0320) states: “This will only prevent good claims from being heard by juries and will have an unfair impact on those people with good claims. The rule should not encourage courts to find facts. It will also increase litigation costs and clog the court dockets. State law will be affected also.”

Adam Long, Esq. (EV-2021-0005-0321) declares that the proposed amendment “poses an existential threat to the Rules of Evidence generally” because “[i]n no other area have we sought to curtail the authority of the trial judge to enforce the Rules of Evidence.”

D. James Jordan, Esq. (EV-2021-0005-0322) opposes the amendment, arguing it will create problems in state courts. He concludes: “Let the jury decide, not the court.”

Tyler Stampone, Esq. (EV-2021-0005-0323) complains that the amendment will lead to clogged dockets, will have a negative effect on state courts, and will transfer factfinding authority from the jury to the court.

Jo Ann Niemi, Esq. (EV-2021-0005-0324) asserts that the term “preponderance of the evidence” “will be interpreted by state and federal court judges as requiring the plaintiff to put on a trial and prove our expert is right.” She argues that the preponderance of the evidence standard “would shift the burden of defeating a *Daubert* challenge to

the party offering the expert AND the proponent would have to do so by a preponderance of the evidence standard.”

Andy Birchfield, Esq. (EV-2021-0005-0325) asserts that the proposed amendment will lead to clogged dockets and will result in the dismissal of meritorious plaintiffs’ claims.

Donald Stack, Esq. (EV-2021-0005-0326) opposes the amendment and decries “the gradual but inexorable chipping away of our fundamental principles that have occurred based upon the business interests that have sought to influence the adoption and language of the FRE and FRCP.”

Michael Wierzbicki, Esq. (EV-2021-0005-0327) states that the proposed amendment “invades the process of the jury and undermines the adversarial process.”

The Attorneys Information Exchange Group (EV-2021-0005-0328) considers “preponderance of the evidence” to be limited to admissible evidence under Rule 104(a), even though that rule specifies that the court is not bound by the rules of evidence. The Group advocates that the term should be changed to “the preponderance of information.”

Sydney Everett, Esq. (EV-2021-0005-0329) states that the rule is working well, so that no amendment is necessary, and that the proposed amendment would violate the 7th amendment by transferring factfinding authority to the court.

Michael Eshman, Esq. (EV-2021-0005-0330) contends that a rule change is not necessary, and that the proposed amendment would come at the expense of the 7th amendment right to jury trial.

Josh Vick, Esq. (EV-2021-0005-0331) argues that the preponderance of the evidence standard would undermine the jury's role as finder of fact, whereas the preponderance of the information standard would not. He also argues that the proposed amendment would lead to costly hearings and delays in litigation.

Bradley Melzer, Esq. (EV-2021-0005-0332) opposes the amendment, based on "the preference for a Jury to be the ultimate fact finder, the added expense, the additional time delay that this rule change would cause, and the likely impact on state law."

Troy Marsh, Esq. (EV-2021-0005-0333) submitted the comment set forth in the summary to Comment 0239.

Paul Byrd, Esq. (EV-2021-0005-0334) opposes the proposed amendment on the ground that it will foster minitrials, and states that "we should not further burden the parties already bearing the burden of proof on all the elements of their causes of action, often injured individuals with scarce resources compared to their wealthy corporate opponents, with an evidentiary rule change that almost certainly will weigh the scales of justice further in favor of the rich over the poor."

J. Bradley Stevens, Esq. (EV-2021-0005-0335) states that the current rule is working well and that the amendment will not help the trial judge manage the gatekeeping function.

Michael Boyd, Esq. (EV-2021-0005-0336) opposes the proposed amendment because "it is the jury's responsibility to weigh the evidence and apply the preponderance of the evidence standard, not the Judge."

Amar Reval, Esq. (EV-2021-0005-0337) states that the rule should not encourage courts to find facts; that the proposed amendment will contribute to the problem of the vanishing trial; and that the amendment will lead to extensive delays in litigation.

Gavin King, Esq. (EV-2021-0005-0338) opposes the amendment, opining that it “serves no purpose other than to tip the balance of the courts toward a particular type of litigants. What's worse: this will eventually lead to the amendment of several state rules.”

Joshua Verde, Esq. (EV-2021-0005-0339) opposes placing the burden of persuasion on the party offering the expert, arguing that it is unclear what “elements” a court must consider to determine whether the standard has been met. He also objects to the proposed change to Rule 702(d) on the ground that it “possibly puts an unfair burden on an expert that they must be published or show employment in a field where their conclusions can be applied.”

Nicola Drake, Esq. (EV-2021-0005-0340) opposes the amendment to Rule 702 on the ground that it “will allow the Court to become finders of fact, improperly, and that will spill over into state law.” She also predicts that the amendment “will clog the courts with costly, time consuming hearings which will be unfair to solo or small firms representing plaintiffs.”

Anonymous (EV-2021-0005-0341) contends that the proposed amendment will improperly shift factfinding authority from the jury to the court, and that it will increase litigation costs.

Amy Harriman, Esq. (EV-2021-0005-0342) states, in language the same as other comments: “This will prevent good claims from being heard by juries and the impact on

our clients will be unfair. This will require expensive and time consuming hearings that will clog the dockets and increase costs.”

Tyler Berberich, Esq. (EV-2021-0005-0343) states: “This amendment should not pass. It will do nothing other than prevent good claims from being heard by juries. The negative impact on injured individuals will be severe and unnecessary.”

Timothy McHale, Esq. (EV-2021-0005-0344) states: “This will prevent good claims from being heard by juries. The impact on plaintiffs will be unfair, and it will result in additional expenses and time that will slow down the process.”

Jack Smalley, Esq. (EV-2021-0005-0345) submitted the comment that is reproduced in the summary of Comment 0239.

Phillip Lorenz, Esq. (EV-2021-0005-0346) declares that adopting the proposed amendment “will change the trial judge's role from that of reliability gatekeeper to a finder of fact regarding the proffered testimony, thereby invading the province of the jury.” He suggests that “the Committee decline to modify Rule 702 unless and until such time as a majority of federal and state judges who are tasked with applying it see the need for such a change.”

Kyle McNew, Esq. (EV-2021-0005-0347) objects to the preponderance of the evidence standard, arguing that “judges will understand that to mean they are being placed in a position akin to a factfinder, like a jury. That invites credibility determinations, and that is not the judge's role in the expert gatekeeper function.” He suggests as an alternative that Rule 104(a) could be mentioned in the text of 702.

Maddison West, Esq. (EV-2021-0005-0348) states: “The impact on our clients will be unjust, unfair, and unconscionable. This will prevent good claims from being heard by juries.”

Milette E. Weber, Esq. (EV-2021-0005-0349) states that Rule 702 is functioning well and there is no need for change. She argues that the proposed amendment is contrary to *Daubert* in that it requires the court to evaluate whether the expert’s conclusion reflects a proper application of the methodology, whereas *Daubert* instructed courts to look only at the expert’s methodology.

Heidi Vicknair, Esq. (EV-2021-0005-0350) states: “This will prevent good claims from being heard by juries and will encourage courts to find facts. Further this will affect state law by trying to change the rules and can lead to inconsistencies and problems.”

Aigner Kolom, Esq. (EV-2021-0005-0351) opposes the proposed amendment to Rule 702, believing that it will “prevent good claims from being heard by juries and will encourage courts to find facts” and also that it will affect state law “by trying to change the rules and can lead to inconsistencies and problems.”

Justin Owen, Esq. (EV-2021-0005-0352) opposes the proposed amendment stating that its effect would be “the evisceration of litigants’ ability to seek redress or pursue causes of action which, in whole or in part, involve or rely upon new, novel, developing, or evolving theories, concepts, fields, and/or subject matter.” That result would be “a violation of citizens’ constitutional rights of access to the courts and to seek redress for injuries to their person and property, which is an unconscionable result.” He also predicts that the amendment would lead to an “avalanche” of additional motions and hearings that would be

“gargantuan” if the courts have to apply an evidentiary burden to each and every aspect of an expert’s testimony.

Gary C. Eto, Esq. (EV-2021-0005-0353) declares that the proposed amendment would “severely limit litigants’ rights to a jury trial by allowing judges to be the finder of fact with respect to expert testimony.”

Anonymous (EV-2021-0005-0354) states: “These changes will waste more court time and expense for unnecessary hearings, all while preventing good claims from being presented to a jury.”

Daniel Stampone, Esq. (EV-2021-0005-0355) is opposed to the proposed amendment to Rule 702 because it will “result in costly and protracted hearings/litigation that will only serve to infest and clog the dockets while unnecessarily increasing costs.”

Leo & Oginni Trial Lawyers, PLLC (EV-2021-0005-0356) declares that the proposed amendment “will ultimately go against the 7th amendment.”

Kenneth T. Lumb, Esq. (EV-2021-0005-0357) states that the proposed amendment is “contrary to the law and to the U.S. Constitution” and that it will require expensive hearings that will clog dockets.

Albert Guerrero, Esq. (EV-2021-0005-0358) is concerned that the preponderance of the evidence standard will encourage judges to become triers of fact, and that the amendment “appears to shift the burden in a *Daubert* challenge to the party offering the expert evidence to prove reliability and to do so by a preponderance of the evidence, rather than to the party that is challenging the evidence.”

Robert Edwards, Esq. (EV-2021-0005-0359) states that the preponderance of the evidence standard will result in the trial judge “usurping the jury’s domain” whereas that will not occur if a “preponderance of the information” standard is used.

Jordan Leibovitz, Esq. (EV-2021-0005-0360) opposes the proposed amendment, contending that it allows judges to be triers of fact, and that it will increase the costs of litigation.

Scott Frost, Esq. (EV-2021-0005-0361) contends that the current Rule 702 is working well, and objects that the proposed amendment “will hurt both sides as experts are excluded based upon one court’s decisions and not science.”

Seth Harding, Esq. (EV-2021-0005-0362) opposes the proposed amendment. He concludes that the amendment will usurp the jury’s role, violate the 7th Amendment, and increase the costs of litigation for plaintiffs. He concludes: “Reminder: The love of money is the root of all kinds of evil. In many cases this amendment will be a tool of this unfortunate principle of human nature.”

Devin McNulty, Esq. (EV-2021-0005-0363) predicts that the proposed amendment will lead to costly hearings and lengthy argument schedules and delay.

Mary Leah Miller, Esq. (EV-2021-0005-0364) submitted, with minor variations, the comment that is reproduced in the summary to Comment 0239.

Anonymous (EV-2021-0005-0365) states that “these changes will create confusion, restrict judicial discretion, and infringe on the role of the jury.”

Estee Lewis, Esq. (EV-2021-0005-0366) contends that the proposed amendment would limit the type of information upon which an expert can rely, and that, “it unduly shifts the burden on the party utilizing an expert” because “with *Daubert* challenges, the burden is on the adverse party to prove that an expert is not qualified, and this burden is then rebutted by the proponent.”

Denney & Barrett (EV-2021-0005-0367) is opposed to the proposed amendment, arguing that it puts the judge in the role of factfinder and “the arbiter of which expert’s opinion wins”; that it will create costly hearings; and that it is inconsistent with *Daubert’s* focus on the expert’s methodology rather than the conclusion reached by the expert.

Chris Moore, Esq. (EV-2021-0005-0368) opposes the amendment, because it “shifts the burden to the proponent of the opinion. Traditionally, and correctly, the law requires the party challenging an expert or her opinion to prove their unreliability.” He also states that “the rule should not encourage, much less require, courts to find or weigh facts traditionally reserved for juries” and that the rule will lead to expensive hearings that clog the courts.

Stampone O'Brien Dilsheimer Law (EV-2021-0005-0369) opposes the proposed amendment on the ground that it is prejudicial to plaintiffs and would encourage the judge to be a factfinder.

Anonymous (EV-2021-0005-0370) contends that the proposed amendment would undermine the difference between judges and juries, and would increase the costs of litigation.

John Hadden, Esq. (EV-2021-0005-0371) opposes the amendment, stating that “[t]he right to a jury trial is

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inviolate under the 6th and 7th Amendments, but expanding the role of judges to make more and more fact-based determinations that are traditionally the province of the jury erodes the Constitutional guarantees the Founders envisioned.”

Derek C. Johnson, Esq. (EV-2021-0005-0372) opposes the amendment, on the grounds that it would create another barrier for injured parties; it would shift factfinding power from the jury to the court; and it would lead to expensive hearings.

Matthew Millea, Esq. (EV-2021-0005-0373) states that “[t]he jury, as the finder of fact, should be the one weighing the evidence, not the judge, whose only task is to determine whether the proposed expert testimony meets the standards of Rule 702.” He argues that the proposed amendment will create a conflict with Rule 104(a), the rule that the amendment is explicitly applying, because the amendment somehow implies that the trial court may only consider admissible evidence in ruling on the admissibility of an expert opinion.

Lewis M. Chandler, Esq. (EV-2021-0005-0374) states that the proposed amendment is “another assault on the U.S. Constitution” and that it would foster expensive minihearings.

Patrick Sheehan, Esq. (EV-2021-0005-0375) opposes the amendment, instructing that judges should not be encouraged to find facts, because “that’s unconstitutional” and that “[t]he people of this country deserve better protection from and by a legal system that lawyers control.”

Erin K. Bradley, Esq. (EV-2021-0005-0376) contends that the proposed amendment would shift

factfinding away from the jury to the court, and would result in clogged dockets.

Patrick Ardis, Esq. (EV-2021-0005-0377) provides the same arguments in the same language as Erin Bradley, Comment 0376.

William T. Gibbs, Esq. (EV-2021-0005-0378) argues that the proposed amendment unconstitutionally shifts factfinding authority from the jury to the court.

Rachel Gelfand, Esq. (EV-2021-0005-0379) provides the same arguments in the same language as Erin Bradley, Comment 0376.

Daniel V. Parish, Esq. (EV-2021-0005-0380) provides the same arguments in the same language as Erin Bradley, Comment 0376.

Alison Hawthorne, Esq. (EV-2021-0005-0381) submitted a slightly altered version of the statement reproduced in the summary of Comment 0239 (e.g., “influx” for “waterfall”).

David P. Mason, Esq. (EV-2021-0005-0382) argues that Rule 702 is working well, and that the amendment would require expensive and complex hearings on whether experts are properly applying their methodology.

Paul J. Komyatte, Esq. (EV-2021-0005-0383) opposes the amendment on the ground that it would lead to expensive and time-consuming hearings in almost every case, and that it would lead to similar problems in state courts.

Lucas Garrett, Esq. (EV-2021-0005-0384) states that the proposed amendment will have the effect of requiring

expensive and time-consuming hearings that will clog dockets and increase costs. He argues that the amendment “encourages judges to venture out of their core competencies and instead wade into the substance of expert testimony in a way that will prevent good claims from being heard by juries.”

Anonymous (EV-2021-0005-0385) submitted the statement set forth in the summary of Comment 0239.

David Wool (EV-2021-0005-0386) suggests changing the committee note provision that refers to rejecting court decisions holding that sufficiency of basis and reliability of application are questions of weight. He reasons that in any particular opinion, the court may be properly holding that sufficiency of basis or reliability of application may in fact be a question of weight.

Robert Cheeley, Esq. (EV-2021-0005-0397) opposes the preponderance of the evidence standard, arguing, identically with others, that it is “inextricably intertwined” with juror factfinding.

Michele L. Reed, Esq. (EV-2021-0005-0388) opposes the proposed amendment on the ground that it shifts factfinding authority to the court, and imposes an adverse prejudicial impact on the party with the burden of proof.

Jennifer Emmel, Esq. (EV-2021-0005-0389) states that the preponderance of the evidence standard calls for judicial factfinding that is inconsistent with gatekeeping. She also contends that the proposed amendment “would result in different standards across different scientific areas and situations, thus precipitating a watershed of appeals.”

Christopher Conway, Esq. (EV-2021-0005-0390) states that the preponderance of the evidence standard “takes

issues of fact out of the hand of the fact finder, the jury, and into the hands of the judge” which is “a clear and blatant violation of the 7th Amendment.”

Edmund A. Normund, Esq. (EV-2021-0005-0391) states that existing rules properly regulate expert testimony, and that any case law that is contrary to the existing rules represents a minority. He concludes that the proposed amendment to Rule 702 “seeks to turn trial judges into pretrial jurors and seeks to require them to weigh evidence and credibility that is properly and currently the role of the fact-finder.”

Alex Gillen, Esq. (EV-2021-0005-0392) “can only assume the next rules revision will just do away with the Seventh Amendment in its entirety, truly making the citizens voiceless.”

Gabrielle Holland, Esq. (EV-2021-0005-0393) states that the preponderance of the evidence standard is “inextricably intertwined” with jury factfinding, and that “the addition of this language is not well-conceived and will relegate the jury to a mere advisory panel rather than the fact-finder, which would essentially make the purpose of a jury null and void.”

John O’Neill, Esq. (EV-2021-0005-0394) asserts that the preponderance of the evidence standard “will lead, certainly and unfortunately, to inconsistency in evaluation of the Rules of Evidence by the Court.” He also states that “the modification to Rule 702(d) will, certainly and unfortunately, lead courts to become the finder of fact and invade the province of the jury.”

Samuel Prillaman, Esq. (EV-2021-0005-0395) states: “The proposed amendments to 702 will prevent juries from hearing good claims and have an unfair effect on our clients.

The rule should not encourage courts to find facts. This will require expensive and time consuming hearings that will unnecessarily clog the courts.”

Harden Kundlam McKeon & Poletto (EV-2021-0005-0396) supports the proposed amendment to Rule 702. The firm states that it is “essential that the judges enforce their roles as gatekeepers rather than have juries misunderstand when expert’s conclusions reach beyond what the expert’s basis and methodology support. This leads to confusion and improper verdicts and findings by the jury.”

Frederic Halstrom, Esq. (EV-2021-0005-0397) contends that the proposed changes to Rule 702 “are but another attempt to add layers and layers of complexity to the Federal Rules of Evidence purely for special interests.” In his view, “requiring the plaintiff to dry run their entire expert case before trial doubles the case costs which will be incurred by plaintiffs, and which are usually advanced by plaintiffs’ lawyers.”

Ingrid A.. Halstrom, Esq. (EV-2021-0005-0398) opposes the proposed amendment to Rule 702, stating that it “would make it harder for a plaintiff to offer reliable expert testimony, increase the gatekeeping function of the judge, and diminish the role of the jury by putting the decision to accept or reject expert testimony in the hands of a judge, not the jury.”

Robert Frank Melton, Esq. (EV-2021-0005-0399) opposes the amendment, stating that it “will lead to even more pressure on our courts because each court will have to ‘weigh’ each individual expert opinion to determine as the fact finder, whether that specific opinion meets this highly elevated new burden of proof.” He argues that “[t]he focus should remain on the ‘principles and methodology’ of an

expert, as stated clearly in *Daubert v. Merrell Dow Pharmaceuticals*.”

G. Bryan Ulmer, III, Esq. (EV-2021-0005-0400) opposes the amendment, stating that it will do more harm than good by: “1) adding confusion to the rules; 2) increasing the burden on a strained court system; 3) adding expense to litigation; and 4) eroding, demeaning, and diminishing the role of the jury as factfinder.”

Peters Murdaugh Parker Eltzroth & Detrick (EV-2021-0005-0401) is opposed to the proposed amendment on the grounds that it will be harder for plaintiffs to get claims heard by juries, there will be lengthy hearings, and judges will be allowed to find facts.

Bert Utsey, Esq. (EV-2021-0005-0402) opposes the amendment because it is a solution to a non-existent problem, and it would “negatively affect the trial strategy” of proponents of experts.

William Bonner, Esq. (EV-2021-0005-0403) contends that it is improper to allow judges to find facts in ruling on the admissibility of expert testimony. He also states that if judges are allowed to find facts, “the proposed amendment invites inconsistency because no two judges will view the same set of facts identically.”

Wynn E. Clark, Esq. (EV-2021-0005-0404) opposes the proposed amendment on the ground that it will require a party to prove to both the judge and the jury that the expert’s opinion is correct.

Scott Blair, Esq. (EV-2021-0005-0405) believes that “this rule change will disproportionately favor corporate defendants with plenty of money to hire experts to now

attack the application of a plaintiff expert's opinions even though the underlying science is sound.”

Kenneth Elwood, Esq. (EV-2021-0005-0406) opposes the amendment because it will lead to more expense, it would improperly allow the court to find facts in determining the admissibility of expert testimony, and most importantly the proposed amendment “shifts the burden of proof in a *Daubert* challenge.”

William Bonner, Esq. (EV-2021-0005-0407) submitted a comment identical to the one he submitted as Comment 0403.

Kathleen A. Farinas, Esq. (EV-2021-0005-0408) states that it is confusing for the preponderance of the evidence standard to be included only in Rule 702, when it applies to many other rules. She also contends that the proposed change to Rule 702(d) is so subtle that it will not be understood, especially in state courts.

Theile McVey, Esq. (EV-2021-0005-0409) contends that the proposed amendment establishes a “new standard” that “will only create more issues, more confusion, and prevent testimony that would otherwise assist a trier of fact in making an informed decision/verdict.”

Chris Finney, Esq. (EV-2021-0005-0410) states that “this rule change seeks to further degrade the 7th Amendment by removing and limiting the function of a jury in the USA. The continual limitations and assaults on the right to a jury trial are again represented in this rule change by taking power from a jury and putting in the hands of judges, thus encouraging and enabling judicial activism which both red and blue citizens dislike.”

Rip Andrews, Esq. (EV-2021-0005-0411) states: “This rule change violates the 7th Amendment. It puts judges in the place of juries. Juries are best equipped, by living in the real world, to judge the credibility of experts.”

Anonymous (EV-2021-0005-0412) states that the proposed amendment “invites the courts to engage in impermissible and unnecessary fact finding and creates an additional drag on the system that simply rewards big billers and increases costs for all.”

Jonathan V. O’Steen, Esq. (EV-2021-0005-0413) argues that the proposed changes to Rule 702 “elevate judges to fact finders, which increases litigation costs through additional extensive briefing and evidentiary hearings. This unnecessarily expands the role of judges in our civil justice system and introduces unnecessary delay.”

Peter E (EV-2021-0005-0414) asserts that “Federal courts are already a sinkhole for impecunious parties” and that the proposed amendment would necessitate minitrials that will further increase expense.

Daniel Sciano, Esq. (EV-2021-0005-0415) states that the rules on experts are working well and that the proposed amendment would lead to greater expenses of litigation.

Jane Mauzy, Esq. (EV-2021-0005-0416) opposes the proposed amendment, arguing that the current rules are working well, that the proposed amendment would lead to greater expenses, and that the “changes to Rule 702 would effectively take the jury's role of analyzing the weight and credibility of an expert and place it solely in the hands of the judge” in violation of the 7th Amendment.

Christopher Burke, Esq. (EV-2021-0005-0417) opposes the proposed amendment, arguing that it will

improperly increase the role of the judge in violation of the 7th Amendment.

Raphael Qiu, Esq. (EV-2021-0005-0418) posted a statement used by several others: “This will prevent good claims from being heard by juries. The impact on our clients will be unfair. The rule should not encourage courts to find facts. This will require expensive and time consuming hearings that will clog dockets and increase costs. State law will be affected too.”

Jeremy O’Steen, Esq. (EV-2021-0005-0419) complains that “[w]ithout explanation in the memorandum, the proposed amendment to Rule 702 shifts the burden of proof in a *Daubert* challenge from the party bringing the challenge to the party offering an expert’s testimony.” He also argues that the preponderance of the evidence standard improperly shifts factfinding authority to the court, and that the proposed amendment will lead to costly hearings and appeals.

M. Chad Gerke, Esq. (EV-2021-0005-0420) states that the proposed amendment “will keep juries from hearing cases, versus what is provided for in the Bill of Rights (7th Amendment) and what our founding fathers fought so dearly for.”

Stewart Gross, Esq. (EV-2021-0005-0421) contends that the proposed changes “elevate judges to fact finders, which increases litigation costs through additional extensive briefing and evidentiary hearings. This unnecessarily expands the role of judges in our civil justice system and introduces unnecessary delay.” He also complains that the committee note “directly questions the intellect of jurors.”

Lyle Warshauer, Esq. (EV-2021-0005-0422) opposes the amendment but states that if the rule is to be amended,

the preponderance of the evidence standard should be changed to “preponderance of the information.” According to him this is not a semantic difference, because the preponderance of the evidence standard has historically been tied to juror factfinding.

Peter Donovan, Esq. (EV-2021-0005-0423) asserts that “fact-finding must be left to the jury and not the Court and by adding this language it creates a slippery slope where the Court may overstep its authority and make findings of fact that should be left to the jury.” He also complains that the proposed amendment would lead to increased motion practice and more expenses of litigation.

Michael J. Warshauer, Esq. (EV-2021-0005-0424) argues that advocates of the rule have misstated and misrepresented the number of cases that have misapplied Rule 702; that advocates of the rule have never mentioned the 7th Amendment right to jury trial; and that the “preponderance of the evidence” standard violates the 7th Amendment while the “preponderance of the information” standard does not.

Bradley Boone, Esq. (EV-2021-0005-0425) opines that the preponderance of the evidence standard is “redundant” because it already applies to the Rule 702 admissibility requirements. He also recommends that the word “reliable” be struck from the amendment.

Eric Shapiro, Esq. (EV-2021-0005-0426) states that the current rules on experts work well, and that allowing the judge to be a factfinder in determining the admissibility of expert testimony likely violates the 7th Amendment.

Rhett Wallace, Esq. (EV-2021-0005-0427) contends that the preponderance of the evidence standard would allow the judge to be a factfinder and therefore it would erode the

rights protected by the 7th Amendment. He opines, however, that a standard of “preponderance of the available information” “maintains the trial court’s role as a gatekeeper while preserving the rights guaranteed by the 7th Amendment.”

Robert K. Poundstone, Esq. (EV-2021-0005-0428) argues that the proposed changes to Rule 702 “question the intellect of jurors” and would lead to extensive hearings that would increase the cost of litigation.

Martzell, Bickford & Centola (EV-2021-0005-0429) opposes the amendment, arguing that adding the preponderance of evidence standard is unnecessary because it already exists in the rule. Their concern is that if the standard is added to the text, this could lead to a perception of a heightened or “enhanced” burden of a plaintiff to have expert testimony admitted as evidence, “which could confuse a trial court and ultimately act as a bar to have plaintiffs’ experts heard by a jury, and could potentially cause courts to conflate their role as a gatekeeper on the admissibility of expert testimony with a trial on the merits.”

Wayne Parsons Esq. (EV-2021-0005-0430) states that adding the preponderance requirement to the text of the rule is “superfluous” because it already applies, and therefore any such addition might be interpreted “to subtly instruct the courts to grant more motions barring testimony of experts.” He also argues that the proposed amendment and committee note are demeaning to jurors.

Virgil Adams, Esq. (EV-2021-0005-0431) states: “The proposed change is totally unnecessary and will unfortunately place trial judges in the position of being judge AND jury in determining whether sufficient facts have been proven by a preponderance of the evidence. This will only lead to more confusion and more appeals.”

James Fowler, Esq. (EV-2021-0005-0432) recommends that the Committee “should reject any proposed amendment that would conflate the jury’s factfinding duties with the court’s role as gatekeeper relative to expert testimony.” He asserts that the proposed amendment “would prevent meritorious claims from being heard by juries and require expensive and time consuming hearings that would cause congestion to court’s dockets and increase costs on litigants.”

Dylan Scilabro, Esq. (EV-2021-0005-0433) states that “[o]ut of respect for the 7th amendment of the constitution, the credibility and weight of witness testimony need only be assessed by a jury, not a judge.” He also suggests that if the amendment is enacted, it “will absolutely call into question the duty of impartiality that our judges maintain and will put them in a position where their character may be called into question.”

Douglas Loefgren, Esq. (EV-2021-0005-0434) states that the proposed amendment “effectively turns a judge into a jury and further erodes the right to trial by jury.” He believes that the right to jury trial “is one of the key things that separates our country from most others and makes it truly great.”

Lauren Newton, Esq. (EV-2021-0005-0435) states that expert witnesses are already expensive for injured parties, and that the proposed amendment “will increase the burden on judges and lawyers and further deny justice.”

Stevie N. Scotten, Esq. (EV-2021-0005-0436) contends that the proposed changes to Rule 702 “directly question the intellect of jurors” and will lead to expensive hearings and delays designed to “elevate trial judges to fact-finders.”

Lawrence A. Anderson, Esq. (EV-2021-0005-0437) opposes the proposed amendment on the ground that the preponderance of the evidence standard improperly turns the court into a factfinder. He further contends that the preponderance of evidence standard is contrary to the Supreme Court’s decision in *Bourjaily v. United States*, because in that case the Court distinguished the trial court’s rule in evaluating evidentiary admissibility from the jury’s rule in determining whether the burden of proof (of guilt) was met.

Kevin Swenson, Esq. (EV-2021-0005-0438) argues that the proposed amendment “ shifts a significant portion of the fact finder role from the jury to the judge.” He also argues that the proposed amendments would make it longer and more expensive to get a case to a jury because all expert issues “would need to be tried twice.”

M. Raymond Hatcher, Esq. (EV-2021-0005-0439) argues that the current Rule 702 works very well, and if, as the proposed committee note says, the amendment does not change the prerequisites of the rule, there is therefore no reason to change the text.

Ryan Skiver, Esq. (EV-2021-0005-0440) opposes the proposed amendment, because it would mean “that the judge would be deciding the facts instead of the juries” and it would allow the judge to simply “pick sides.”

Bryce Montague, Esq. (EV-2021-0005-0441) states that the proposed amendment “would shift the responsibility of deciding the facts in a case to a judge instead of the juries. This would negatively impact plaintiffs as this could lead to exclusion of all of their experts, which could also lead to the failure of meeting their burden of proof.”

Joshua D. Payne, Esq. (EV-2021-0005-0442) states that the proposed amendment “would wrongly encourage courts to find facts, assessing the correctness of an expert’s opinion rather than whether they have met the threshold requirements of Rule 702.” He also argues that the amendment would lead to expensive hearings that would clog dockets.

The Democracy Forward Foundation (EV-2021-0005-0443), an organization working to show that independent science can inform public decisionmaking without political interference, supports the proposed amendment to Rule 702. The Foundation strongly agrees with the committee note comments on forensic expert testimony. It states that the Note “is correctly pointing out that courts must be attentive to their longstanding gatekeeping function to prevent juries from receiving evidence that has no scientific basis.” It suggests that the Note clarify that the requirements set forth are questions of admissibility and not weight. It concludes that “[e]nsuring that forensic expert evidence meets a minimum standard of reliability is essential to preventing the unjust conviction of innocent people and to promoting public confidence in the judicial system.

Alan Van Gelder, Esq. (EV-2021-0005-0444) contends that the proposed amendment will require expensive hearings that will clog dockets. He also contends that the proposed amendment “will result in a miscarriage of justice and disproportionately fall on those most in need of the civil justice system.”

Peter Cerilli, Esq. (EV-2021-0005-0445) states that the proposed amendment “will effectively create costly and more lengthy multi-level trials, first before a judge weighing the preponderance of forensic expert evidence, and then

before the jury itself” and that the costs of additional hearings “will further deter litigants from pursuing their jury trial rights.”

Kurt D. Maahs, Esq. (EV-2021-0005-0446) criticizes the proposed amendment on the ground that it shifts fact-finding authority from the jury to the court in violation of the 7th Amendment. He also complains that the proposed committee note “directly questions the intellect of jurors.”

David J. Llewellyn, Esq. (EV-0005-0447) states, identically with other comments, that: “The phrase ‘preponderance of the evidence’ is inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis.”

Maegen Peek Luka, Esq. (EV-2021-0005-0448) contends that the proposed amendment violates *Daubert* because that case prohibits a court from evaluating the application of the expert’s methodology (though the text of Rule 702 requires such a review). She complains that the amendment would violate the right to a jury trial because it gives the judge the power to find facts. She states that the authors of language in the committee note “should be ashamed” for demeaning the power of jurors to understand when an expert’s opinion may be overstated. She concludes that the amendment is so offensive that it will “tread on the rights our forefathers stressed were critical to the foundation of this nation.”

William Bacon, Esq. (EV-2021-0005-0449) objects that the proposed amendment turns the judge into a factfinder, that it will increase the expenses of litigation, that it will add delays, and that it will have a negative effect on the states.

Karl Pearson, Esq. (EV-2021-0005-0450) opposes the amendment on the ground that the preponderance of the evidence standard “allows judges too significant of a gatekeeping role at the expense of jurors who are charged with deciding cases.”

Michael Beard, Esq. (EV-2021-0005-0451) predicts that the proposed amendment will lead to delays, clogged dockets, and greater expenses. He also states, identically with other posted comments, that the judge should not be allowed to take up the “mantel of juror.” Finally, he states that the proposed amendment “coupled with the abuse of discretion standard of review opens the real possibility that judges assume too much control over trials and impose their view of the merits (i.e., through consideration of expert conclusions) of a case instead of allowing juries to decide cases.”

Elise R. Sanguinetti, Esq. (EV-2021-0005-0452) contends that the proposed amendment will erode the right to jury trial by transferring factfinding power to the court; that it will lead to expensive hearings and clogged dockets; and that it will have a negative effect on the states.

Joseph King, Esq. (EV-2021-0005-0453) objects to the proposed amendment on the ground that it imposes “another level of factfinding by the trial court.”

Lance Entrekin, Esq. (EV-2021-0005-0454) complains that the proposed amendment shows a “complete contempt” for jurors, and concludes that “[w]e do not need yet another pretext for judges to prevent jurors from hearing testimony offered by adequately qualified and adequately foundationed expert witnesses.”

Bryan Baer, Esq. (EV-2021-0005-0455) believes that the amendment will lead to confusion. He states that the

preponderance of the evidence standard is “a standard for the finder of fact” whereas an evidentiary ruling is one of “law.”

Craig J. Simon, Esq. (EV-2021-0005-0456) opines that the proposed amendment violates the right to trial by jury because it shifts factfinding power to the judge; that it demeans the intelligence of jurors; and that it will lead to clogged dockets and costly hearings.

Andrew Nebenzahl, Esq. (EV-2021-0005-0457) is concerned that the proposed amendment will negatively affect the flexibility mandated by *Daubert*. He also recommends that the phrase “preponderance of the evidence” should be deleted.

Jarred McBride, Esq. (EV-2021-0005-0458) objects to a paragraph in the committee note that “questions the intellect of jurors.”

Stephen Becker, Esq. (EV-2021-0005-0459) disagrees that courts have been misapplying *Daubert* and Rule 702. He argues that the proposed changes to Rule 702 allow district judges “to decide not merely whether they find that the expert's opinions have a sufficiently sound basis but whether judges believe the expert's opinions are more likely true than not true.”

Gary M. DiMuzio, Esq. (EV-2021-0005-0460) opposes the proposed changes to Rule 702. He argues that the change to Rule 702(d) will encourage the judge to become “an amateur scientist” who will decide “who is right.” He opposes the preponderance of the evidence standard, fearing that it will be used by defendants to argue for a “higher standard.”

Trysta Puntteney, Esq. (EV-2021-0005-0461) states that the preponderance of the evidence standard applies to

the jury and not to the judge. She also opines that the proposed amendment demeans jurors.

The National Association of Criminal Defense Lawyers (EV-2021-0005-0462) “enthusiastically supports the Committee’s proposed clarification” in the proposed amendment, “given the existing confusion among the lower federal courts as to the proper standard for admitting expert testimony.” NACDL states that “the need to exclude unreliable or dubious evidence is particularly acute in the criminal context” because witnesses have testified in “spurious fields of expertise” resulting in wrongful convictions. NACDL agrees that judicial gatekeeping is essential because of the risk that jurors may be unable to assess whether the conclusions of an expert go beyond what the basis and methodology supports.

Anonymous (EV-2021-0004-0463) states that the preponderance of the evidence standard “appears to put a trial court judge firmly in the place of a juror on an issue of fact” and that “an unjustly high standard will prevent litigants from being able to access justice on issues of fact through the means the Constitution intended: through a trial by a jury of their peers.”

Hunter W. Lundy, Esq. (EV-2021-0005-0464) opposes the proposed amendment on the ground that it is “taking away the fact-finding duties of the jury.”

Crane, Phillips & Rainwater, PLLC (EV-2021-0005-0465) opposes the amendment, arguing that it erodes the factfinding duties of the jury and that it will create a trial within a trial.

Charles Williamson, Esq. (EV-2021-0005-0466) states that “Rule 702 is perfectly fine as it is, and adding

another step to the courthouse is nothing more than a dilatory tactic, unilaterally favoring the defendants, who as a matter of course throw whatever stones they can to force a settlement for pennies on the dollar.” He concludes that the asserted problems in applying the rule are “espoused by the Defense Bar, who has the money for lobbying efforts.” He states that the proposed amendment “promotes nothing more than the continued destruction of American citizens' rights to a fair trial beneath the boot of corporate greed. Do not be deceived!”

Professors Richard Jolly and Valerie Hans (EV-2021-0005-0467) take no position on the text of the proposed amendment but object to language in the proposed committee note stating that jurors may be unable to assess whether an expert’s conclusion reflects a proper application of basis and methodology. The professors argue that the language is unnecessary to support the rule, and underestimates the ability of jurors as demonstrated in some empirical studies.

Dennis E. Murray, Esq. (EV-2021-0005-0468) concludes, in language identical to other public comments: “The proposed amendments and the comments would circumvent the law, the judiciary and the very purpose of the rules and should be rejected entirely.”

Brian Snyder, Esq. (EV-2021-0005-0469) contends that the proposed amendment is “another example of a rule that is not necessary and that will negatively affect only plaintiffs” and states that if the proposed amendment is enacted, “the fundamental right to a civil trial by jury will be in peril.”

William C. Ourand, Esq. (EV-2021-0005-0470) relies on John Adams’s quote: “Representative government and trial by jury are the heart and lungs of liberty. Without

them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds.” He also states that the amendment is contrary to *Daubert*, which states that the court should review only the expert’s methodology.

Michael Bryan Slaughter, Esq. (EV-2021-0005-0471) argues that the proposed amendment threatens the constitutional right to a jury trial, and will lead to extra expenses of litigation.

Waters & Kraus (EV-2021-0005-0472) believe that the proposed amendment’s use of the term “preponderance of the evidence” means “preponderance of the admissible evidence” even though it is referring to a judge’s determination in a Rule 104(a) hearing. Working with that assumption, the firm concludes that many experts, such as those employing a differential diagnosis, will be excluded because they will be relying in part on inadmissible evidence.

Lincoln Combs, Esq. (EV-2021-0005-0473) argues that the demands on expert testimony already impose unjustified expense, and that the proposed amendment will just make it worse. He believes that the proposed amendment is inconsistent with the constitutional right to a jury trial.

Matthew MacLeod, Esq. (EV-2021-0005-0474) opposes the proposed amendment, stating that it “raises the specter of protracted litigation and delay when unnecessary, and blurs the duties and obligations of judge and juries.”

Brian Leonard, Esq. (EV-2021-0005-0475) predicts that if the proposed amendment is adopted, “the traditional role of jurors will be weakened, opening the door to further erosion. Further, the proposed amendments will surely result in unnecessary delay and undue expense.”

Bob Schuster, Esq. (EV-2021-0005-0476) opposes the proposed amendment. He argues that the real risk is not that juries are being “hornswoggled” by experts. Instead, the real risk is that “we get farther and farther away from justice, that the cottage industry that has formed around *Daubert* and other expert witness challenges only gets larger, that the motions get thicker, and the trial delays get extended.”

Patrick A. Salvi, II, Esq. and Salvi Schostok & Pritchard (EV-2021-0005-0477) oppose the amendment, concluding with language offered in other posted comments: “The proposed amendments and the comments would circumvent the law, the judiciary and the very purpose of the rules and should be rejected entirely.”

Gary McCallister, Esq. (EV-2021-0005-0478) states that the preponderance of the evidence standard improperly alters the balance between the court and the jury, but that a preponderance of the information standard would be acceptable.

Frederick Berry, Esq. (EV-2021-0005-0479) states that the preponderance of the evidence standard “will force the trial court to take on the untraditional role of a fact finder where the matter will eventually be resolved by a jury.”

Charles E. Soechting, Jr., Esq. (EV-2021-0005-0480) argues that the proposed amendment would “disrupt the safeguards as built into the checks and balances between the judiciary and the jury which threatens the rights of the parties, significantly.” He also claims that the amendment would lead to a clog in the courts.

Husch Blackwell, LLP (EV-2021-0005-0481) supports the proposed amendment to Rule 702. It states that “[t]he distinction between weight and admissibility has become so prevalent that it has effectively lost all meaning,

giving courts carte blanche to disregard issues which strike at the very heart of an expert’s reliability.” It concludes that “[a]mending Rule 702 to place the focus back on the courts’ gatekeeping function will not only force litigants to contend with the flaws in their experts’ testimony, but it will likewise require courts to clarify and articulate the actual standards of admissibility.”

George L. Garrow, Jr., Esq. (EV-2021-0005-0482) opposes the amendment, arguing that the preponderance of the evidence standard will “remove the jury from the job of being fact-finder” --- but the “preponderance of information” standard will not.

Frances Lynch, Esq. (EV-2021-0005-0483) opposes the proposed amendment, arguing that “it will take decisions out of the hands of jurors. This is incorrect and unconstitutional.” He states that the term “preponderance of the evidence” is “connected with fact finding and the weighing of evidence – a job for the jury.”

Patrick J. Wagle, Esq. (EV-2021-0005-0484) opposes the amendment because it “makes it more difficult for a plaintiff’s experts to be heard by the jury.” He also claims that amending Rule 702 to require “evidence” means that only admissible evidence can be presented in support of an expert, even if it is permissible for the expert to rely on inadmissible information in forming his or her opinions.

Andrew Mahoney, Esq. (EV-2021-0005-0485) opposes the proposed amendment, stating that it “will cause confusion and lead to the exclusion of qualified experts in addition to creating far more work and making it more difficult and costly for injured parties to have their shot at justice in trial.”

Ilya E. Lerna, Esq. (EV-2021-0005-0486) claims that the proposed amendment “directly conflicts with Rule 104 in the case of expert testimony and binds the court to the rules of evidence in preliminary matters of admissibility.” He also concludes that “this amendment invades the jury’s role in evaluating and making the final determination of correctness of expert testimony.”

Mark Breyer, Esq. (EV-2021-0005-0487) opposes the proposed amendment because it turns the judge into a factfinder. He states that “if we are going to set up a rule that is fair to all sides it is far better to set one up where error is likely to be reviewed (allowing an expert) than a standard that is likely to potentially prevent a meritorious case from being heard.”

Sean McGarry, Esq. (EV-2021-0005-0488) opposes the proposed amendment, arguing that it “contradicts the purpose of Rule 102 because it would create additional delays caused by extensive briefing and evidentiary hearings, increase costs for parties, and invite appeals on trial court decisions.” He also argues that the proposed amendment infringes upon the 7th Amendment because it turns judges into factfinders.

Jarrod Burch, Esq. (EV-2021-0005-0489) states: “Rule 702 is effective at keeping junk science from being presented to the jurors. The change would also create the need for more hearings/ vetting of experts by the courts that will clog dockets and increase case expenses, as well as unfairly toss more plaintiff claims.”

Lynn Shumway, Esq. (EV-2021-0005-0490) fears that “many trial court judges will interpret the proposed rule to require them to decide between the plaintiff and defendant expert evidence as being admissible and actually take the

case away from the jury by deciding which expert has shown the preponderance of the evidence.”

Brian LaCien, Esq. (EV-2021-0005-0491) opposes the proposed changes to Rule 702 on the ground that they will cause trial delays and they “only seek to tip the scale in favor of excluding expert testimony.”

Sheila L. Birnbaum, Esq. and Mark Cheffo, Esq. (EV-2021-0005-0492) support the proposed amendment to Rule 702. They state that the inclusion of the preponderance of the evidence standard is a “clarification” that will provide “much-needed guidance to both parties and courts and help ensure consistency and predictability in how Rule 702 is applied.” They argue that “this predictability is particularly important in MDLs, where inconsistent application of the same rule sows confusion and undermines the uniformity that MDLs exist to create.” They support the suggestion that “the court determines” should be added to the text to emphasize that it is the court’s obligation to rule on expert testimony upon an objection. They disagree with the concerns that “the changes will confuse the courts or mislead them into assessing expert testimony more aggressively than under the current rule.” They contend that “judicial overreach has not been a problem in assessing the reliability of expert testimony and, in fact, more consistent judicial involvement will be welcome to the extent it aims to ensure uniformity and, more importantly, the presentation of sound science to the jury.”

John Michaels, Esq. (EV-2021-0005-0493) opposes the amendment, seeing no need for a change to the current practices regarding the admissibility of expert testimony.

Zacharay Mushkatel, Esq. (EV-2021-0005-0494) opposes the amendment, stating that “inviting judicial officers to apply a legal standard to fields of science,

medicine or any specialty necessarily invites them to evaluate evidence -- a forum strictly intended for jury consideration and NOT judicial officers.”

William A. Rossbach, Esq. (EV-2021-0005-0495) thinks that the term “preponderance of the evidence” must mean “preponderance of the admissible evidence” --- leading to an internal contradiction with Rule 104(a) which provides that the court is not bound by rules of evidence. He suggests that this conundrum is solved by changing the word “evidence” to “information.”

Mary Raybon, Esq. (EV-2021-0005-0496) opposes the proposed amendment, declaring that it “would have a chilling effect on courts, who would in essence be able to go beyond their rule as gatekeepers and instead become like that of a juror.”

Kristine Keala Meredith, Esq. (EV-2021-0005-0497) states that the proposed amendment would lead to “side litigation” and that it would improperly transfer factfinding from the jury to the court.

Aaron Eiesland, Esq. (EV-2021-0005-0498) states that that “the proposed changes to FRE 702 would only erode the protections provided for in the United States Constitution and outsource these civil liberties to unanswerable parties.”

James E. Coogan, Esq. (EV-2021-0005-0499) is “not in favor of the addition of the preponderance standard because FRE 702 already sets forth specific requirements for the expert’s opinion to be admissible.” He states that “it’s not abundantly clear why adding the standard to this rule (duplicative of 104(a)) is going to rectify those erroneous rulings” that give rise to the amendment. He approves of the paragraph in the committee note rejecting the requirement

that the expert’s opinion must do more than merely “help” the jury, because, in his experience, the idea that the opinion must do more than “help” has been “an improper bar to expert testimony.”

Josh Autry, Esq. (EV-2021-0005-0500) opposes the proposed amendment and the committee note. He concludes that “the proposed amendment does not substantively change the rule, but nevertheless gives defense counsel an added tool in their arsenal to seek unwarranted exclusion of plaintiffs’ experts and to cast doubt on decades of binding caselaw by the Courts of Appeals and by the Supreme Court itself.”

Amy Hernandez, Esq. (EV-2021-0005-0501) opposes the proposed amendment to Rule 702 and joins the comments of Michael Warshauer (Comment 0424).

Tyler J. Atkins, Esq. (EV-2021-0005-0502) is “very concerned that the proposed changes to the rule would unduly invade every party’s right to a trial on the merits by effectively transforming the judge into a pretrial factfinder.”

Grace Babcock, Esq. (EV-2021-0005-0503) opposes the amendment, stating that juries, and not judges, “are in the best position to determine the weight afforded to an expert’s work.” She claims that “[t]he law requires a party challenging an expert to prove the unreliability of the expert and her work, but the proposed amendment shifts that burden to the party offering the opinion instead.”

Colin M. Simpson, Esq. (EV-2021-0005-0504) opposes the proposed amendment, on the grounds that it will shift factfinding authority from the jury to the court, it will impose an additional hurdle for plaintiffs, and it will create problems in state courts. He also objects to the committee note’s reference to the possibility that the jury may not be

able to assess whether the expert's opinion accurately reflects the basis and methodology.

Anonymous (EV-2021-0005-0505) supports the proposed amendment to Rule 702, stating that by including the standard of proof in the text, "the rule helps to create standardization across all courts."

Rachel A. Fuerst, Esq. (EV-2021-0005-0506) objects that the proposed amendment will increase litigation expenses and clog dockets, to the detriment of the indigent.

Mark Schultz, Esq. (EV-2021-0005-0507) states: "The jury is instructed as to the burden of proof as to each element of a cause of action or crime. Placing a separate burden on expert testimony and taking it away from the jury is contrary to American jurisprudence."

A.J. de Bartolemeo, Esq. and Brian R. Morrison, Esq. (EV-2021-0005-0508) object to the preponderance of the evidence standard as it could "force the court to take over the jury's role in deciding whether an expert is 'correct' in his or her opinion." They argue that the change to Rule 702(d) will allow defendants to argue that an expert's opinion should be excluded because it is "unpopular, even if it is not extravagant."

Brian Franciskato, Esq. (EV-2021-0005-0509) opposes the proposed amendment to Rule 702. He states that "[t]he U.S. Constitution and the current Federal Rules, require the jury to consider the evidence and make their decision based on the preponderance of the evidence. Having an additional procedure for a judge to consider the evidence, under the same standard, is unconstitutional, in violation of the 7th Amendment right to a jury trial." He also predicts that the amendment would lead to greater costs on plaintiffs.

American Property Casualty Association (EV-2021-0005-0510) analyzes some cases decided during the public comment period and concludes that “Courts are not consistently applying FRE 702 to require that expert evidence meet each of the Rule’s admissibility requirements by the preponderance of the evidence standard.” It supports the clarification of adding a preponderance of the evidence standard to the text of Rule 702. It suggests that the rule be further clarified by stating that the court must determine admissibility.

Jennifer L. Joost, Esq. (EV-2021-0005-0511) objects to the term “preponderance of the evidence” and states that “if Rule 702 is amended as currently proposed, the burden of any confusion caused by the use of the word ‘evidence’ instead of the more accurate word, ‘information,’ will be borne by plaintiffs.”

Robin Greenwald, Esq., Ellen Relkin, Esq., and James Bilsborrow, Esq. (EV-2021-0005-0512) believe that “the proposed amendments make it more likely that courts will be compelled to pick a winner rather than serving as a gatekeeper for reliable expert testimony.” They opine that a preponderance standard implies a comparative inquiry, i.e., that the plaintiff’s experts must be better than the defendant’s experts. They also contend that the amendment to Rule 704(d) would “require the parties to litigate what is the correct opinion, potentially stripping this ultimate issue from the jury.”

Leah Snyder, Esq. (EV-2021-0005-0513) states that the proposed amendment will lead to burdens on expert testimony that “only a professional witness could overcome.” She claims that the proposed amendment would lead to greater expense, and dismissal of meritorious claims by plaintiffs.

Rudolph Migliore, Esq. (EV-2021-0005-0514) states that “[a]dding another standard will only further complicate the judge's already complex task under the law and lead to more litigation and appeals related to how the standard is to be applied in this context.”

Frederick S. Longer, Esq. (EV-2021-0005-0515) opposes the proposed amendment to Rule 702, opining that “the introduction of the preponderance standard is hardly a clarification, but a direct effort to change the existing preponderance of information standard.”

J. Randolph Pickett, Esq. (EV-2021-0005-0516) states that “[t]he idea that the judge should act as a fact finder, and weigh evidence prior to the jury's consideration, is yet another example of further erosion of the right to jury trial.”

Michael Hanby, Esq. (EV-2021-0005-0517) is “concerned that the ‘preponderance of evidence standard’ improperly takes away the jury’s role in deciding claims. The party seeking to introduce expert testimony will essentially have the burden of presenting their evidence twice—once in front of the judge and once in front of the jury. This will needlessly result in extra work and time for the court.”

Yvonne M. Flaherty, Esq. (EV-2021-0005-0518) declares that “[i]mposing a preponderance of the evidence standard effectively requires the parties to first try their case to the Court and, if the Court sides with the Plaintiff’s expert, then the parties proceed to a second trial to a jury.”

Michael J. Donahue, Esq. (EV-2021-0005-0519) declares that the proposed amendment “conflates the jury’s fact-finding duties with the court’s role as gatekeeper

relative to expert testimony. If this proposed amendment is adopted, some courts will conclude that a new, additional hurdle to admissibility must be imposed.”

Lauren G. Barnes, Esq. (EV-2021-0005-0520) opposes the proposed amendment, stating that “not only does it risk usurping the function of the jury, but the rule change also invites delay in litigating cases.”

Theresa M. Blanco, Esq. (EV-2021-0005-0521) opposes the amendment. She states that the preponderance of the evidence standard “will have the practical effect of making judges factfinders, thereby usurping the role of the jury” and it will increase costs for plaintiffs.

Carlos F. Llinas Negret, Esq. (EV-2021-0005-0522) opposes the amendment, arguing that *Daubert* and Rule 702 are working well and there is no need to upset longstanding precedent.

Ellis & Thomas, PLLC (EV-2021-0005-0523) states, in language identical to many other comments: “This will prevent good claims from being heard by juries. The impact on plaintiffs will be unfair. The rule should not encourage courts to find facts. This is an unfair shift of the burden. This will require expensive and time consuming hearings that will clog dockets and increase costs. State law will be affected too.”

Melanie L. Ben, Esq. (EV-2021-0005-0524) opposes the amendment. She states that it “will be extremely inefficient and will cause the work load to unnecessarily and inefficiently shift the tasks from the jury to a judge.”

U.A. Lewis, Esq. (EV-2021-0005-0525) contends that the proposed amendment “will prevent juries from deciding claims, even the really good claims,” and deprive jurors of

“additional means to allow the people to have a say in what justice means in the US.” He warns that “[i]f a person cannot look forward to their day in court before an impartial jury as the finder of fact, then it may result in not waiting for the court at all, and taking matters into their own hands.”

Stuart Ollanik, Esq. (EV-2021-0005-0526) opposes the proposed amendment, arguing that it “provides a statement of burden of proof not supported by the case law, and inconsistent with the proper role of the trial court as gatekeeper of expert evidence, which is to determine whether a proper foundation has been laid, not to weigh testimony of competing experts and determine which side wins.” He contends that the rule will lead to increased expenses of litigation.

Trent Shuping, Esq. (EV-2021-0005-0527) opposes the amendment on the ground it will “perhaps require the judge to usurp the constitutional role of the jury.” He concludes that under the amendment “it will no longer be necessary to simply demonstrate the admissibility of evidence under the rules, but it will be necessary to first fully persuade judges as to the truth of the underlying facts and the expert’s conclusions.”

Timothy A. Loranger, Esq. (EV-2021-0005-0528) states that the proposed amendment “only encourages further departure from the bedrock principle, enshrined in the 7th Amendment, that facts and controversies be decided by a jury.”

Andre Archuleta, Esq. (EV-2021-0005-0529) states that the amendment “will make the process extremely inefficient” and that “the amendment takes one of the main jobs of the jury, weighing an expert’s opinion away.”

Stephen J. Herman, Esq. (EV-2021-0005-0530) states that under the proposed amendment “Judges seem encouraged to err, in difficult cases, on the side of excluding testimony, and keeping it hidden from the jury’s consideration.”

Chase Ruffin, Esq. (EV-2021-0005-0531) believes that the proposed amendment “will invite trial court judges to usurp the role of juries by weighing the ultimate credibility of expert opinions under the guise of ‘reliability’ determinations.” He believes that this will result in inconsistent and unpredictable rulings on expert admissibility.

Public Justice (EV-2021-0005-0532) contends that a reference to preponderance of the “evidence” will be interpreted to mean “admissible evidence” and so objects to that term. Public Justice also counsels against adding criticisms of individual cases to the committee note. It also contends that “the court determines” should be kept out of the text, arguing that including the language “will engender a cottage industry of disputes as to the nature of the findings that the Rule is requiring. Judges know when findings are necessary. They should not be required to tie up their time and litigants’ time with the inevitable ‘findings hearings’ when they are unnecessary.”

Sara Silzer, Esq. (EV-2021-0005-0533) opines that the proposed changes to Rule 702 “are not necessary or helpful, particularly given that they may create inconsistency in how state evidence rules are applied. They seem to encourage judges to become fact finders when determining the admission of expert testimony while having the appropriately more limited traditional role of being ‘just the judge, not the jury’ as to all other evidentiary rulings.”

Summary of Hearing Testimony

1. **Rebecca E. Bazan, Duane Morris LLP (Support for Rule 702 Amendment)**

Ms. Bazan testified in support of the proposed amendment to Rule 702. She noted problematic trends in which Rule 702 is misapplied in life sciences and toxic tort cases where expert testimony is crucial. Ms. Bazan explained that speculative and unreliable testimony is deemed admissible and is passed on to the jury, with any reliability problems going to the weight of the testimony. Ms. Bazan contended that litigants are willing to file weaker cases knowing that they may be able to get past summary judgment and extract a settlement. Ms. Bazan opined that the proposed changes to Rule 702 would reaffirm the trial judge's gatekeeping function through specific reference to the preponderance standard. She thought that the amendment would cut down on the filing of specious cases, would keep unreliable expert testimony from the jury, would streamline the issues that make it to trial, and would produce more accurate settlement assessments.

2. **Douglas K. Burrell, DRI Center for Law & Public Policy (Support for Rule 702 Amendment)**

Mr. Burrell testified on behalf of the DRI Center for Law & Public Policy, a think-tank that undertakes in-depth studies on issues including rules changes. He stated that the Center strongly supports the proposed amendment to Rule 702 and appreciates the Advisory Committee's lengthy work on the subject. In particular, Mr. Burrell expressed support for the proposed amendment to Rule 702(d) requiring an expert's opinion to reflect a reliable application of principles and methods. He explained that the amendment is necessary

because many federal decisions rely upon stale precedent that preceded the 2000 amendment to Rule 702 in turning the reliability of the expert's ultimate opinion over to the jury. Mr. Burrell also explained that several pre-2000 federal opinions erroneously state that there is a "presumption in favor of admitting expert opinion testimony" that undermines the trial judge's gatekeeping role and the preponderance standard. He suggested that the Committee add sentences to the proposed Advisory committee note as follows: "Rule 702 neither favors nor disfavors the admissibility of expert testimony. Prior statements of a heightened standard or of a presumption in favor of admissibility are erroneous."

3. Larry E. Coben, Anapol Weiss (Opposes Rule 702 Amendment)

Mr. Coben offered testimony in his capacity as a trial lawyer and on behalf of a nonprofit organization of civil lawyers that represents consumers in products liability cases. He argued that Rule 702 provides appropriate boundaries for the admission of expert testimony as currently drafted and that the existing Rule allows juries to decide disputed cases. Mr. Coben suggested that criticism of federal courts applying the existing standard is misplaced, noting that a trial judge who fails to mention the preponderance standard expressly may nonetheless apply it correctly. He expressed concern that adding a preponderance standard to the text of Rule 702 would lead trial judges to confuse the admissibility question with a proponent's burden of proof on the merits. Further, he suggested that the standard, if added, should not read a "preponderance of the *evidence*" because trial judges need not rely on admissible evidence in determining admissibility (he suggested this was in conflict with Rule 703). Rather it should reference a "preponderance of the information." Finally, Mr. Coben suggested that the amendment must do

more than “clarify” existing standards to draw the public response that has occurred, and that it will be interpreted as a substantive change to the Rule 702 standard. He predicted that the amendment would produce an avalanche of new legal arguments that would expand litigation and would convert trial judges into the thirteenth juror.

4. Alex R. Dahl, Lawyers for Civil Justice (Support for Rule 702 Amendment)

Mr. Dahl testified on behalf of LCJ in support of the proposed amendment to Rule 702. According to Mr. Dahl, extensive LCJ research shows widespread misunderstanding of Rule 702. He offered two recommendations to improve the proposed amendment and to ensure that judges and litigants appreciate the clarifications being made. First, the Committee should reinsert the “if the court finds” language into the text of the proposed amendment to clearly signal that it is the judge and not the jury who evaluates all the requirements of Rule 702. He suggested that adding the preponderance standard to the text is helpful but still relies on the reader to infer that the judge applies it. Second, the amendment should expressly reject the caselaw that is inconsistent with the amendment by adding references to problematic cases (*Loudermill*, et. al) to the committee note. He opined that such a specific rejection of stale precedent would not serve as a “rebuke” to Federal judges, but rather would help judges get it right by avoiding precedent inconsistent with the Rule 702 standard.

5. Gardner M. Duvall, Whiteford Taylor Preston LLP (Support for Rule 702 Amendment)

Mr. Duvall testified in support of the proposed amendment to Rule 702. He explained that there is conflicting federal precedent on the application of Rule 702, much of which

fails to follow the proper process for admitting expert testimony. Many federal opinions cite back to pre-2000 precedent and admit expert testimony in areas that have been admitted previously, more in keeping with the *Frye* standard than the *Daubert* approach. He suggested that the Advisory Committee has identified a pervasive problem with federal courts passing on reliability inquiries to juries.

6. Ronni E. Fuchs, Troutman Pepper (Support for Rule 702 Amendment)

Ms. Fuchs represents clients in mass tort and products liability cases largely focused on the proper application of Rule 702. She testified to the profound effect of unpredictability in the operation of Rule 702 on rational client decision-making. Ms. Fuchs' clients require information about admissibility standards and likely outcomes to make rational decisions about investing significant resources in the process to qualify and challenge expert witnesses. She opined that a common understanding of the burden of proof with respect to admitting expert testimony is critical. Because federal judges do not apply the Rule 702 standard consistently, common understanding and predictability are lacking. Some federal courts find that Rule 702 liberally favors admission and provides a presumption against excluding an expert. Others hold that reliability issues go to the weight of the evidence and should be passed on to juries. Ms. Fuchs' stated that predictability is critical for *all* parties involved in litigation and that the amendment would offer important clarification to correct pervasive misunderstandings that would allow clients to make rational decisions about litigation investment.

7. James Gotz, Hausfeld LLP

Mr. Gotz represents plaintiffs in pharmaceutical, mass tort, and environmental cases. He offered suggestions about the Advisory committee note accompanying the proposed amendment to Rule 702. Specifically, while he praised the draft note language clarifying that certain issues will go only to the weight of an admissible expert opinion, he expressed concern that examples of matters affecting weight in the draft note could be perceived as *always* affecting only weight and as the *only* matters affecting weight. He urged the Committee to add language to the note clarifying that determining weight versus admissibility is a holistic, context-driven analysis requiring case-by-case determinations. He suggested the following sentence: “Whether a challenge is a matter that goes to weight or admissibility is necessarily a case-specific decision.” Furthermore, he noted that the committee note to the 2000 amendment to Rule 702 offered very helpful guidance for trial judges exercising their gatekeeping authority and that the note and the post-2000 precedent applying it could be perceived to have been “overruled” by a 2023 amendment to Rule 702. To avoid this perception, Mr. Gotz suggested adding another sentence to the draft committee note, as follows: “Because Rule 702 is being clarified is and not changed, the Advisory Committee note to the 2000 amendment should continue to be used.”

8. Wayne Hogan, Terrell Hogan Yegelwel P.A. (Opposes Rule 702 Amendment)

Mr. Hogan argued that the amendment would risk the abridgment of the right to trial by jury. He opined that the text of the proposed rule utilizes incorrect language when it directs trial judges to decide on admissibility requirements by “a preponderance of the *evidence*.” He argued that

requiring use of “evidence” is inconsistent with Rule 104(a), which permits judges to consider even inadmissible information in determining admissibility. He stated that the amendment should not rely on note language to make that distinction clear and argued that the text of the proposed amendment should be altered to require a decision based upon a “preponderance of the *information*.” Mr. Hogan noted that many states adopt the language of the Federal Rules of Evidence without accompanying Advisory committee notes and that it is crucial to ensure that proper meaning is conveyed in rule text and not in committee notes.

9. Katie R. Jackson, Shook Hardy & Bacon L.L.P. (Support for Rule 702 Amendment)

Ms. Jackson testified concerning her lengthy research project on the application of Rule 702 in her capacity as a fellow for Lawyers for Civil Justice. She reported that she reviewed over 1,000 federal cases and authored a report, which was filed with the Advisory Committee. Her research produced several findings. First, she noted that two-thirds of federal cases do not mention the proponent’s burden of proof or the preponderance standard in connection with Rule 702. She acknowledged that a failure to mention the preponderance standard does not necessarily indicate misapplication of the standard. Still, she noted that this would be akin to two-thirds of federal cases regarding discovery obligations failing to mention governing Federal Rule of Civil Procedure 26(b). In addition, Ms. Jackson reported that 13 % of federal cases erroneously indicate that there is a presumption in favor of the admissibility of expert testimony. Finally, she found courts that articulated *both* a preponderance standard in tandem with a presumption favoring admissibility. She argued that this direct conflict in articulated standards reveals the general confusion in the federal courts about application of the preponderance

standard in connection with Rule 702. She concluded that her research showed that Rule 702 is not applied consistently and that the proposed amendment would help clarify the appropriate standard of proof.

10. Andrew E. Kantra, Troutman Pepper (Support for Rule 702 Amendment)

Mr. Kantra testified that his practice focuses on counseling clients on expert witness issues in mass tort cases and in multidistrict litigation in the pharmaceutical context. He explained that he has witnessed the wholesale admission of unreliable expert testimony due to a misperception among smart and distinguished jurists that there is a presumption in favor of admissibility. He argued that the proposed amendment is essential and would direct trial judges to perform the careful evaluation of expert testimony that is necessary and not to “presume” admissibility.

11. Toyja E. Kelley, DRI Center for Law & Public Policy (Support for Rule 702 Amendment)

The President of the DRI Center for Law & Public Policy testified in favor of the proposed amendment. He noted that the Supreme Court in *Bourjaily* held that the preponderance of the evidence standard applies to Rule 104(a) determinations, but that courts have overlooked it and have sometimes been reversed for applying it in the Rule 702 context. He opined that the amendment should expressly state the preponderance standard to correct courts that find a presumption in favor of admissibility, but urged the Committee to re-insert language clarifying that the decision is for “the court” and not for the jury. Mr. Kelley noted that he represents clients on both the plaintiffs’ and defense side and that the proposed changes to Rule 702 are critical whether he is representing a plaintiff or a defendant.

12. Eric G. Lasker, Hollingsworth LLP (Support for Rule 702 Amendment)

Mr. Lasker testified that he is a co-author of a law review article that called on the Advisory Committee to amend Rule 702 and that he favors the proposed amendment. He opined that the amendment would go a long way to improving the administration of justice. He expressed support for the LCJ proposal to add “if the court determines” language to the text of the amendment, explaining that the history under the 2000 amendment to Rule 702 illustrates the ability of the federal courts to overlook implicit understandings. He also supported note language urging courts to reject pre-2000 precedent. And he noted that an amendment would be only the first step in preventing the admission of shoddy experts that undermine the public faith in science. He suggested that steps should be taken to better educate the federal judiciary on the operation of a 2023 amendment.

13. Mary Massaron, Plunkett Clooney Attorneys & Counselors at Law (Support for Rule 702 Amendment)

As an appellate practitioner, Ms. Massaron testified that aberrant outcomes at the trial level are often due to the admission of unreliable expert opinion testimony. She opined that improvident admission of expert testimony comes from federal courts applying inconsistent and incorrect understandings of Rule 702. She suggested that district courts focus upon a proffered expert’s credentials, but leave rigorous examination of their methods, principles, and application to the jury. She further suggested that jurors fall back on external cues such as impressive credentials when they lack the ability to understand the scientific principles and methodology. She opined that jurors are unlikely to detect a highly-credentialed expert who is

misapplying methods and principles in the context of the specific case. She stated that it is nearly impossible to correct Rule 702 errors on appeal due to the abuse of discretion and harmless error standards that apply, and that rigorous consideration at the trial level is essential to just outcomes. She concluded that adopting the proposed amendment is essential and that it is vital for the Committee to identify cases misapplying the Rule 702 standard in the committee note to help well-meaning jurists trying to get it right.

**14. John M. Masslon II, Washington Legal Foundation
(Support for Rule 702 Amendment)**

Mr. Masslon testified in support of the proposed amendment to Rule 702 but offered suggestions to improve the amendment. First, he opined that the Committee should specifically cite rejected federal opinions in the committee note. He suggested that the Committee had done this in past amendments and that it was important to prevent courts from relying upon outdated precedent. He argued that doing so would give the cases a “red flag” on Lexis and Westlaw and might support Rule 11 sanctions for lawyers relying upon them. In addition, Mr. Masslon suggested a sentence in the committee note clarifying that there is no presumption in favor of the admissibility of expert testimony. Finally, Mr. Masslon urged the Committee to clarify the court’s obligation to perform gatekeeping by adding “if the *court* finds that the proponent has demonstrated by a preponderance of the evidence that” to the text of the proposed rule.

15. Lee Mickus, Evans Fears & Schuttert LLP (Support for Rule 702 Amendment)

Mr. Mickus testified that he encounters Rule 702 disputes frequently in his practice as a civil defense litigator in products liability cases. He supports the proposed amendment but urges the Committee to re-insert the word “court” into the text to clarify the trial judge’s gatekeeping role. He opined that an amendment is necessary because federal courts are caught between Rule 702 and pre-existing contrary caselaw that encourages them to pass reliability issues to the jury. Because judges will look to the text of an amended rule first, Mr. Mickus suggested that the text needs to offer an unmistakable signal that the *judge* and not the jury must evaluate all of the requirements of Rule 702. Mr. Mickus also expressed doubt that a trial judge would mistakenly assume that she had to make “findings” in the absence of any objection. He noted that objections are required in the adversary system across all Federal Rules of Evidence, so trial judges are unlikely to assume such a major change in practice without express directions to undertake *sua sponte* review.

16. Amir Nassihi, Shook Hardy & Bacon L.L.P. (Support for Rule 702 Amendment)

As co-chair of his firm’s class action group, Mr. Nassihi testified in favor of the proposed amendment to Rule 702. He explained that there is conflicting federal precedent on the application of Rule 702 at the class certification stage, and described federal opinions applying a flexible, less rigorous standard at that stage. Mr. Nassihi opined that the proposed amendment clarifying the preponderance of the evidence standard would help reinforce the importance of applying Rule 702 properly in high stakes hearings like class certification.

17. Leslie W. O’Leary, Ciresi Conlin LLP

Ms. O’Leary testified in opposition to rejecting specific Federal cases in the Advisory Committee note to the proposed amendment (as has been urged by others). She represents plaintiffs in products liability cases that are focused on the admissibility of expert testimony under Rule 702. She argued that there was a false narrative that junk science is running rampant in the federal courts. Rather, she suggested that federal courts have remained vigilant and cautious in screening expert testimony. She argued that it was not the Committee’s role to reject federal opinions. She opined that the rejection of specific cases would appear biased and would be inappropriate without an examination of the full trial record in those cases.

**18. Jared M. Placitella, Cohen Placitella & Roth P.C.
(Opposition to Rule 702 Amendment)**

Mr. Placitella represents plaintiffs in toxic tort cases and testified in opposition to any amendment to Rule 702. He opined that the preponderance standard has been used for twenty years, eliminating any need to “add” it to the Rule. He expressed concern that an amendment would invade the province of the jury by causing courts to believe that they must decide the “correctness” of scientific evidence. Mr. Placitella suggested greater education in the area of forensic experts rather than an amendment to Rule 702 that would affect all areas of expert opinion testimony.

He further argued that the proposed amendment should not require the trial judge to analyze “evidence.” Mr. Placitella noted that Rule 104(a) makes it clear the trial judges are “not bound by the rules of evidence” in resolving questions of admissibility. He opined that trial courts may mistakenly find that they are bound by the rules of evidence in

administering Rule 702 if an amendment uses the term “evidence.” He suggested that the use of the term “evidence” in Rule 702 would contradict Rule 703. Should the Committee proceed with an amendment, he suggested language, such as: “These matters should be established by a preponderance of the *proof*” or better yet of the “information.”

19. Bill Rossbach, Rossbach Law P.C. (Opposition to Proposed Amendment to Rule 702)

Mr. Rossbach testified in opposition to the use of the phrase “preponderance of the evidence” in the proposed amendment to Rule 702. He suggested that the Supreme Court’s *Bourjaily* opinion also utilized the phrase “preponderance of the proof” and that the proposed amendment should use the term “information” rather than “evidence.” He emphasized that the court’s inquiry is not whether the proponent wins or loses on the merits, but whether Rule 702 is satisfied. In addition, Mr. Rossbach urged the Committee not to “scold” prior federal decisions in the Committee note if the principal goal of the amendment is education – he argued that rebuke is not an effective pedagogical method. Mr. Rossbach also called into question the methodology behind the LCJ study suggesting widespread confusion in the application of Rule 702. He argued that federal courts are not necessarily misapplying Rule 702 simply because two-thirds fail to articulate the preponderance standard in their rulings. Finally, he suggested that the amendment risks undermining the constitutional right to a jury trial.

**20. Thomas J. Sheehan, Shook Hardy & Bacon L.L.P.
(Support for Rule 702 Amendment)**

Mr. Sheehan thanked the Committee for all of the work it has done to address the confusion surrounding Rule 702. He noted that numerous articles and reports published in the 22 years since the last amendment to Rule 702 all recognize courts' struggle to apply 702. He suggested that the confusion surrounding Rule 702 was driven by repeated misstatements in old cases about the role of the trial judge in screening expert testimony. Mr. Sheehan opined that rules amendments can work to correct misunderstandings by prompting judges to reexamine the Rule and their role in administering it. He characterized the proposed amendments as "modest," but still felt they would help judges better apply Rule 702. Mr. Sheehan urged the Committee to re-insert "if the court determines" back into the rule to eliminate any ambiguity about the trial court's gatekeeping role. He stated that the precedent supporting the use of the phrase "preponderance of the evidence" (instead of "preponderance of the information"). He argued that it is important to adopt a change accompanied by a note that highlights how courts have misapplied the Rule in the past.

**21. Gerson Smoger, Smoger & Associates P.C. (Opposition
to Proposed Amendment to Rule 702)**

Mr. Smoger spoke in opposition to the proposed amendment to Rule 702. He opined that the proposed amendment should not use the terminology "the court finds" or "preponderance of the evidence" for fear that it will cause more lengthy, expensive evaluation of expert opinion testimony. Should any amendment be advanced, the text should use the phrase "preponderance of the information."

22. Navan Ward, American Association for Justice

Mr. Ward testified in favor of the AAJ's recommendations for Rule 702. He explained that his clients rely upon experts to support their claims and that their exclusion ends cases (in a way that it does not for defendants). Specifically, he argued that: 1) removal of the "court finds" language from the text of the proposed amendment was appropriate and that language should not be re-inserted, because including it raises to a risk that trial judges think they must find an expert's opinion "correct"; and 2) a proposed amendment should use the phrase "preponderance of the information" and not "preponderance of the evidence." Mr. Ward explained that the Advisory Committee's draft note already provides that "evidence means information" and that this clarification should be made in rule text. He further suggested that the clarification regarding information in the note be moved to a more prominent place in the note.

23. Michael J. Warshauer, Warshauer Law Group (Opposition to Proposed Amendment to Rule 702)

Mr. Warshauer testified in opposition to any amendment to Rule 702, arguing that the research suggesting a problem with Rule 702 is misleading. Mr. Warshauer explained that Rule 702 is often the most expensive and time-consuming aspect of the litigation process and cautioned that the goal of the Federal Rules of Evidence is not to reduce trial dockets or to protect defendants. Rather, he opined that their goal is to ensure that the promise of the 7th amendment is kept and administered fairly. He claimed that defendants want the trial judge to become the finder of fact in place of the jury – and want trial judges to be a "fence" and not a gatekeeper. Mr. Warshauer criticized the phrase "preponderance of the evidence" in the proposed amendment to Rule 702 because he fears it encourages judges to make findings of fact. If

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there must be an amendment, he argued the text should reference a “preponderance of the available information.” According to Mr. Warshauer, using the term “evidence” will cause trial courts to weigh expert testimony and pick a winner.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE¹**

1 **Rule 611. Mode and Order of Examining Witnesses**
2 **and Presenting Evidence**

3 * * * * *

4 **(d) Illustrative Aids.**

5 **(1) Permitted Uses.** The court may allow a party
6 to present an illustrative aid to help the finder of fact
7 understand admitted evidence if:

8 (A) its utility in assisting comprehension
9 is not substantially outweighed by the
10 danger of unfair prejudice, confusing
11 the issues, misleading the jury, undue
12 delay, or wasting time; and

13 (B) all parties are given advance notice
14 and a reasonable opportunity to object
15 to its use, unless the court, for good
16 cause, orders otherwise.

¹ New material is underlined in red.

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- 17 (2) *Use in Jury Deliberations.* An illustrative aid
18 must not be provided to the jury during
19 deliberations over a party’s objection, unless
20 the court, for good cause, orders otherwise.
- 21 (3) *Record.* When practicable, an illustrative aid
22 that is used at trial must be entered into the
23 record.

Committee Note

The amendment establishes a new subdivision within Rule 611 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term “illustrative aid” is used instead of the term “demonstrative evidence,” as that latter term is vague and has been subject to differing interpretation in the courts. “Demonstrative evidence” is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the factfinder thus fall into two separate categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room, to study it, and to use it to help determine the disputed facts.

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The second category—the category covered by this rule—is information that is offered for the narrow purpose of helping the factfinder to understand what is being communicated to them by the witness or party presenting evidence. Examples include blackboard drawings, photos, diagrams, powerpoint presentations, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as “illustrative aids,” have also been described as “pedagogical devices” and sometimes (and less helpfully) “demonstrative presentations”—that latter term being unhelpful because the purpose for presenting the information is not to “demonstrate” how an event occurred but rather to help the finder of fact understand evidence that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous, admissible information offered to prove a fact, and a summary of evidence that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule 611(d).

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. Experience has shown that illustrative aids can be subject to abuse. It is possible that the illustrative aid may be prepared to distort the evidence presented, to oversimplify, or to stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence.

Cf. Fed. R. Evid. 703; *see* Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403—one particular problem being that the illustrative aid might appear to be substantive demonstrative evidence of a disputed event. If those dangers substantially outweigh the value of the aid in assisting trier of fact, the trial court should exercise its discretion to prohibit—or modify—the use of the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party has a right to have the jury instructed about the limited purpose for which the illustrative aid may be used. *See* Fed. R. Evid. 105.

One of the primary means of safeguarding and regulating the use of illustrative aids is to require advance disclosure. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis by other parties, particularly if they are complex. The amendment therefore provides that illustrative aids prepared for use in court must be disclosed in advance in order to allow a reasonable opportunity for objection—unless the court, for good cause, orders otherwise. The rule applies to aids prepared either before trial or during trial before actual use in the courtroom. But the timing of notice will be dependent on the nature of the illustrative aid. Notice as to an illustrative aid that has been prepared well in advance of trial will differ from the notice required with respect to a handwritten chart prepared in response to a development at trial. The trial court has discretion to determine when and how notice is provided.

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Because an illustrative aid is not offered to prove a fact in dispute, and is used only in accompaniment with testimony or presentation by the proponent, the amendment provides that illustrative aids ordinarily are not to go to the jury room unless all parties agree. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may misinterpret the import – usefulness – and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations; that discretion is most likely to be exercised in complex cases, or in cases where the jury has requested to see the illustrative aid. If the court does exercise its discretion to allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE¹**

1 **Rule 1006. Summaries to Prove Content**

2 **(a) Summaries of Voluminous Materials Admissible**

3 **as Evidence.** The ~~proponent~~ court may admit as
4 evidence ~~use~~ a summary, chart, or calculation to
5 prove the content of voluminous writings,
6 recordings, or photographs that cannot be
7 conveniently examined in court, whether or not they
8 have been introduced into evidence.

9 **(b) Procedures.** The proponent must make the
10 underlying originals or duplicates available for
11 examination or copying, or both, by other parties at
12 a reasonable time and place. And the court may
13 order the proponent to produce them in court.

¹ New material is underlined in red; matter to be omitted is lined through.

- 14 **(c) Illustrative Aids not Covered. A summary, chart,**
15 **or calculation that functions only as an illustrative**
16 **aid is governed by Rule 611(d).**

Committee Note

Rule 1006 has been amended to correct misperceptions about the operation of the Rule by some courts. Some courts have mistakenly held that a Rule 1006 summary is “not evidence” and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the Rule has been amended to clarify that a party may offer a Rule 1006 summary “as evidence.” The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence.

Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some courts have mistakenly held that the underlying voluminous writings or recordings themselves must be admitted into evidence before a Rule 1006 summary may be used. Because Rule 1006 allows alternate proof of materials too voluminous to be conveniently examined during trial proceedings, admission of the underlying voluminous materials is not required and the amendment so states. Conversely, there are courts that deny resort to a properly

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supported Rule 1006 summary because the underlying writings or recordings – or a portion of them – *have been* admitted into evidence. Summaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence. In most cases, a Rule 1006 chart may be the only evidence the trier of fact will examine concerning a voluminous set of documents. In some instances, the summary may be admitted in addition to the underlying documents.

A summary admissible under Rule 1006 must also pass the balancing test of Rule 403. For example, if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion.

Although Rule 1006 refers to materials too voluminous to be examined “in court” and permits the trial judge to order production of underlying materials “in court”, the rule applies to virtual proceedings just as it does to proceedings conducted in person in a courtroom.

The amendment draws a distinction between summaries of voluminous, admissible information offered to prove a fact, and summaries of evidence offered solely to assist the trier of fact in understanding the evidence. The former are subject to the strictures of Rule 1006. The latter are illustrative aids, which are now regulated by Rule 611(d).

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE¹**

1 **Rule 611. Mode and Order of Examining Witnesses**
2 **and Presenting Evidence**

3 * * * * *

4 **(e) Juror Questions for Witnesses.**

5 **(1) Instructions to Jurors if Questions are**

6 **Allowed.** **If the court allows jurors to submit**
7 **questions for witnesses during trial, then the**
8 **court must instruct the jury that:**

9 **(A) any question must be submitted to the**
10 **court in writing;**

11 **(B) a juror must not disclose a question's**
12 **content to any other juror;**

13 **(C) the court may rephrase or decline to**
14 **ask a question submitted by a juror;**

15 **(D) a juror must draw no inference from**
16 **the fact that a juror's question is**

¹ New material is underlined in red.

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- 17 asked, rephrased, or not asked;
18 (E) an answer to a juror's question should
19 not be given any greater weight than
20 an answer to any other question; and
21 (F) the jurors are neutral factfinders, not
22 advocates.

23 **(2) Procedure When a Question is Submitted.**

24 When a question is submitted by a juror, the
25 court must, outside the jury's hearing:

- 26 (A) review the question with counsel to
27 determine whether it is should be
28 asked, rephrased, or not asked; and
29 (B) allow a party to object to it.

30 **(3) Reading the Question to a Witness.** If the
31 court allows a juror's question to be asked,
32 the court must read it to the witness or permit
33 one of the parties to ask the question.

Committee Note

New subdivision (e) sets forth procedural safeguards that are necessary when a court decides to allow jurors to submit questions for witnesses at trial. Courts have taken different positions on whether to allow jurors to ask questions of witnesses. But courts agree that before the practice is undertaken, trial judges should weigh the benefits of allowing juror questions in a particular case against the potential harm that it might cause. And they agree that safeguards must be imposed.

Rule 611(e) takes no position on whether and under what circumstances a trial judge should allow juror questions. The intent of the amendment is to codify the minimum procedural safeguards that are necessary when the court decides to allow juror questions. These safeguards are necessary to ensure that the parties are not prejudiced, and that jurors remain impartial factfinders.

The safeguards set forth are taken from and are well-established in case law. But the cases set out these safeguards in varying language, and often not in a single case in each circuit. The intent of the amendment is to assist courts and counsel by setting forth all the critical safeguards in uniform language and in one place.

The safeguards and instructions set forth in the rule are mandatory, but they are not intended to be exclusive. Courts are free to impose additional safeguards, or to provide additional instructions, when necessary to protect the parties from prejudice, or to assure that the jurors maintain their neutral role.

A court may refuse to allow a juror's question to be posed, or may modify it, for a number of reasons. For

example, the question may call for inadmissible information; it may assume facts that are not in evidence; the witness to whom the question is posed may not have the personal knowledge required to answer; the question may be argumentative; or the question might be better posed at a different point in the trial. In some situations, one of the parties may wish to pose the question, and the court may in its discretion allow the party to ask a juror's question—so long, of course, as it is permissible under the rules of evidence. In any case, the court should not disclose—to the parties or to the jury—which juror submitted the question.

After a juror's question is asked, a party may wish to ask follow-up questions or to reopen questioning. The court has discretion under Rule 611(a) to allow or prohibit such questions.

foundation is consistent with the common law approach to prior inconsistent statement impeachment. *See, e.g., Wammock v. Celotex Corp.*, 793 F.2d 1518, 1521 (11th Cir. 1986) (“Traditionally, prior inconsistent statements of a witness could not be proved by extrinsic evidence unless and until the witness was first confronted with the impeaching statement.”). The original rule imposed no timing preference or sequence, however, and permitted an impeaching party to introduce extrinsic evidence of a witness’s prior inconsistent statement before giving the witness the necessary opportunity to explain or deny it. This flexible timing can create problems concerning the witness’s availability to be recalled, and lead to disputes about which party bears responsibility for recalling the witness to afford the opportunity to explain or deny. Further, recalling a witness solely to afford the requisite opportunity to explain or deny a prior inconsistent statement may be inefficient. Finally, trial judges may find extrinsic evidence of a prior inconsistent statement unnecessary in some circumstances where a witness freely acknowledges the inconsistency when afforded an opportunity to explain or deny. Affording the witness an opportunity to explain or deny a prior inconsistent statement before introducing extrinsic evidence of the statement avoids these difficulties. The prior foundation requirement prevents unfair surprise; gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency; promotes judges’ efforts to conduct trials in an orderly manner; and conserves judicial resources.

The amendment preserves the trial court’s discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispense with the requirement altogether. A trial judge may decide to delay or even forgo a witness’s opportunity to explain or deny a prior inconsistent statement in certain

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circumstances, such as when the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or when a prior opportunity was impossible because the witness's statement was not discovered until after the witness testified.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE¹**

1 **Rule 801. Definitions That Apply to This Article;**
2 **Exclusions from Hearsay**

3 * * * * *

4 **(d) Statements That Are Not Hearsay.** A statement
5 that meets the following conditions is not hearsay:

6 * * * * *

7 **(2) *An Opposing Party's Statement.*** The
8 statement is offered against an opposing
9 party and:

10 **(A)** was made by the party in an
11 individual or representative capacity;

12 **(B)** is one the party manifested that it
13 adopted or believed to be true;

¹ New material is underlined in red; matter to be omitted is lined through.

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14 (C) was made by a person whom the party
15 authorized to make a statement on the
16 subject;

17 (D) was made by the party's agent or
18 employee on a matter within the
19 scope of that relationship and while it
20 existed; or

21 (E) was made by the party's
22 coconspirator during and in
23 furtherance of the conspiracy.

24 The statement must be considered but does not by itself
25 establish the declarant's authority under (C); the existence or
26 scope of the relationship under (D); or the existence of the
27 conspiracy or participation in it under (E).

28 If a party's claim or potential liability is directly
29 derived from a declarant or the declarant's principal, a
30 statement that would be admissible against the declarant or

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- 31 the principal under this rule is also admissible against the
32 party.

Committee Note

The rule has been amended to provide that when a party stands in the shoes of a declarant or the declarant's principal, hearsay statements made by the declarant or principal are admissible against the party. For example, if an estate is bringing a claim for damages suffered by the decedent, any hearsay statement that would have been admitted against the decedent as a party-opponent under this rule is equally admissible against the estate. Other relationships that would support this attribution include assignor/assignee and debtor/trustee when the trustee is pursuing the debtor's claims. The rule is justified because if the party is standing in the shoes of the declarant or the principal, the party should not be placed in a better position as to the admissibility of hearsay than the declarant or the principal would have been. A party that derives its interest from a declarant or principal is ordinarily subject to all the substantive limitations applicable to them, so it follows that the party should be bound by the same evidence rules as well.

Reference to the declarant's principal is necessary because the statement may have been made by the agent of the person or entity whose rights or obligations have been succeeded to by the party against whom the statement is offered.

The rationale of attribution does not apply, and so the hearsay statement would not be admissible, if the declarant makes the statement after the rights or obligations have been transferred, by contract or operation of law, to the party against whom the statement is offered.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE¹**

1 **Rule 804. Exceptions to the Rule Against Hearsay—**
2 **When the Declarant Is Unavailable as a**
3 **Witness**

4 * * * * *

5 **(b) The Exceptions. * * ***

6 **(3) *Statement Against Interest.*** A statement that:

7 **(A)** a reasonable person in the declarant’s
8 position would have made only if the
9 person believed it to be true because,
10 when made, it was so contrary to the
11 declarant’s proprietary or pecuniary
12 interest or had so great a tendency to
13 invalidate the declarant’s claim
14 against someone else or to expose the
15 declarant to civil or criminal liability;
16 and

¹ New material is underlined in red; matter to be omitted is lined through.

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17 (B) if offered in a criminal case as one
18 that tends to expose the declarant to
19 criminal liability, is supported by
20 corroborating circumstances that
21 clearly indicate its trustworthiness;~~if~~
22 ~~offered in a criminal case as one that~~
23 ~~tends to expose the declarant to~~
24 ~~criminal liability~~---after considering
25 the totality of circumstances under
26 which it was made and evidence, if
27 any, corroborating it.

Committee Note

Rule 804(b)(3)(B) has been amended to require that in assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence corroborating or contradicting it. While most courts have considered corroborating evidence, some courts have refused to do so. 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 that tends to expose the declarant to

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criminal liability should be admissible under this exception when offered in a criminal case. A court evaluating the admissibility of a third-party confession to a crime, for example, must consider not only circumstances such as the timing and spontaneity of the statement and the third-party declarant's likely motivations in making it. It must also consider corroborating information, if any, supporting the statement, such as evidence placing the third party in the vicinity of the crime. Courts must also consider evidence that contradicts the declarant's account.

The amendment is consistent with the 2019 amendment to Rule 807 that requires courts to consider corroborating evidence in the trustworthiness inquiry under that provision. It is also supported by the legislative history of the corroborating circumstances requirement in Rule 804(b)(3). *See* 1974 House Judiciary Committee Report on Rule 804(b)(3) (adding “unless corroborating circumstances clearly indicate the trustworthiness of the statement” language and noting that this standard would change the result in cases like *Donnelly v. United States*, 228 U.S. 243 (1912), that excluded a third-party confession exculpating the defendant despite the existence of independent evidence demonstrating the accuracy of the statement).

TAB 7B

Advisory Committee on Evidence Rules
Minutes of the Meeting of May 6, 2022
Thurgood Marshall Federal Judiciary Building
Washington, D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on May 6, 2022 at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

The following members of the Committee were present:

Hon. James P. Bassett
Hon. Thomas D. Schroeder
Elizabeth J. Shapiro, Esq., Department of Justice, on behalf of John P. Carlin, Principal Associate Deputy Attorney General (ex officio)
Arun Subramanian, Esq.
Hon. Richard J. Sullivan
Rene Valladares, Esq., Federal Public Defender

The following members of the Committee were present Via Microsoft Teams:

Hon. Patrick J. Schiltz, Chair
Traci L. Lovitt, Esq.

Also present were:

Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Hon. Robert J. Conrad, Jr., Liaison from the Criminal Rules Committee
Hon. Sara Lioi, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Andrew Goldsmith, Esq., Department of Justice
Bridget M. Healy, Counsel, Rules Committee
Scott Myers, Rules, Counsel, Rules Committee
Brittany Bunting, Rules Committee Staff
Allison Bruff, Rules Committee Staff
Burton Dewitt, Rules Clerk
Timothy Lau, Esq., Federal Judicial Center

Present Via Microsoft Teams:

Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Madison Alder, Judiciary Reporter, Bloomberg Law
Hon. Sara J. Agne, Maricopa County Superior Court
Amy Brogioli, Associate General Counsel, American Association for Justice
Joe Cecil, Berkeley Law School

Hon. Maria Cruz, Arizona State Court of Appeals
Alex Dahl, Strategic Policy Counsel
Gary Dimuzio, Dimuzio Law
Abigail Dodd, Senior Legal Counsel, Shell Oil Company
James Gotz, Hausfeld
Sri Kuehnlenz, Cohen & Gresser LLP
John G. McCarthy, Federal Bar Association
Jared Placitella, Cohen, Placitella & Roth, P.C.
Susan Steinman, Senior Director of Policy & Sr. Counsel, American Association for Justice
Christine Zinner, American Association for Justice

I. Opening Business

Announcements

The Chair welcomed everyone to the meeting and stated that he wished he could be present but that he was recovering from COVID. He thanked the Reporter and the Academic Consultant for the extraordinarily high caliber of the materials in the Agenda book. The Chair then invited all participants to introduce themselves.

After the introductions, the Chair noted that two members of the Committee were rotating off of the Committee after six years of devoted service. He thanked Justice Bassett and Traci Lovitt for their invaluable contributions to the work of the Committee and invited each to share remarks. Justice Bassett thanked the Chair and the Committee for the opportunity of a lifetime to contribute to the work of the Committee. He stated that he wished every judge and lawyer could witness the careful deliberative process of the Committee and the thought and attention to detail that goes into every word chosen for a rule or Committee note. He further noted the importance of comity between federal and state courts and the importance of including state court judges in the work of the Committee. Traci Lovitt stated that it was a sincere honor to be a part of the Committee's work. She praised the intellectual firepower around the table and stated that she was in awe of the extraordinary work that goes into the rulemaking process.

The Chair then gave a brief report on the January, 2022 Standing Committee meeting, explaining that the Evidence Advisory Committee had only informational items regarding work on several potential amendments to share with the Standing Committee. He noted that there was a great deal of interest in proposals regarding illustrative aids and safeguards for juror questions.

Approval of Minutes

A motion was made to approve the minutes of the November 5, 2021 Advisory Committee meeting. The motion was seconded and approved by the full Committee.

II. Rules 106, 615 and 702 Published for Comment

The Reporter opened a discussion of the three Rules that had been released for public comment, explaining that the public comment period had closed in February, 2022. He explained that the issue for the Committee was whether to approve the three proposed amendments to be transmitted to the Standing Committee and the Judicial Conference.

A. Rule 106

The Reporter called the Committee's attention to the published proposal to amend Rule 106, the rule of completeness. That proposal appeared on page 98 of the Agenda book. He reminded the Committee that the proposal would make two changes to the existing rule. First, it would allow completion of all statements in any form. This would be a change from the current rule that applies only to written or recorded statements and would permit completion of unrecorded, oral statements. He noted that many jurisdictions already permit completion of oral statements through Rule 611(a) and the common law and that the amendment would bring completion of all statements under one rule. Second, the Reporter reminded the Committee that the amendment to Rule 106 would allow completion over a hearsay objection because a party who presents a portion of a statement in a manner that distorts the meaning of that statement forfeits the right to object to completion based upon hearsay. He lauded the Committee for its unanimous approval of an amendment to Rule 106 after many years of work.

The Reporter explained that there were few public comments on the proposed amendment to Rule 106, but that the comments that were received were largely positive. Even so, the Committee decided to make small changes to the language of the rule text that was published for comment. First, the published amendment would have covered "written or oral statements." But it was pointed out that some statements may be neither written nor oral. Assertive conduct is considered a statement and American Sign Language represents a form of communication that contains assertive statements that are not oral or written, but that should be subject to completion. For that reason, the Committee at its last meeting determined to remove the modifiers "written or oral" from the text of the amendment, such that Rule 106 would cover "statements" in any form. The Reporter noted that a version of the amendment deleting "written or oral" from rule text appeared on page 106 of the Agenda book. The Reporter further noted that some corresponding changes would need to be made to the Committee note to reflect that alteration. He directed the Committee's attention to page 107 of the Agenda book where the language of the paragraph that began "Second, Rule 106 has been amended" had been revised to reflect that the amendment would apply to statements "in any form – including statements made through conduct or sign language." A Committee member noted that the modifiers "written or oral" would also need to be deleted from line 180 on page 108, and the Reporter made the change. Another Committee member inquired whether the modifier "oral" should also be deleted from line 140 on page 107 of the Agenda book that read "Second, Rule 106 has been amended to cover all statements, including oral statements that have not been recorded." The Reporter responded that the modifier "oral" should remain in that sentence of the note as an example of what the amendment would permit. He noted that the completion of oral statements through Rule 106 was a principal innovation of the amendment and that, while it was important to include assertive conduct, the amendment would

be used much more commonly to allow completion of oral statements. The Chair agreed that he would prefer to leave the word “oral” in line 140 on page 107 of the Committee note to reflect the fact that most of the practical impact of the expansion to all statements would be with respect to the coverage of oral statements.

The Reporter suggested one additional change to the Committee note. He proposed deleting a sentence in the Committee note on page 100 of the Agenda book that stated that “the results under this rule as amended will generally be in accord with the common-law doctrine of completeness at any rate.” The Reporter explained that this sentence was unnecessary to explain the operation of the amended rule and that the common law included various iterations of the rule of completeness before it was codified in Rule 106. Thus, he recommended deleting the entire sentence. By consensus, the Committee agreed with the recommendation.

The Chair then sought the Committee’s vote on whether to approve an amendment to Rule 106 and the accompanying note reflecting these changes (appearing on pages 106-108 of the Agenda book), with the added change to line 180 on page 108 to delete the words “written or oral.” Participating Committee members unanimously approved the proposed amendment to Rule 106 and the accompanying note.

B. Rule 615

Next, the Reporter called the Committee’s attention to the proposal to amend Rule 615, the rule of witness sequestration. He explained that there was a deep division in the courts about the scope of a Rule 615 order. Some courts hold that a Rule 615 order extends only to the courtroom doors and does not protect against witness access to testimony outside the courtroom. The Reporter explained that this is problematic because sequestration is not effective if witnesses may access testimony from outside the courtroom. For that reason, other courts hold that a Rule 615 order automatically extends beyond the courtroom to control witness access to information. The Reporter explained that this approach is also problematic because Rule 615 does not extend so far on its face. For this reason, the Committee published a proposed amendment to Rule 615 that would clarify that a Rule 615 order automatically covers only access to testimony inside the courtroom, but that a trial judge may extend protection outside the courtroom in her discretion. The proposal also addressed a subsidiary issue regarding how many representatives an entity party may designate as exempt from sequestration under Rule 615(b). While the vast majority of courts recognize that an entity party may designate only one representative under Rule 615(b) to provide parity with individual parties, some courts allow multiple designations. The proposed amendment would clarify that an entity party may designate only one representative as of right under subsection (b) and must show that any additional exempt witnesses are “essential to presenting the party’s claim or defense” under Rule 615(c).

The Reporter explained that public comment on the proposal was sparse but positive and that the Magistrate Judge’s Association thought the amendment would be a useful addition. The Reporter asked that the Committee consider two minor changes to the Committee note based on the public comment. First, he explained that the AAJ helpfully suggested that all references to an “agent” in the Committee note should be changed to “representative” to track the text of the rule. He called the Committee’s attention to page 117 of the Agenda book to see the proposed change.

He further noted that the NACDL suggested elimination of the citation to the *Arayatanon* case in the Committee note. The Reporter explained that the case did support the proposition for which it was cited -- that a court may approve multiple exemptions from sequestration for witnesses “essential” to prove a party’s case – but that the case also suggested that the opponent of the exemption had to disprove essentiality. Because the burden of proof is on the party seeking the exemption, including this citation in the Committee note could muddle the proper burden of proof. The Reporter recommended deletion of the citation for that reason.

The Chair then sought the Committee’s approval of the proposed amendment to Rule 615 with no changes to the rule text and two minor changes to the note – to replace the word “agent” with the word “representative” and to eliminate the case citation. Participating Committee members unanimously approved the proposed amendment to Rule 615. The Reporter opined that the amendment was a perfect one for the Committee to advance because the courts are deeply divided and because the amendment will offer concrete and practical clarification for courts and litigants.

C. Rule 702

The Reporter reminded the Committee that it had been considering clarifying amendments to Rule 702 since 2016 and that the project had culminated in two proposals. First, the proposed amendment published for comment would seek to limit overstatement by testifying experts by emphasizing that trial judges must determine that the opinions expressed by an expert reflect a reliable application of the expert’s principles and methods to the facts of the case. Second, the amendment would emphasize that Rule 104(a) applies to Rule 702, requiring a trial judge to find the admissibility requirements satisfied by a preponderance of the evidence before submitting expert opinion testimony to the trier of fact over objection.

The Reporter explained that there was a large volume of public comment. Although there was substantial support for the amendment, a large volume of public comments were negative. Upon close inspection, many of the comments appeared to be “cut and paste” comments quoting identical phrases and talking points. The Reporter further noted that the negative comments were reminiscent of – and sometimes virtually identical to -- the comments received in opposition to the 2000 amendment to Rule 702. Predictably, the comments fell along party lines. The defense bar generally favors the amendment, and the plaintiffs’ bar generally opposes it. He explained that a division of opinion about an amendment along party lines does not necessarily suggest that an amendment should not be approved so long as the amendment is the product of sound and neutral rulemaking principles. The Reporter noted that many successful amendments, such as the recent amendment to the notice provision of Rule 404(b), were favored by one side and not the other. Finally, the Reporter noted that the negative commentary about the proposed amendment usurping the role of the jury actually demonstrates the need for the amendment, as such comments reflect a fundamental misunderstanding that a jury decides the admissibility of expert opinion testimony. Rule 104(a) already applies to the admissibility requirements of Rule 702, demanding that the judge alone determine whether those requirements are satisfied. Comments arguing for a role for the jury reflect the very misunderstanding that underscores the need to emphasize the applicable Rule 104(a) standard. The Reporter nonetheless noted that several minor changes to the rule text

and Committee note could be considered to address some of the concerns raised in the public comment.

The Reporter explained that the negative public commentary took issue with the use of the phrase “preponderance of the evidence” in the text of the proposed amendment. He noted that the requirements of Rule 702 are undoubtedly preliminary questions of admissibility governed by Rule 104(a). He further noted that it was the Supreme Court in *Bourjaily v. United States* that held that the “preponderance of the evidence” standard applies to the judge’s Rule 104(a) findings. So, the preponderance of the evidence standard already governs. And the point of the amendment is to emphasize and clarify that fact for the courts that have missed it.

Still, the Reporter explained that many of the commenters opined that the preponderance of the evidence standard carries with it a connotation of fact-finding by the jury. The Reporter suggested that the phrase “more likely than not” describes the preponderance of the evidence standard and could be employed in rule text instead. The Chair noted that some commenters also expressed concern that “preponderance of the evidence” language could suggest that the trial judge is limited to admissible evidence in considering the requirements of Rule 702, which is inconsistent with Rule 104(a). He explained that it was not necessary to trade “preponderance of the evidence” language for “more likely than not” language, but that it could be beneficial to avoid what appeared to be a term that was a lightning rod for negative public comment. Some committee members suggested that there was no need to make a change because all competent lawyers and judges understand that the preponderance of the evidence standard is not restricted to juries. If the public comment on the point appeared to be a “talking points campaign” rather than constructive feedback, perhaps there is no need to modify accurate rule language in response to it. Another committee member suggested that the amendment might require a finding “by a preponderance” and avoid the remainder of the phrase “of the evidence.” The Reporter suggested that such language might be too abrupt and may not satisfy the commenters concerned about “preponderance” language in any event. The committee consensus was to change the language in the text of the amendment from “preponderance of the evidence” to “more likely than not.” Though the Committee felt that this change was unnecessary and would not alter the standard of review employed by the trial court in evaluating the admissibility of expert testimony, the Committee ultimately concluded that there was value in making a modification to respond to the public comment.

Some committee members expressed concern that the change might be interpreted to signal a substantive change in the governing standard when no change is intended because the “preponderance of the evidence” standard and the “more likely than not” standard are equivalent. The Reporter responded that changes could be made in the Advisory Committee’s note to ensure that the change would not be misconstrued. The Chair noted that several changes to the note suggested prior to the meeting would actually increase the risk of a misunderstanding, as they eliminate virtually all references to “preponderance of the evidence.” He argued that, if the phrase “preponderance of the evidence” was replaced by “more likely than not” in the rule text, then the Committee note should be crystal clear that the two phrases were equivalent. The Reporter noted that the note includes a citation to the Supreme Court’s decision in *Bourjaily* that does articulate the preponderance of the evidence standard, but he suggested that the Committee might wish to add a sentence to the note directly stating that “more likely than not” means a “preponderance of

the evidence.” The Chair proposed adding the following sentence to the first paragraph of the note immediately after the citation to Rule 104(a): “This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules.” Committee members agreed that this sentence should be added to avoid any inference that the Committee intended to alter the applicable standard by switching the language of the text from “preponderance of the evidence” to “more likely than not.” Judge Kuhl explained that she had suggested switching to “more likely than not” in the note to avoid using the term “by a preponderance” without “of the evidence.” She agreed that using “preponderance of the evidence” in the note was appropriate. She also pointed out that she had suggested a citation in the note to the 2000 Committee note to Rule 702 that cited the Supreme Court’s opinion in *In re Paoli* to distinguish the court’s preliminary findings regarding the admissibility of an expert from merits findings with respect to the expert’s opinion.

One committee member queried whether the second paragraph of the note was superfluous in light of the added sentence equating the more likely than not standard with the preponderance of the evidence standard. The Reporter responded that the second paragraph of the note was important to eliminate any negative inference about the application of the Rule 104(a) standard to other evidence rules that do not explicitly reference it. Rule 104(a) applies to preliminary findings of admissibility without being articulated in every evidence rule. An amendment to Rule 702 articulating the standard expressly was necessary because courts were failing to apply it in this context.

Next, the Reporter explained that there were several public comments urging the Committee to reinsert the language “if the court finds” into the text of the amendment. These comments noted that the reason for the amendment is confusion about the respective roles of judge and jury in deciding admissibility of expert testimony. These commenters argued that the text of the amendment should specify that it is “the court” that must “find” the requirements of Rule 702 satisfied before submitting the opinion to the jury, lest courts continue to defer to juries about the sufficiency of an expert’s basis and the reliable application of principles and methods to the facts of the case even after the amendment. The Reporter explained that some committee members had concerns about the language “the court finds” and that an alternative that would achieve the same purpose could be to require that “the proponent demonstrates to the court that it is more likely than not that.” One committee member stated that the amended text should not require the proponent to demonstrate the Rule 702 requirements in every case because no demonstration is necessary in the absence of an objection from the other side. The committee member suggested that such language could be read as a pre-clearance requirement for all expert testimony even without any objection and that this would be an unintended change in well-established practice. The Reporter stated that it is implicit in all of the evidence rules that the court is not required to rule in the absence of objection and that no pre-clearance requirement would be inferred due to that fundamental norm. Still, he noted that language might be added to the Committee note clarifying that no finding would be necessary in the absence of objection.

Judge Bates inquired whether adding the caveat requiring an objection would make a substantive change to the amended rule in the note. The Reporter explained that the caveat in the note about an objection would not change the text of the rule but would instead underscore a generally applicable principle. The Reporter for the Standing Committee concurred that it is

important to avoid adding substantive material to notes but agreed with the Reporter that this particular addition to the note would simply bring to light an underlying assumption, and that such a change would be appropriate. A committee member then suggested a sentence in the note clarifying that there is no gatekeeping obligation in the absence of objection. Several judges objected, noting that plain error review requires a level of gatekeeping in all circumstances – even in the absence of an objection. They argued that it would be more accurate to state that *the amendment* does not require the court to make findings of reliability in the absence of objection, rather than to say that judges have no obligation whatsoever to consider whether expert testimony is reliable in the absence of an objection. The Committee ultimately decided to add a sentence to the second paragraph of the note stating that: “Nor does the rule require that the court make a finding of reliability in the absence of objection.” This sentence avoids any notion that the rule imposes a pre-clearance requirement without undermining a court’s duty to avoid plain error.

The Chair then asked the Committee whether all members were supportive of the proposed changes discussed thus far: 1) a change to the text of the rule to state: “if the proponent demonstrates to the court that it is more likely than not that”; 2) a new sentence in the first paragraph of the note equating the preponderance of the evidence standard and the more likely than not standard; and 3) a new sentence in the second paragraph of the note clarifying that the amendment does not require the court to make findings in the absence of objection. All committee members agreed to these changes.

The Reporter next called the Committee’s attention to the paragraph in the note describing the reason for the change to Rule 702(d) to avoid expert overstatement. He explained that some of the public comment suggested that the note language was insulting to jurors because it stated that jurors “may be unable to evaluate” and “unable to assess” expert methodology and conclusions. The Reporter explained that there was certainly no intent to insult jurors and suggested that the note might provide that jurors lack the “background knowledge” necessary to assess expert methodology and conclusions. Another participant queried whether “background knowledge” was the best terminology to describe jurors’ ability to assess expert methodology. He suggested using the term “specialized” knowledge as that language is already used in Rule 702 to describe the type of knowledge that experts possess and laypersons do not. The Committee agreed to use the term “specialized” knowledge in the seventh paragraph of the note.

The Reporter then noted that additional changes to the first two sentences of the seventh paragraph of the note regarding overstatement had been suggested to emphasize the trial judge’s “ongoing” gatekeeping authority with respect to the opinions expressed by an expert witness during trial testimony. Other committee members questioned whether a trial judge has an “ongoing” obligation with respect to Rule 702 after finding expert testimony admissible. The Reporter explained that this was the purpose of the amendment to Rule 702(d) – to emphasize the trial judge’s ongoing obligation to prevent an admitted expert from testifying to unsupported overstatements like a “zero error rate.” The Chair suggested combining the first and second sentences of the seventh paragraph of the note – which essentially say the same thing – and avoiding the term “ongoing.” The combined sentence would read: “Rule 702(d) has also been amended to emphasize that each expert’s opinion must stay within the bounds of what can be concluded by a reliable application of the expert’s basis and methodology.” All agreed that this was a constructive change. The Committee also agreed to remove the word “extravagant” from

the final sentence of the note. The Chair also proposed deleting the words “of course” from the third paragraph of the note and adding numbers 1) and 2) to the sections of the note discussing the two features of the amendment. Another committee member suggested that the third paragraph of the note should say that: “the fact that the expert has not read every single study that exists *may* raise a question of weight” instead of “*will* raise a question of weight.”

A committee member then moved to approve the amendment to Rule 702 with the changes to the rule text and note agreed upon at the meeting. The rule text would be changed to read “if the proponent demonstrates to the court that it is more likely than not that” with corresponding changes to the note to equate the “more likely than not” standard with the “preponderance of the evidence” standard. The note would also include a sentence clarifying that the amendment does not require findings of reliability in the absence of objection. It would use “specialized knowledge” to describe the foundation that jurors lack. It would add organizing numbers, would condense the first two sentences of the seventh paragraph, and eliminate the words “of course” from the note. It would also eliminate the word “extravagant” and include a citation to the 2000 Advisory Committee’s note to Rule 702. The motion was seconded and unanimously approved by all participating committee members. The Reporter reminded the Committee of the almost six years of work on the amendment to Rule 702 and recognized its approval as a breathtaking moment. He thanked committee members and liaisons for their important and helpful contributions. The Chair agreed, stating that the amendment would leave evidence law better than the Committee found it.

III. Proposed Amendments for Publication

The Reporter explained that there were several proposals to publish amendments for notice and comment before the Committee.

A. Rule 611(d)/Rule 1006

The Reporter introduced proposals to amend Rule 611 to add a new subsection (d) and to update Rule 1006, explaining that the Committee would be voting on whether to approve these amendments for publication. He reminded the Committee that the amendment to Rule 611 would add a provision regulating the use of illustrative aids at trial, noting that illustrative aids are used routinely but that no provision regulates them specifically. He explained that the separate companion amendment to Rule 1006 would help resolve court confusion about the difference between summaries used as illustrative aids and summaries offered into evidence to prove the content of voluminous records.

1. Illustrative Aids

The Reporter called the Committee’s attention to the proposed amendment to Rule 611 appearing on page 234 of the Agenda Book to note two minor suggested changes to the draft previously reviewed by the Committee. The term “jury” in proposed Rule 611(d)(1)(A) would be changed to “factfinder” because the factfinder might be the judge and not a jury in a bench trial, which would also be governed by the new rule. The verb “are” in line 44 on page 235 of the Agenda Book would be changed to “is” to conform to the singular tense used earlier in the

sentence. A committee member suggested that the term “trier of fact” be used in subsection (d)(1)(A) instead of factfinder to track the use of that language in Rule 702 and all agreed.

The Reporter explained that there were questions raised at the Standing Committee meeting about the notice provision in the rule that would require advance disclosure of an illustrative aid to the opposing party. The concern was that some lawyers would object to showing the power point presentation to be used in their closing arguments to their opponents in advance. The Reporter noted that the notice provision was a flexible one that might make 5-minute advance notice adequate in a circumstance such as that, but queried whether the Committee wanted to make notice discretionary to allow the judge to dispense with notice altogether in certain circumstances. He also suggested that the Committee might publish the proposal with the existing notice provision to collect public input on the appropriate notice for illustrative aids. The Reporter also highlighted the bracketed material in the sixth paragraph of the Committee note discussing notice “at a jury trial” and queried whether the Committee wished to so limit the reach of the rule. The Chair noted that notice would be appropriate in a bench trial as well and suggested deleting the bracketed material. The Chair also noted that line 82 of the note on page 236 of the Agenda Book discussed “use of the aid by the jury” and proposed changing it to “consideration of the aid by the jury.”

Another participant asked why subsection (d)(3) of the proposed rule would require that an illustrative aid be marked as an exhibit when it is not evidence. The Chair responded that having illustrative aids in the record is crucial for appellate review, in case the appellant argues that the trial judge erred by allowing use of the illustrative aid. The participant asked how a trial judge should handle impermanent aids like chalks or dry erase boards or layered aids that change as testimony comes in. She queried how a trial judge would mark aids such as these to be included in the record. The Chair observed that there would be a notice problem with illustrative aids that were created in “real time” (such as writing on a dry erase board), as well as a problem marking them for the record. The Reporter suggested modifying Rule 611(d)(3) to read: “Where practicable, an illustrative aid that is used at trial must be entered into the record.” This would allow flexibility for developing aids such as chalk or dry erase drawings. He noted that lines 87-88 of the Committee note on page 236 of the Agenda Book would also need to be modified to read: “While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record where practicable.”

For the same reason, the Reporter opined that the text of the notice provision in Rule 611(d)(1)(b) should also be altered to read: “all parties are notified in advance of its intended use and are provided a reasonable opportunity to object to its use, unless the court for good cause orders otherwise.” He also noted that the Committee note would need to be changed as well, such that lines 65-67 of the note on page 236 of the Agenda Book would now provide: “The amendment therefore provides that illustrative aids prepared for use in court must be disclosed in advance in order to allow a reasonable opportunity for objection unless the court for good cause orders otherwise.” The Chair noted that line 30 of the note on page 235 of the Agenda Book needed a comma inserted after “to study it” and that line 39 should read “a source of evidence” and not “another source of evidence” (as an illustrative aid is not evidence). The Chair also questioned the reference in the note to use of an aid as substantive evidence as “the most likely problem” with illustrative aids, suggesting that misleading the jury might be a bigger problem. The Reporter responded that use of illustrative aids as substantive evidence is certainly a significant problem

that the amendment is seeking to correct and suggested that the note say “one problem being” instead of “the most likely problem.” Another Committee member pointed out that line 75 of the note on page 236 of the Agenda Book incorrectly stated that illustrative aids are “admissible only in accompaniment with testimony” when illustrative aids aren’t admissible evidence at all. All agreed that the note should say that illustrative aids are “used only in accompaniment with testimony.”

Judge Bates asked whether the amendment as drafted would require lawyers to reveal their closing argument power point presentations to opposing counsel in advance. He explained that his sense was that different judges currently handle that issue differently and inquired whether the rule change would now require all judges to order disclosure. The Reporter suggested that lawyers will still be able to argue about whether a power point is an illustrative aid regulated by the rule. The Chair opined that the amendment would set forth general principles but that it was inevitable that trial judges would differ in the way they interpreted and applied those guiding principles. A committee member asked whether the term “argument” in the rule text might be interpreted to require advance notice of a closing argument power point. He suggested that such a power point is argument and that perhaps it should not be subject to the guidelines imposed by the amendment. The Reporter observed that such a power point would still qualify as an “illustrative aid” even if it illustrated the closing argument only. The Committee member responded that illustrative aids used with witnesses should be subject to notice, but that lawyers should be able to use a power point in closing without advance clearance. Judge Bates commented that he shared the same concern and did not think that the good cause flexibility added to the notice requirement would be sufficient to address that circumstance.

The Reporter queried whether the Committee wanted to remove the language “or argument” in the text of the rule and the Committee note. The Chair noted that the Committee could include the words “or argument” in the amendment published for comment in brackets to solicit input on how best to handle the problem of aids used to illustrate argument. Another Committee member opined that the Committee should determine in advance of publishing the amendment what it is intended to regulate. He stated a preference for eliminating “argument” from the proposal so that it would cover aids used with witnesses but not aids used in opening or closing. The Reporter noted that a visual aid used during closing might summarize evidence and still be regulated by the amendment even if the words “or argument” are eliminated. The Chair agreed, pointing out that something that is an illustrative aid when exhibited to a witness does not cease being an illustrative aid when it is exhibited to the jury during a closing argument. Ultimately, the Committee agreed to take out the words “or argument” and concluded that public comment could help the Committee be more specific in distinguishing illustrative aids that are subject to the rule and summaries of argument that are not.

A Committee member then moved to approve Rule 611(d) for publication with all of the modifications agreed upon. The motion was seconded and unanimously passed.

2. Rule 1006 Summaries

Professor Richter then introduced the proposed amendment to Rule 1006 that would serve as a companion to the amendment to Rule 611 by clarifying the foundation necessary for admitting

a summary as evidence of writings, recordings, or photographs too voluminous to be conveniently examined in court. She reminded the Committee that courts often conflate the principles applicable to summaries used only to illustrate testimony or other evidence and those applicable to Rule 1006 summaries that are admitted to prove the content of voluminous records.

Professor Richter called the Committee's attention to the proposed amendment to Rule 1006 on page 256 of the Agenda Book that would seek to correct the confusion in the cases. She highlighted changes to the draft rule and questions for the Committee. She explained that the Chair and Reporter had agreed that the word "substantive" should be deleted from Rule 1006(a), such that the amendment would simply provide that Rule 1006 summaries are to be admitted "as evidence." She noted that the modifier "substantive" remained in the Committee note due to the common use of that term to differentiate evidence offered for a limited purpose from evidence offered to prove a fact. Professor Richter also explained that the proponent of a Rule 1006 summary must demonstrate that it "accurately" conveys the content of the underlying voluminous materials and that it is not argumentative or prejudicial in order to earn an exception to the best evidence rule – a rule that typically requires originals or duplicates of writings, recordings, or photographs to be admitted to prove their content. The terms "accurate and non-argumentative" were included in the text of the proposed amendment because some courts confused Rule 1006 summaries with illustrative summaries and allowed argumentative and inaccurate content. Professor Richter noted that a comma would need to be added after the words "in court" in the final line of proposed Rule 1006(a). Professor Richter also pointed out minor changes to the Committee note to eliminate the bracketed paragraph regarding the use of symbols or shortcuts in Rule 1006 summaries and to add the correct tense to the final paragraph of the note.

The Chair stated that he was uneasy about the inclusion of the terms "accurate and non-argumentative" in the text of the amendment due to the concern that they would increase disputes about the admissibility of Rule 1006 summaries. For example, almost all Rule 1006 summaries are "argumentative" in the sense that the proponent summarizes only some, and not all, of the underlying data. The Chair opined that Rule 403 could serve to control the admission of an inaccurate or argumentative Rule 1006 summary. Another Committee member opined that the term "accurate" would introduce a new standard of uncertain meaning to Rule 1006 and that the terms "accurate and non-argumentative" should be removed from rule text and that language about Rule 403 should be added to the Committee note. Professor Richter explained that Rule 1006 is a powerful one that permits a "summary" of voluminous writings, recordings, or photographs to be introduced in lieu of originals or duplicates. She noted that the proper foundation for admission of a Rule 1006 summary in the caselaw has long included the requirements that the summary be accurate and non-argumentative. While there may be arguments for judges to resolve in evaluating those elements of the foundation, they are part of the foundation necessary to earn an exception to the best evidence rule and not simply a Rule 403 issue. The Federal Public Defender agreed that Rule 1006 is a potent rule and opined that language should be included in the Committee note at the very least to emphasize the proper foundation. The Chair stated that that the terms "accurate and non-argumentative" should be cut from the text of the rule, but that language should be added to the Committee note emphasizing that Rule 403 may keep out an inaccurate or prejudicial summary.

A Committee member next inquired about the language of proposed Rule 1006(c), suggesting that its reference to a “summary” that is regulated only by Rule 611(d) seemed circular in a rule about the admission of summaries. Committee members noted that the purpose of subsection (c) was to convey that if a summary does not meet the standards set forth in Rule 1006(a), it is an illustrative aid covered by Rule 611(d). The Chair suggested that subsection (c) should read: “A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d).” Committee members agreed that this language better conveyed the intent of the provision.

A Committee member pointed out that the proposed draft would require a “written” summary and questioned whether that would include a photographic summary. The Reporter explained that Rule 101(b)(6) provides that any reference to any kind of “written” material or any other medium includes electronically stored information. The Committee member queried whether this would capture photographs.

The Department of Justice representative asked whether limiting Rule 1006 to written summaries would prevent testimony by a case agent helping to organize a case and suggested additional language in the Committee note addressing the proper use of a summary witness. Professor Richter pointed out the limited purpose of a Rule 1006 summary to prove the content of material too voluminous to be considered in court. The amendment would prohibit a witness from orally describing voluminous underlying documents to prove their content to the jury and would require a chart or spreadsheet or some sort of accompanying writing to demonstrate that content. Any other use of a summary witness is not regulated by Rule 1006 and would not be regulated under the amendment. Professor Richter explained that litigants often point to Rule 1006 to support other uses of summary witnesses, however, simply because it is the only provision in the existing rules that expressly permits a “summary.” The draft amendment was designed to eliminate the use of Rule 1006 for such purposes. She further noted that a writing summarizing voluminous content would likely be more effective than oral testimony about that content alone and could easily be created to comply with a “written” limitation. The Chair suggested that the Committee could publish the proposal with the “written” limitation to determine whether there would be any unforeseen consequences to adding such a restriction. The Reporter suggested that the word “written” might be published in brackets to invite commentary about it.

Another Committee member added that the Committee note should discuss the proper use of a summary witness. Judge Bates inquired what the intent of the amendment would be regarding summary witnesses and whether the amendment would change the status quo. He expressed concern that the amendment might foreclose testimony from summary witnesses that is now routinely admitted. A Committee member disagreed that an amendment to Rule 1006 would make any summary witness inadmissible. It would simply provide that a purely testimonial summary could not be offered to prove the content of voluminous documents without a writing and that any other use of a summary witness would have to be justified under other provisions. He opined that this was a helpful clarification. After this discussion, the Chair proposed eliminating the “written” limitation in the draft amendment due to the Committee’s concerns, and Committee members agreed.

The Chair then raised the fact that Rule 1006 does not require advance disclosure of the summary to the opponent. The provision requires production of the underlying voluminous materials but not the summary itself, which presumably the opponent needs to review before it is presented. The Chair noted that the lack of notice in Rule 1006 is arguably at odds with the notice requirement in proposed Rule 611(d) governing illustrative aids. One Committee member suggested that a Rule 1006 summary would have to be disclosed in advance when all trial exhibits are disclosed anyway. The Reporter also suggested that Rule 1006 summaries are different than illustrative aids – because Rule 1006 summaries are “evidence,” they will be disclosed when mere aids will not. The Chair pointed out that trial exhibits are often exchanged on the eve of trial, which might give an opponent two days to verify the accuracy of a summary of 500,000 documents. The Reporter stated his preference not to add a new notice provision to Rule 1006 because notice provisions in the evidence rules are generally reserved for significant matters such as Rule 404(b) evidence. The Chair relented.

Judge Bates queried whether the reference to production of the “originals or duplicates” in subsection (b) of the proposed amendment referred to the underlying voluminous documents or the summary. The Reporter responded that it referred to the underlying documents and noted that this had become less clear after the production obligation was put into a new subsection (b). The Reporter suggested adding the term “underlying” to subsection (b) to clarify the “originals or duplicates” intended. The Committee agreed.

A Committee member moved to approve the amendment to Rule 1006 for publication with the deletion of “substantive,” “accurate and non-argumentative,” and “written” from the text of the rule; with the addition of “underlying” to subsection (b); and with subsection (c) to read: “A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d).” The Committee member also moved to approve a Committee note reflecting those changes. The Committee note would eliminate any discussion of “accurate and non-argumentative” summaries in favor of language stating that: “A summary admissible under Rule 1006 must also pass the balancing test of Rule 403. For example, if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion.” The note would also eliminate any discussion of limiting Rule 1006 to “written” summaries and would eliminate the bracketed paragraph about symbols and shortcuts. The motion was seconded and unanimously approved.

B. Safeguards for Jury Questions: Rule 611(e)

The Reporter introduced the proposal to add a new subsection (e) to Rule 611 to provide procedures and safeguards for judges who wish to allow jurors to pose questions for witnesses. He noted that the practice of allowing juror questions has been somewhat controversial and that the amendment would take no position on whether a judge should allow the practice. Instead, the rule would offer uniform procedures and safeguards that would apply whenever a judge chose to allow juror questions. The Reporter directed the Committee’s attention to the working draft of the rule on page 266 of the Agenda Book. He explained that subsection (e)(1) would better capture the intent of the rule if it stated: “If the court allows jurors to submit questions for witnesses...” instead of “If the court allows jurors to ask questions of witnesses...” This is because the rule

would not allow jurors to question witnesses directly and would require that the court or counsel pose the questions. Subsection (e)(1)(C) would also be changed to conform. (“the court may rephrase or decline to ask a question *submitted* by a juror”). The Reporter also noted that lines 45-46 of the Committee note on page 269 of the Agenda Book would prohibit the court from disclosing to the parties or to the jury which juror submitted a particular question. He explained that there had been a question raised about whether counsel should be permitted to learn which juror asked a particular question. The Reporter voiced concerns that this could lead to mischief and stated his preference to leave the note intact. Finally, the Reporter explained that the new provision regarding illustrative aids would appear in Rule 611(d) and that the safeguards and procedures for jury questions would appear below it in Rule 611(e). He explained that this order is appropriate given how commonly illustrative aids will be used and the relative rarity of juror questions.

One participant at the meeting opined that it would be obvious to all in the courtroom which juror asked a question, such that the prohibition on disclosure in the Committee note would mean little. The Chair suggested that whether it is obvious which juror asked a question depends upon how the trial judge handles juror questions; some of his colleagues allow jurors to submit questions in a way that preserves anonymity. The Reporter also suggested that the Committee note cautions against disclosure of a questioning juror’s identity by the court even if the parties are able to infer that identity on their own.

The Chair suggested several small changes. He suggested that a comma be added after the word “rephrased” in subsection (e)(1)(D). He suggested that the word “neutral” be inserted before the word factfinders in subsection (e)(1)(F). He also voiced concern that the words “appropriate under these rules” in subsection (e)(2)(A) were too imprecise (what is “appropriate?”) and suggested new language stating: “the court must, outside the jury’s hearing: (A) review the question with counsel to determine whether it should be asked, rephrased, or not asked.”

A Committee member then moved to approve the amendment to add a new subsection 611(e) for publication, with all of the agreed-upon changes to the rule and accompanying Committee note. The motion was seconded and unanimously approved.

C. Party Opponent Statements offered against Successors/ Rule 801(d)(2)

The Reporter introduced the proposal to amend Rule 801(d)(2), the hearsay exemption for party opponent statements. The Reporter explained that party opponent statements admissible against a declarant or the declarant’s principal are sometimes excluded when a successor party stands in the shoes of the declarant or the declarant’s principal due to an assignment of a claim. He offered the example of an individual suing for personal injuries whose own statements would be admissible against her. If the individual dies before trial and her estate pursues the personal injury claim on her behalf, some courts would exclude the decedent declarant’s statements when offered against the estate. The amendment would make the statements admissible against a party who stands in the shoes of the declarant or the declarant’s principal. The Reporter explained that the amendment would appear at the bottom of Rule 801(d)(2), noting that the restylists had approved the placement despite their typical disdain for hanging paragraphs.

The Reporter called the Committee's attention to the draft amendment providing for admissibility when "a party's claim or defense is directly derived from a declarant or a declarant's principal." He noted that the Reporter to the Standing Committee had raised a question about the word "defense" in the amendment and invited Professor Struve to elaborate. Professor Struve explained that a successor party -- who should be bound by the statements of the predecessor -- might have an independent defense to the claims, such as the successor liability defense. She suggested that the amendment should replace the term "defense" with the terms "potential liability" to provide for admissibility of predecessor statements even in circumstances in which the successor enjoys an independent defense. The Reporter noted that the Committee note would not need to be changed if this alteration were made. Committee members agreed to use the terms "potential liability" instead of "defense." The Committee thereafter unanimously voted to approve the amendment to Rule 801(d)(2) as modified for publication.

D. Rule 804(b)(3) and Corroborating Circumstances

Professor Richter introduced the proposal to amend Rule 804(b)(3). The amendment would clarify that, in assessing whether corroborating circumstances clearly indicate the trustworthiness of a statement against penal interest, courts should consider not only the totality of the circumstances under which the statement was made, but also any other evidence corroborating it. She called the Committee's attention to the draft of the proposal circulated in a supplemental memorandum. She explained that the restylists had suggested replacing "corroborating the statement" in subsection (B) of the amendment with "corroborating it." She further noted that Judge Schroeder had suggested a helpful modification to the first sentence of the Committee note to make it more direct. Finally, Professor Richter explained that an example had been added to the note to illustrate the type of information the court should consider in evaluating the corroborating circumstances requirement under the amendment.

The Chair pointed out that a judge should consider *all* independent evidence about the credibility of a declarant's statement -- i.e., not only evidence that corroborates it, but also evidence that undermines it. He suggested adding language to the first sentence of the note so that it would instruct a judge to consider evidence "corroborating or contradicting" a statement. The Chair also suggested stating in the note that the "court *must* consider not only the totality of circumstances..." He also asked to change "like" in the example in the note to "such as." Judge Bates noted that a comma should be inserted after the citation to the *Donnelly* case in the note. One Committee member suggested that the opening phrase of subsection (B) of the rule text is awkward because it begins with the caveat that a statement must be one that exposes the declarant to criminal liability and must be offered in a criminal case to trigger the corroborating circumstances requirement. The Reporter explained that there was no other place to put that caveat that would make the rule read more smoothly.

The Committee unanimously voted to approve the proposed amendment and Committee note to Rule 804(b)(3) as modified for publication.

E. Rule 613(b) and a Prior Foundation for Extrinsic Evidence of a Prior Inconsistent Statement

Professor Richter directed the Committee's attention to the proposal to amend Rule 613(b) to require a prior foundation on cross-examination of a witness before offering extrinsic evidence of the witness's prior inconsistent statement. She explained that the proposed amendment would require a prior foundation but would retain the trial court's discretion to delay or forgo the foundation under appropriate circumstances. Professor Richter noted that a supplemental draft of the proposal had been circulated that added illustrations of circumstances that might justify departure from the prior foundation requirement in the Committee note.

The Federal Public Defender suggested that his only concern with the proposal might be one raised in Professor Richter's Agenda memo that the amendment could be a solution in search of a problem. The Reporter responded that public comment would help clarify that point. And Professor Richter noted that the amendment could help the neophyte trial lawyer who reads the current rule to allow flexible timing for a witness's opportunity to explain or deny a prior inconsistent statement, only to learn after cross-examination has concluded that the trial judge requires a prior foundation. The Chair agreed, noting that every one of the federal judges whom he had asked about this issue reported requiring a prior foundation despite the flexible timing allowed under current Rule 613(b). Judge Bates suggested deleting "Of course" from the second and final paragraph of the Committee note. He also recommended deleting the bracketed "in the interests of justice" language in the second paragraph of the note. Finally, Judge Bates expressed concern about citing a concurring opinion in the Committee note. The Reporter responded that the concurring opinion cited was the clearest and most persuasive explanation of the virtues of the prior foundation rule and had been included for that reason. The Reporter then suggested that the note could employ a similar defense of the prior foundation requirement without citing the concurrence directly. The Committee agreed to that solution.

The Committee voted unanimously to approve the proposed amendment to Rule 613(b) and accompanying note with the agreed-upon modifications for publication.

IV. Closing Matters

The Chair thanked the Committee and all participants for their patience and for their contributions. He announced that the fall meeting would take place on October 28, 2022 in Phoenix, Arizona.

Respectfully Submitted,

Liesa L. Richter

TAB 8

TAB 8A

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Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2021	<u>H.R. 41</u> <i>Sponsor:</i> Biggs (R-AZ)	CV 23	Bill Text: https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf Summary (authored by CRS): This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors.	<ul style="list-style-type: none"> 1/4/21: Introduced in House; referred to Judiciary Committee 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Injunctive Authority Clarification Act of 2021	<u>H.R. 43</u> <i>Sponsor:</i> Biggs (R-AZ)	CV	Bill Text: https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf Summary (authored by CRS): This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit.	<ul style="list-style-type: none"> 1/4/21: Introduced in House; referred to Judiciary Committee 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Mutual Fund Litigation Reform Act	<u>H.R. 699</u> <i>Sponsor:</i> Emmer (R-MN)	CV 8 & 9	Bill Text: https://www.congress.gov/117/bills/hr699/BILLS-117hr699ih.pdf Summary: This bill provides a heightened pleading standard for actions alleging breach of fiduciary duty under the Investment Company Act of 1940, requiring that “all facts establishing a breach of fiduciary duty” be “state[d] with particularity.”	<ul style="list-style-type: none"> 2/2/21: Introduced in House; referred to Judiciary Committee and Financial Services Committee 3/22/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Protect Asbestos Victims Act of 2021	<u>S. 574</u> <i>Sponsor:</i> Tillis (R-NC) <i>Co-sponsors:</i> Cornyn (R-TX) Grassley (R-IA)	BK	Bill Text: https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf Summary: Would amend 11 USC § 524(g) “to promote the investigation of fraudulent claims against [asbestosis trusts] ...” and would allow outside parties to make information demands on the administrators of such trusts regarding payment	<ul style="list-style-type: none"> 3/3/2021: Introduced in Senate; referred to Judiciary Committee

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Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			to claimants. If enacted in its current form S. 574 may require an amendment to Rule 9035. The bill would give the United States Trustee a number of investigative powers with respect to asbestosis trusts set up under § 524 even in the districts in Alabama and North Carolina. Rule 9035 on the other hand, reflects the current law Bankruptcy Administrators take on US trustee functions in AL and NC and states that the UST has no authority in those districts.	
<p>Eliminating a Quantifiably Unjust Application of the Law Act of 2021</p>	<p>H.R. 1693 <i>Sponsor:</i> Jeffries (D-NY)</p> <p><i>Co-Sponsors:</i> [56 bipartisan co-sponsors]</p>	<p>CR 43</p>	<p>Bill Text: https://www.congress.gov/117/bills/hr1693/BILLS-117hr1693rfs.pdf</p> <p>Summary: The bill decreases the penalties for certain cocaine-related controlled substance crimes, and allows those convicted under prior law to petition to lower the sentence. The bill then provides that “[n]otwithstanding Rule 43 of the Federal Rules of Criminal Procedure, the defendant is not required to be present” at a hearing to reduce a sentence pursuant to the bill.</p>	<ul style="list-style-type: none"> • 3/9/21: Introduced in House; referred to Judiciary Committee and Committee on Energy and Commerce • 5/18/21: Referred to Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security • 7/21/21: Judiciary Committee consideration and mark-up session held; reported from committee as amended • 9/28/21: Debated in House • 9/28/21: Passed house in roll call vote 361-66 • 9/29/21: Received in Senate; referred to Judiciary Committee

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Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Sunshine in the Courtroom Act of 2021	<p>S.818 <i>Sponsor:</i> Grassley (R-IA)</p> <p><i>Co-sponsors:</i> Blumenthal (D-CT) Cornyn (R-TX) Durbin (D-IL) Klobuchar (D-MN) Leahy (D-VT) Markey (D-MA)</p>	CR 53	<p>Bill Text: https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf</p> <p>Summary: This is described as a bill “[t]o provide for media coverage of Federal court proceedings.” The bill would allow presiding judges in the district courts and courts of appeals to “permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge provides.” The Judicial Conference would be tasked with promulgating guidelines.</p> <p>This would impact what is allowed under Federal Rule of Criminal Procedure 53 which says that “[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”</p>	<ul style="list-style-type: none"> • 3/18/21: Introduced in Senate; referred to Judiciary Committee • 6/24/21: Scheduled for mark-up; letter being prepared to express opposition by the Judicial Conference and the Rules Committees • 6/24/21: Ordered to be reported without amendment favorably by Judiciary Committee
Litigation Funding Transparency Act of 2021	<p>S. 840 <i>Sponsor:</i> Grassley (R-IA)</p> <p><i>Co-sponsors:</i> Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)</p> <p>H.R. 2025 <i>Sponsor:</i> Issa (R-CA)</p>		<p>Bill Text: https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf [Senate]</p> <p>https://www.congress.gov/117/bills/hr2025/BILLS-117hr2025ih.pdf [House]</p> <p>Summary: Requires disclosure and oversight of TPLF agreements in MDL’s and in “any class action.”</p>	<ul style="list-style-type: none"> • 3/18/21: Introduced in Senate and House; referred to Judiciary Committees • 5/3/21: Letter received from Sen. Grassley and Rep. Issa • 5/10/21: Response letter sent to Sen. Grassley from Rep. Issa from Judge Bates • 10/19/21: Referred by House Judiciary Committee to Subcommittee on Courts, Intellectual Property, and the Internet

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Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Justice in Forensic Algorithms Act of 2021	H.R. 2438 <i>Sponsor:</i> Takano (D-CA) <i>Co-sponsor:</i> Evans (D-PA)	EV 702	<p>Bill Text: https://www.congress.gov/117/bills/hr2438/BILLS-117hr2438ih.pdf</p> <p>Summary: A bill “[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings, provide for the establishment of Computational Forensic Algorithm Testing Standards and a Computational Forensic Algorithm Testing Program, and for other purposes.”</p> <p>Section 2 of the bill contains the following two subdivisions that implicate Rules:</p> <p>“(b) PROTECTION OF TRADE SECRETS.— (1) There shall be no trade secret evidentiary privilege to withhold relevant evidence in criminal proceedings in the United States courts. (2) Nothing in this section may be construed to alter the standard operation of the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, as such rules would function in the absence of an evidentiary privilege.”</p> <p>“(g) INADMISSIBILITY OF CERTAIN EVIDENCE.—In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if— (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software.”</p>	<ul style="list-style-type: none"> • 4/8/21: Introduced in House; referred to Judiciary Committee and to Committee on Science, Space, and Technology • 10/19/21: Referred by Judiciary Committee to Subcommittee on Crime, Terrorism, and Homeland Security
Juneteenth National Independence Day Act	S. 475	AP 26; BK 9006; CV 6; CR 45	Established Juneteenth National Independence Day (June 19) as a legal public holiday	<ul style="list-style-type: none"> • 6/17/21: Became Public Law No: 117-17

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Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Bankruptcy Venue Reform Act of 2021	<p>H.R. 4193 <i>Sponsor:</i> Lofgren (D-CA)</p> <p><i>Co-Sponsors:</i> Buck (R-CO) Perlmutter (D-CO) Neguse (D-CO) Cooper (D-TN) Thompson (D-CA) Burgess (R-TX) Bishop (R-NC)</p> <p>S. 2827 <i>Sponsor:</i> Cornyn (R-TX)</p> <p><i>Co-sponsor:</i> Warren (D-MA)</p>	BK	<p>Bill Text: https://www.congress.gov/bill/117th-congress/house-bill/4193/text?r=453 [House]</p> <p>https://www.congress.gov/117/bills/s2827/BILLS-117s2827is.pdf [Senate]</p> <p>Summary: Modifies venue requirements relating to Bankruptcy proceedings. Senate version includes a limitation absent from the House version giving “no effect” for purposes of establishing venue to certain mergers, dissolutions, spinoffs, and divisive mergers of entities.</p> <p>Would require the Supreme Court to prescribe rules, under § 2075, to allow an attorney to appear on behalf of a governmental unit and intervene without charge or meeting local rule requirements in Bankruptcy Cases and arising under or related to proceeding before bankruptcy and district courts and BAPS.</p>	<ul style="list-style-type: none"> 6/28/21: H.R. 4193 introduced in House; referred to Judiciary Committee 9/23/21: S. 2827 introduced in Senate; referred to Judiciary Committee
Nondebtor Release Prohibition Act of 2021	<p>S. 2497 <i>Sponsor:</i> Warren (D-MA)</p>	BK	<p>Bill Text: https://www.congress.gov/bill/117th-congress/senate-bill/2497/text?r=195</p> <p>Summary: Would prevent individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, and others in bankruptcy by:</p> <ul style="list-style-type: none"> Prohibiting the court from discharging, releasing, terminating or modifying the liability of and claim or cause of action against any entity other than the debtor or estate. Prohibiting the court from permanently enjoining the commencement or continuation of any action with respect to an entity other than the debtor or estate. 	<ul style="list-style-type: none"> 7/28/21: Introduced in Senate, Referred to Judiciary Committee
Protecting Our Democracy Act	<p>H.R. 5314 <i>Sponsor:</i> Schiff (D-CA)</p> <p><i>Co-Sponsors:</i> [168 co-sponsors]</p>	CR 6; CV	<p>Bill Text: https://www.congress.gov/bill/117th-congress/house-bill/5314/text [House]</p> <p>https://www.congress.gov/117/bills/s2921/BILLS-117s2921is.pdf [Senate]</p>	<ul style="list-style-type: none"> 9/21/21: H.R. 5314 introduced in House; referred to numerous committees, including House

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Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
	<p>S. 2921 <i>Sponsor:</i> Klobuchar (D-MN)</p> <p><i>Co-Sponsors:</i> Blumenthal (D-CT) Coons (D-DE) Feinstein (D-CA) Hirono (D-HI) Merkley (D-OR) Sanders (I-VT) Warren (D-MA) Wyden (D-OR)</p>		<p>Summary: Various provisions of this bill amend existing rules, or direct the Judicial Conference to promulgate additional rules, including:</p> <ul style="list-style-type: none"> Prohibiting any interpretation of Criminal Rule 6(e) that would prohibit disclosure to Congress of certain grand jury materials related to individuals pardoned by the President Requiring the Judicial Conference to promulgate rules “to ensure the expeditious treatment of” actions to enforce Congressional subpoenas. The bill requires that the rules be transmitted within 6 months of the effective date of the bill. 	<p>Judiciary Committee</p> <ul style="list-style-type: none"> 9/30/21: S. 2921 introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs 12/9/21: H.R. 5314 debated and amended in House under provisions of H. Res. 838 12/9/21: H.R. 5314 passed by House 12/13/21: House bill received in Senate
<p>Congressional Subpoena Compliance and Enforcement Act</p>	<p>H.R. 6079 <i>Sponsor:</i> Dean (D-PA)</p> <p><i>Co-Sponsors:</i> Nadler (D-NY) Schiff (D-CA)</p>	CV	<p>Bill Text: https://www.congress.gov/117/bills/hr6079/BILLS-117hr6079ih.pdf</p> <p>Summary: The bill directs the Judicial Conference to promulgate rules “to ensure the expeditious treatment of” actions to enforce Congressional subpoenas. The bill requires that the rules be transmitted within 6 months of the effective date of the bill.</p>	<ul style="list-style-type: none"> 11/26/21: Introduced in House; referred to Judiciary Committee
<p>Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)</p>	<p>S. 3385 <i>Sponsor:</i> Whitehouse (D-RI)</p> <p><i>Co-Sponsors:</i> Sanders (I-VT) Blumenthal (D-CT) Hirono (D-HI) Warren (D-MA) Lujan (D-NM)</p>	AP 29	<p>Bill Text: https://www.congress.gov/117/bills/s3385/BILLS-117s3385is.pdf</p> <p>Summary: In part, the legislation would require amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief.</p>	<ul style="list-style-type: none"> 12/14/21: Introduced in Senate; referred to Judiciary Committee

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Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Courtroom Videoconferencing Act of 2022	<p>H.R. 6472 <i>Sponsor:</i> Morelle (D-NY)</p> <p><i>Co-Sponsor:</i> Fischbach (R-MN) Bacon (R-NE) Tiffany (R-WI)</p>	CR	<p>Bill Text: https://www.congress.gov/117/bills/hr6472/BILLS-117hr6472ih.pdf</p> <p>Summary: The bill would make permanent (i.e., even in absence of emergency situations) certain CARES Act provisions, including allowing the chief judge of a district court to authorize teleconferencing for initial appearances, arraignments, and misdemeanor pleas or sentencing. The bill would require a defendant’s consent before proceeding via teleconferencing, and would ensure that defendants can utilize video or telephone conferencing to privately consult with counsel.</p>	<ul style="list-style-type: none"> 1/21/22: Introduced in House; referred to Judiciary Committee
Save Americans from the Fentanyl Emergency Act of 2022	<p>H.R. 6946 <i>Sponsor:</i> Pappas (D-NH)</p> <p><i>Co-Sponsors:</i> Newhouse (R-WA) Budd (R-NC) Suozzi (D-NY) Van Drew (R-NJ) Cuellar (D-TX) Roybal-Allard (D-CA) Craig (D-MN) Spanberger (D-VA)</p>	CR 43	<p>Bill Text: https://www.congress.gov/117/bills/hr6946/BILLS-117hr6946ih.pdf</p> <p>Summary: The bill decreases the penalties for certain fentanyl-related controlled substance crimes, and allows those convicted under prior law to petition to lower the sentence. The bill then provides that “[n]otwithstanding rule 43 of the Federal Rules of Criminal Procedure, the defendant is not required to be present” at a hearing to vacate or reduce a sentence pursuant to the bill.</p>	<ul style="list-style-type: none"> 3/7/22: Introduced in House; referred to the Committee on Energy and Commerce and Judiciary Committee
Bankruptcy Threshold Adjustment and Technical Corrections Act	<p>S. 3823 <i>Sponsor:</i> Grassley (R-IA)</p> <p><i>Co-Sponsors:</i> Durbin (D-IL) Whitehouse (D-RI) Cornyn (R-TX)</p> <p>H.R. 7494 <i>Sponsor:</i> Neguse (D-CO)</p> <p><i>Co-Sponsor:</i> Cline (R-VA)</p>	BK 1020; BK Forms 101 & 201	<p>Bill Text: https://www.congress.gov/117/bills/s3823/BILLS-117s3823es.pdf [Senate]</p> <p>https://www.congress.gov/117/bills/hr7494/BILLS-117hr7494ih.pdf [House]</p> <p>Summary: This bill would retroactively reinstate for a further two years from the date of enactment the CARES Act definition of debtor in Section 1182(1) with its \$7.5m subchapter V debt limit.</p>	<ul style="list-style-type: none"> 3/14/22: Introduced in Senate; referred to Judiciary Committee 4/7/22: Passed Senate with amendment by unanimous consent 4/11/22: Received in House; referred to Judiciary Committee

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Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Government Surveillance Transparency Act of 2022	<p>S. 3888 <i>Sponsor:</i> Wyden (D-OR)</p> <p><i>Co-Sponsors:</i> Daines (R-MT) Lee (R-UT) Booker (D-NJ)</p> <p>H.R. 7214 <i>Sponsor:</i> Lieu (D-CA)</p> <p><i>Co-Sponsors:</i> Davidson (R-OH)</p>	CR 41	<p>Bill Text: https://www.congress.gov/117/bills/s3888/BILLS-117s3888is.pdf [Senate]</p> <p>https://www.congress.gov/117/bills/hr7214/BILLS-117hr7214ih.pdf [House]</p> <p>Summary: The bill explicitly adds a sentence and two subdivisions of text to Rule 41(f)(1)(B) regarding what the government must disclose in an inventory taken pursuant to the Rule. See page 25 of either PDF for full text.</p>	<ul style="list-style-type: none"> • 3/22/22: Introduced in Senate; referred to the Judiciary Committee • 3/24/22: Introduced in the House; referred to the Judiciary Committee
21st Century Courts Act of 2022	<p>S. 4010 <i>Sponsor:</i> Whitehouse (D-RI)</p> <p><i>Co-Sponsors:</i> Blumenthal (D-CT) Hirono (D-HI)</p> <p>H.R. 7426 <i>Sponsor:</i> Johnson (D-GA)</p> <p><i>Co-Sponsors:</i> Nadler (D-NY) Jones (D-NY) Cicilline (D-RI) Quigley (D-IL)</p>	AP 29; CV; CR	<p>Bill Text: https://www.congress.gov/117/bills/s4010/BILLS-117s4010is.pdf [Senate]</p> <p>https://www.congress.gov/117/bills/hr7426/BILLS-117hr7426ih.pdf [House]</p> <p>Summary: In part, the legislation would require amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief. Additionally, the bill would require within one year the promulgation of rules regarding procedures for the public to contest a motion to seal a judicial record.</p>	<ul style="list-style-type: none"> • 4/6/22: Introduced in the Senate; referred to Judiciary Committee • 4/6/22: Introduced in the House; referred to Judiciary Committee, Committee on Oversight and Reform, and Committee on House Administration
Supreme Court Ethics, Recusal, and Transparency Act of 2022	<p>H.R. 7647 <i>Sponsor:</i> Johnson (D-GA)</p> <p><i>Co-Sponsors:</i> [15 co-sponsors]</p> <p>S. 4188 <i>Sponsor:</i> Whitehouse (D-RI)</p> <p><i>Co-Sponsors:</i></p>	AP 29; CV; CR; BK	<p>Bill Text: https://www.congress.gov/117/bills/hr7647/BILLS-117hr7647ih.pdf [House]</p> <p>https://www.congress.gov/117/bills/s4188/BILLS-117s4188is.pdf [Senate]</p> <p>Summary: The bill directs the use of the REA process to enact a rule regarding party and amici disclosures in the <i>Supreme Court</i>. Additionally, the legislation would require amicus curiae in <i>any</i> court to disclose whether counsel for a party authored the brief in</p>	<ul style="list-style-type: none"> • 5/3/22: Introduced in the House; referred to Judiciary Committee • 5/11/22: Mark-up Session held in House Judiciary Committee; reported favorably by 22-16 vote • 5/11/22: Introduced in the

Legislation that Directly or Effectively Amends the Federal Rules

117th Congress

(January 3, 2021 – January 3, 2023)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
	Blumenthal (D-CT) Booker (D-NJ) Feinstein (D-CA) Hirono (D-HI) Leahy (D-VT) Schatz (D-HI)		whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief. Finally, the bill requires the use of the REA process to promulgate a rule prohibiting the filing of or striking an amicus brief that would result in the disqualification of a justice, judge, or magistrate judge.	Senate; referred to Judiciary Committee

TAB 8B

JUDICIARY STRATEGIC PLANNING (ACTION)

The Executive Committee has requested information about the Committee's efforts to implement the *Strategic Plan for the Federal Judiciary (Plan)*. A memorandum from the Executive Committee's Chair, Judge Claire V. Eagan, to committee chairs is included as Attachment 1. The memorandum also invites committees to suggest topics for discussion at upcoming long-range planning meetings.

Background

An update to the *Strategic Plan for the Federal Judiciary* was approved by the Judicial Conference at its September 2020 session (JCUS-SEP 2020, pp. 13-14). The Judicial Conference's approach to strategic planning includes priority setting and the integration of the *Plan* into the work of Conference committees (JCUS-SEP 10, pp. 5-6).

Priority Setting

In March 2011, the Executive Committee identified four strategies and one goal from the *Plan* to receive priority attention over the next two years, and then in March 2013, affirmed those four strategies and one goal as priorities for the following two years. After the Judicial Conference approved an update to the *Plan* in September 2015 (JCUS-SEP 2015, pp. 5-6), the Executive Committee, in February 2016, added one new goal as a priority while reaffirming the strategies and goal previously identified. In February 2018 one core value and one goal were added by the Executive Committee, making a total of eight priorities for the next two years. In February 2021, following the Judicial Conference's approval of the 2020 update to the *Plan*, the Executive Committee added seven new strategies and affirmed four strategies and one goal previously identified to establish the following twelve priorities for 2021 and 2022:

- | | |
|--------------|--|
| Strategy 1.1 | Pursue improvements in the delivery of fair and impartial justice on a nationwide basis. |
| Strategy 1.2 | Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values. |
| Strategy 1.3 | Strengthen the protection of judges, court employees, and the public at court facilities, and of judges and their families at other locations. |
| Strategy 2.1 | Assure high standards of conduct and integrity for judges and employees. |
| Strategy 2.4 | Encourage involvement in civics education activities by judges and judiciary employees. |
| Strategy 3.1 | Allocate and manage resources more efficiently and effectively. |

Strategy 4.1	Recruit, develop, and retain a talented, dedicated, and diverse workforce, while defining the judiciary’s future workforce requirements.
Strategy 4.3	Ensure an exemplary workplace free from discrimination, harassment, retaliation, and abusive conduct.
Strategy 5.1	Harness the potential of technology to identify and meet the needs of judiciary users for information, service, and access to the courts.
Goal 5.1d	Continuously improve security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information. In addition, raise awareness of the threat of cyberattacks and improve defenses to secure the integrity of judiciary IT systems.
Strategy 6.3	Promote effective administration of the criminal defense function in the federal courts.
Strategy 7.1	Develop and implement a comprehensive approach to enhancing relations between the judiciary and Congress.

The Executive Committee encouraged committees to consider planning priorities when setting the agenda for future committee meetings and determining which initiatives to pursue. The Executive Committee also suggested planning priorities be considered when assessing the impact of policy recommendations, resource allocation decisions, and cost-containment measures.

Reporting on Strategic Initiatives

The primary means for integrating the *Plan* into committee planning and policy activities is through the development and implementation of committee strategic initiatives: projects, studies, or other efforts that have the potential to make significant contributions to the accomplishment of a strategy or goal in the *Plan*. Committees are encouraged to demonstrate the link between their respective initiatives and one or more of the above planning priorities identified by the Executive Committee. Strategic initiatives are intended to be distinct from the ongoing work of committees, for which there are already a number of reporting mechanisms, including committee reports to the Judicial Conference.

Included as Attachment 2 is a draft report to the Executive Committee briefly describing each of the committee’s strategic initiatives under the following headings: the purpose; desired outcome; related strategies and goals in the *Plan*; whether the initiative is being conducted in partnership with other Judicial Conference committees or other groups; schedule; assessment approach; and results. It is anticipated that the Executive Committee will also request information about the progress of the committee’s strategic initiatives during the summers of 2023 and 2024.

Recommendation: That the Committee approve the materials in Attachment 2 reporting on its strategic initiatives.

Long-Range Planning Meetings

Since 1999, the approach to strategic planning for the Judicial Conference and its committees has relied upon the leadership of committee chairs, with facilitation and coordination by the Executive Committee.¹ On the afternoon before most Judicial Conference sessions, a long-range planning meeting is held to discuss selected strategic planning issues and the judiciary's strategic planning efforts. A particular emphasis is placed on topics that cross areas of committee jurisdiction and responsibility. Participants in long-range planning meetings include the chairs of Conference committees, members of the Executive Committee, the Director of the Administrative Office, and the Director of the Federal Judicial Center.

For the upcoming September 2022 long-range planning meeting, a continuation of the discussion on Court Operations in Remote and Hybrid Work Environments has been proposed, including a review of cooperation between state and federal courts. Suggestions for additional discussion topics for the September and future long-range planning meetings are welcome and encouraged.

¹ *The Judicial Conference and its Committees*, August 2013, pp. 5-6.



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

CLAIRE V. EAGAN
CHAIR, EXECUTIVE COMMITTEE

(918) 699-4795
(918) 699-4787 (FAX)
judge_claire_v_eagan@oknd.uscourts.gov

April 7, 2022

MEMORANDUM

To: Conference Committee Chairs

From: Claire V. Eagan 
Chair, Executive Committee

Re: JUDICIARY STRATEGIC PLANNING (ACTION REQUESTED)

RESPONSE DUE DATE: Following Summer 2022 Judicial Conference Committee Meetings

Each summer, the Executive Committee is provided with an update on the efforts of Judicial Conference committees to implement the *Strategic Plan for the Federal Judiciary (Plan)*. To assist in preparing this update, I am requesting reports on the strategic initiatives that your committees are pursuing. These initiatives are critical elements of the judiciary's strategic planning approach, transforming high-level strategies and goals from the *Plan* into specific efforts with measurable outcomes.

Your summer 2022 meetings will include a strategic planning agenda item inviting committees to report on the status of their respective strategic initiatives. The materials for your summer meetings will provide further information detailing this request.

I also invite you to suggest topics for future long-range planning meetings of Judicial Conference committee chairs. These meetings are one of the few opportunities for Conference committee chairs to come together, and offer a good forum for discussion of cross-cutting issues. For the upcoming September 2022 long-range planning meeting, we propose continuing the discussion on Court Operations in Remote and Hybrid Work Environments, including a review of cooperation between state and federal courts.

Please send a copy of your reports to the AO's Long-Range Planning Officer, Lea Swanson. I also encourage you to contact Lea if you have any questions about this summer's planning agenda item or other planning matters.

cc: Executive Committee
Committee Staff



Committee on Rules of Practice and Procedure Report on Strategic Initiatives

The integration of the [*Strategic Plan for the Federal Judiciary \(Plan\)*](#) into Conference committees' regular planning and policy development activities has primarily been achieved by committees through the development and implementation of strategic initiatives. As requested, this brief report provides the following information about the active strategic initiatives for this Committee: the purpose; desired outcome; related strategies and goals in the *Plan*; whether the initiative is being conducted in partnership with other Judicial Conference committees or other groups; schedule; assessment approach; and results.

At prior meetings, this Committee identified the following strategic initiatives for the 2020-2025 period:

- Evaluating the Rules Governing Disclosure Obligations in Criminal Cases.
- Evaluating the Impact of Technological Advances.
- Bankruptcy Rules Restyling.
- Examining Ways to Reduce Cost and Increase Efficiency in Civil Litigation.
- Consideration of Possible Emergency Rules in Response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

At this meeting, the Committee is asked to review its strategic initiatives and provide a status update to the Executive Committee. The status of each initiative is listed below along with a note regarding which priority strategy is impacted, if any.

On-going Initiatives

- Evaluating the Rules Governing Disclosure Obligations in Criminal Cases.

The Criminal Rules Committee has approved an amendment to Federal Rule of Criminal Procedure 16 (Discovery and Inspection) that clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial, while maintaining the reciprocal structure of the current rule. It is intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. The amended rule will be effective December 1, 2022, absent action to the contrary by Congress. This initiative relates to Strategy 1.1. No other committees are involved in this initiative.

- Evaluating the Impact of Technological Advances.

The e-signature rules were updated in 2018 and the Rules Committees continue to evaluate the effects of technology on court procedures and how to use technology most effectively. For example, the Rules Committees are considering a suggestion to expand the use of electronic filing by unrepresented litigants, and the evaluation of the suggestion is in its beginning stages. This initiative relates to Strategy 5.1. No other committees are involved in this initiative.

- Bankruptcy Rules Restyling.

The Bankruptcy Rules Committee has undertaken a multi-year process of restyling the bankruptcy rules to make them more user-friendly. The first set of restyled rules was published in August 2020, with the goal of having the entire set of restyled Bankruptcy Rules effective December 1, 2024. This initiative relates to Strategy 1.1. No other committees are involved in this initiative.

- Examining Ways to Reduce Cost and Increase Efficiency in Civil Litigation.

The Civil Rules Committee will be completing a pilot project on mandatory initial disclosures in the next year. Following its completion, the committee will consider whether the results of the pilot project support broader changes and will continue to evaluate ways to reduce costs, increase efficiency, and improve the delivery of justice in civil cases. This initiative relates to Strategy 1.1. No other committees are involved in this initiative.

- Consideration of Possible Emergency Rules in Response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

In 2020, Congress directed the Judicial Conference and the Supreme Court to consider possible rule amendments that could ameliorate future national emergencies' effects on court operations in light of the COVID pandemic (see CARES Act, Pub. L. No. 116-136, § 15002(b)(6)). The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules subsequently recommended, and the Standing Committee approved, publication for comment of rules for future emergencies. The rules were published in August 2021 and are being considered for final approval in June 2022. If they are approved, they will be submitted to the Judicial Conference for approval and then the Supreme Court. The anticipated effective date for the emergency rules is December 1, 2023. This initiative relates to Strategy 5.1. No other committees are involved in this initiative.

It is anticipated that the Judiciary Planning Coordinator will also request information about the progress of the Committee's proposed new and on-going initiatives during the summers of 2023 and 2024.

Supplemental Report
MDL Subcommittee
Advisory Committee on Civil Rules
Standing Committee Agenda Book, June 2022

1 The agenda materials for this Standing Committee meeting include the sketch of a possible
2 rule-amendment approach discussed with the Advisory Committee at its March 29, 2022, meeting.
3 But comments the Subcommittee received after the agenda book for that Advisory Committee
4 meeting was prepared raised questions about whether that approach (focusing on possible changes
5 to Rules 26(f) and 16(b)) would actually work in MDL proceedings. Among the problems cited
6 were:

7 (1) Rule 26(f) conferences probably do not occur as part of MDL proceedings in the same
8 manner the rule says they should occur in individual actions. If they have already occurred in some
9 transferred actions, the rule does not call for them to occur again, but probably the scheduling order
10 for that individual action no longer applies. And after transfer it would be chaotic to expect them
11 to occur in individual actions in which they have not occurred (including later-filed and “tagalong”
12 actions) on the schedule set out in the rule for individual actions.

13 (2) It would also be desirable to provide a role for the court to consider designating
14 “coordinating counsel” to meet and confer about the topics on which the court needs information
15 prior to the initial case management conference. Otherwise, there may be unsupervised and
16 possibly counterproductive jockeying among counsel.

17 Prompted by those concerns, the Reporters prepared a sketch of an alternative approach --
18 a possible new freestanding Rule 16.1, directed only to MDL proceedings. The goal of this sketch
19 is to prompt the convening of a meet-and-confer session among counsel before the initial post-
20 transfer case management conference with the court. Such a conference can produce a report
21 providing the court with the parties’ views on issues the court may need to address in early case
22 management orders.

23 On May 24, 2022, the MDL Subcommittee convened an online meeting to discuss the
24 initial sketch, and suggest revisions to it. Going forward, the Subcommittee hopes to receive
25 reactions to this revised approach from various bar groups over the coming summer, so that it can
26 present the results of that outreach to the full Advisory Committee at its October meeting.

27 This Supplemental Report therefore acquaints the Standing Committee with the MDL
28 Subcommittee’s current focus. Because this revised approach has not been presented to the full
29 Advisory Committee, it is included here only to inform the Standing Committee of the current
30 focus of the Subcommittee’s discussions, which has changed since the Advisory Committee’s
31 March 2022 meeting. Reactions from upcoming conferences should provide the Subcommittee
32 with a fuller appreciation of the possible merit of this revised approach as it prepares its report to
33 the Advisory Committee for its October 2022 meeting. The Subcommittee is, of course, happy to
34 receive reactions to this revised approach from Standing Committee members, but with the
35 understanding that the Subcommittee may significantly modify or abandon this new approach on
36 the basis of hoped-for input during the coming summer.

37

Rule 16.1. Multidistrict Litigation Judicial Management

38 (a) MDL MANAGEMENT CONFERENCES. After the Judicial Panel on Multidistrict Litigation
39 orders the transfer of actions to a designated transferee judge, that judge may [must]
40 {should} schedule [an early management conference] {one or more management
41 conferences} to develop a management plan for orderly pretrial activity in the centralized
42 actions.

43 (b) DESIGNATION OF COORDINATING COUNSEL FOR PRE-CONFERENCE MEET AND CONFER. The
44 court may [must] {should} designate coordinating counsel to act on behalf of plaintiffs
45 [and defendants in multi-defendant proceedings] during the pre-conference meet and
46 confer session under Rule 16.1(c). [Designation of coordinating counsel does not imply
47 any determination about the appointment of permanent leadership counsel.] {Such
48 appointments are without prejudice to later selection of other permanent leadership or
49 liaison counsel.}

50

Alternative 1

51 (c) PRE-CONFERENCE MEET AND CONFER. The court may [must] {should} direct the parties to
52 meet and confer through their attorneys or through coordinating counsel designated under
53 Rule 16.1(b) before the initial conference under Rule 16.1(a). [The parties must discuss
54 and prepare a report to the court on the following:] {Unless excused by the court, the parties
55 must discuss and prepare a report for the court on any matter addressed in Rule 16(a) or
56 (b), and in addition on the following}:

57 (1) Appointment of leadership counsel, including lead or liaison attorneys, the
58 appropriate structure of leadership counsel, and whether such appointments should
59 be for a specified term;

60 (2) Responsibilities and authority of leadership counsel in conducting pretrial activity
61 in the proceedings and addressing possible resolution, including methods for
62 providing information to non-leadership counsel concerning progress in pretrial
63 proceedings;

64 (3) Requirements for leadership counsel to report to the court on a regular basis [on
65 progress in pretrial proceedings];

66 (4) Any limits on activity by non-leadership counsel;

67 (5) Whether to establish a means for compensating leadership counsel [including a
68 common benefit fund];

69 (6) Identification of the primary elements of the parties' claims and defenses and the
70 principal factual and legal issues likely to be presented in the proceedings;

- 71 (7) Whether the parties should be directed to exchange information about their claims
72 and defenses at an early point in the proceedings;
- 73 (8) Whether a master complaint or master answer should be prepared;
- 74 (9) Whether there are likely to be dispositive pretrial motions, and how those motions
75 should be sequenced;
- 76 (10) The appropriate sequencing of [formal] discovery;
- 77 (11) A schedule for [regular] pretrial conferences with the court about progress in
78 completing pretrial activities;
- 79 (12) Whether a procedure should be adopted for filing new actions directly in the [MDL]
80 proceeding;
- 81 (13) Whether a special master should be appointed [to assist in managing discovery,
82 discussion of possible resolution, or other matters]. [; and
- 83 (14) Any other matter addressed in Rule 16 and designated by the court.]

84 *Alternative 2*

- 85 (c) PRE-CONFERENCE MEET AND CONFER. The court may [must] {should} direct the parties to
86 meet and confer through their attorneys or through coordinating counsel designated under
87 Rule 16.1(b) before the initial conference under Rule 16.1(a). Unless excused by the court,
88 the parties must discuss and prepare a report for the court on [any matter addressed in Rule
89 16 (a) or (b),] {any matter addressed in Rule 16 and designated by the court,} and in
90 addition on the following:
- 91 (1) Whether the parties should be directed to exchange information about their claims
92 and defenses at an early point in the proceedings;
- 93 (2) Whether [leadership] {lead} counsel for plaintiffs should be appointed [and
94 whether liaison defense counsel should be appointed], the process for such
95 appointments, and the responsibilities of such appointed counsel, [and whether
96 common benefit funds should be created to support the work of such appointed
97 counsel];
- 98 (3) Whether the court should adopt a schedule for sequencing discovery, or deciding
99 disputed legal issues;
- 100 (4) A schedule for pretrial conferences to enable the court to manage the proceedings
101 [including possible resolution of some or all claims].

102 (d) MANAGEMENT ORDER. After an initial management conference, the court may [must]
103 {should} enter an order dealing with any of the matters identified in Rule 16.1(c). This
104 order controls the course of the proceedings unless the court modifies it.

105 Notes on Committee Note

106 (1) This approach is limited to instances in which the Panel grants centralization under
107 § 1407. A Committee Note can explain why MDL proceedings may present particular judicial
108 management challenges, but also emphasize that such challenges are not true of all instances in
109 which the Panel enters a transfer order or unique to MDL proceedings. Accordingly, it likely will
110 be worth noting that many -- perhaps most -- MDL proceedings can be effectively managed
111 without resort to Rule 16.1. At the same time, it could also emphasize that similar organizational
112 efforts may be valuable in other multiparty litigation not subject to a Panel transfer order.

113 (2) Picking a verb: During the March 29 meeting, one thought was that something that says
114 “should consider” is not really a rule, though something that says “must” surely is, and that saying
115 “may” also fits into a rule. To take Rule 16 as a comparison, one could say that it partly adheres
116 to the views expressed during the meeting. Thus, Rule 16(b)(1) says that the court must issue a
117 scheduling order, and Rule 16(b)(3)(A) lists the required contents of that order. Then Rule
118 16(b)(3)(B) says that the scheduling order “may” also include lots of other things. Rule 16(c)(2),
119 on the other hand, says that at a pretrial conference the court “may consider and take appropriate
120 action on” a long list of things. Perhaps that authorizes action that was not clearly within the court’s
121 authority when this rule was adopted in 1983, but it does not seem much stronger than “should
122 consider.” Probably a search through other FRCP rules would identify other instances in which
123 it’s difficult to say that the rule either commands action or provides explicit authority for an action
124 that courts previously lacked. Probably the orientation to adopt is “may” for the court but to
125 empower the court to direct that the parties “must” do the things the court directs.

126 (3) Timing: Rule 16(b)(2) sets a time limit for entry of a scheduling order, triggered by the
127 time when a defendant has been served or appeared. One might insert a time limit in 16.1(a) after
128 the Panel order, but that may not make sense. Moreover, since this is a discretionary rule (unless
129 “must” is used) it would seem odd to have such a mandatory timing aspect.

130 As adopted in 1983, when case management was a new idea, Rule 16(b) included a time
131 requirement in part to prod judges to act. It is not clear that we are trying to do that. Indeed, it may
132 be that *some* such conference is held in virtually every MDL proceeding even though there is no
133 rule saying there should be such a conference. So a time limit seems unnecessary, and it is hardly
134 clear what the trigger for holding the conference should be. Entry of a Panel order might be
135 considered. Until that order is entered, the transferee judge has no authority to act in this manner.
136 And if something like Rule 16.1 were adopted, perhaps the Panel could call attention to it when it
137 sends the transferee judge whatever introductory information it sends. Particularly given the
138 possible need for the court to designate coordinating counsel to manage the meet-and-confer
139 session that should precede the initial conference with the court, setting a specific time limit for
140 that conference seems unwise.

141 (4) Rule 16.1(c) is designed to make the parties discuss and share their views with the court
142 on the topics the judge often must address early in MDL proceedings. Before the judge is called
143 upon to make early and perhaps very consequential calls on those things, the parties should be
144 expected to present their positions on these matters. Perhaps the rule should say the parties must
145 submit their report no less than *X* days before the court has scheduled the conference. But given
146 the challenges of putting a time limit on the court's action discussed in (3) above, it is probably
147 best not to try to build in a specific time requirement on this topic either. Alternatively, the rule
148 could say that "unless the court directs otherwise" the report must be submitted *X* days before the
149 initial conference.

150 The Committee Note could also observe that this sort of conference resembles a Rule 26(f)
151 conference in some ways, but that the requirements of Rule 26(f) are not really suited to situations
152 in which many separate actions are combined for pretrial treatment in a single MDL docket. In
153 early-filed actions there may have already been 26(f) conferences before the Panel orders a
154 transfer, and Rule 16(b) orders may have been entered in those actions. But it may be that some
155 transferor judges have stayed proceedings in other cases upon learning that a Panel petition is in
156 the works or has been filed. Pre-transfer Rule 16(b) orders are surely subject to revision by the
157 transferee judge, and might often be vacated across the board. Coordinated pretrial judicial
158 management is what should follow instead of a patchwork of scheduling directives for individual
159 actions. Chaos could result from trying to adhere to scheduling orders entered by different judges
160 in cases filed at different times, and might also prevent the benefits of combined pretrial
161 proceedings section 1407 seeks to provide.

162 (5) Integrating Rule 16.1 with existing Rule 16: The sketch presents alternative approaches
163 to integrating existing Rule 16 with a new MDL-specific Rule 16.1. As a general matter, the
164 question may be whether to direct the lawyers to discuss everything in Rule 16(a) and (b)
165 (excluding Rule 16(c) as being too broad, but also recognizing that Rule 16(b)(3)(B)(vii) invites
166 almost anything under the sun), or to leave it to the court to add specified items from the list of
167 topics in Rule 16.1(c). In that connection, it might be noted that existing Rule 16(b) orders in
168 transferred cases would, in most instances, be superseded by orders of the transferee court. The
169 add-on provisions of Rule 16.1 in no way override the court's authority to act in any way
170 authorized by Rule 16. Rule 16.1(c) is designed to tee these issues up for the judge to make a
171 considered decision whether to enter such orders on various topics.

172 (6) It may be suitable to limit Rule 16.1 to an initial management conference, in part
173 because 16.1(b)(11) calls for the parties to address the need for and timing of additional
174 conferences, and also because it seems that the main goal is to get this information before the judge
175 at an orderly and informative initial management conference. If we are to maintain flexibility for
176 the judge, it may be inappropriate to seem to direct that additional conferences occur, though it's
177 likely the judge will find those useful and schedule them. On the other hand, on some matters (e.g.,
178 appropriate common benefit fund orders) it may be better to defer action for a period of time.

179 (7) Rule 16.1(b) coordinating counsel may not be needed in many MDLs, but when there
180 are large numbers of counsel it may be critical. A Committee Note could reflect on the problems
181 that can emerge if the court does not attend to what happens before the initial 16.1(a) management
182 conference, and could mention the "Lone Ranger" and "Tammany Hall" possibilities. To some

183 extent (the “Lone Ranger” problem) this sort of difficulty can appear in multi-defendant cases,
184 suggesting that judicial attention to the defense side’s representation in the meet-and-confer
185 session is warranted in some instances. The alternative bracketed last sentences of Rule 16.1(b)
186 may be overly strong, and perhaps a Committee Note to that effect would suffice. But this issue
187 may be important enough to include in the rule.

188 On the other hand, it may nonetheless be that appointment of leadership counsel on the
189 plaintiff side is sufficiently distinct from appointment of liaison counsel on the defense side that
190 these topics should be treated separately in a rule. In many instances, there may be only one or a
191 few defendants, making such appointments on the defense side unimportant. But there surely have
192 been MDL proceedings with a large cast of defendants (consider Opioids, for example).

193 (8) Rule 16.1(d) may be unnecessary. But because any Rule 16(b) scheduling orders
194 entered by transferor courts presumably are no longer in force when all the cases come before the
195 transferee judge, it seemed worth saying. It may be that there are topics to suggest in 16.1(d) that
196 would not be included in the direction regarding the meet-and-confer session called for by 16.1(c),
197 but that is not presently clear.

198 (9) Unlike prior sketches, there is very little in this one about settlement, though there is
199 brief reference in Alternative 1 of 16.1(c)(2) to the possible role of leadership counsel in achieving
200 “resolution” and the possible appointment of a special master, perhaps to assist in achieving
201 resolution. From what we have heard, it is not clear that there is a need to prod transferee judges
202 to keep an eye on settlement prospects. Similarly, it is a bit unnerving to think that the judge can
203 authorize leadership counsel to “represent” non-clients in negotiating settlements. Perhaps the
204 Committee Note can recognize that attention to settlement may loom large in many MDL
205 proceedings, as in other actions (see present Rule 16(c)(2)(I)).

206 (10) Another subject that might be appropriately addressed in a Committee Note is the
207 possibility that class actions might be included within an MDL proceeding. It could be somewhat
208 tricky to explicate how class counsel in the class action should collaborate with leadership counsel
209 guiding the MDL proceedings. It is not clear if there are often parallel structures, but it may be that
210 there are sometimes parallel operations. For example, consider an MDL proceeding including class
211 actions for economic loss and consolidated individual damage actions. Although it offers no
212 across-the-board solution, this rule could at least serve to put the issue before the court.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
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MEMORANDUM

TO: Committee on Rules of Practice and Procedure

FROM: Catherine T. Struve, Reporter
Committee on Rules of Practice and Procedure

RE: Report on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002

DATE: June 2, 2022

RECOMMENDATION:

That the Committee approve the attached Report on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002 for submission to the Judicial Conference, with a recommendation that the Judicial Conference transmit it to Congress.

2022 REPORT ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

The E-Government Act of 2002 directed that rules be promulgated, under the Rules Enabling Act, “to protect privacy and security concerns relating to electronic filing of documents and the public availability ... of documents filed electronically.” Pub. L. No. 107-347, § 205(c)(3)(A)(i). Pursuant to this mandate, the “privacy rules” – Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 – took effect on December 1, 2007.

Subject to specified exemptions, the privacy rules require that filers redact from documents filed with the court (1) all but the last four digits of an individual’s social-security number (“SSN”) or taxpayer-identification number; (2) the month and day of an individual’s birth; (3) all but the initial letters of a known minor’s name; (4) all but the last four digits of a financial-account number; and (5) in criminal cases, all but the city and state of an individual’s home address. In recognition of the pervasive presence of sensitive personal information in filings in actions for benefits under the Social Security Act, and in proceedings relating to an order of removal, to relief from removal, or to immigration benefits or detention, the privacy rules exempt filings in those matters from the redaction requirement but also limit remote electronic access to those filings.

Section 205(c)(3)(C) of the E-Government Act directs that, every two years, “the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security.” Pursuant to that directive, the Judicial Conference submitted reports to Congress in 2009 and 2011. This third report covers the period from 2011 to date.¹

The report proceeds in four parts. Part I discusses amendments, relevant to the privacy rules, that have been adopted since 2011. Part II notes pertinent topics currently pending on the rules committees’ dockets. Part III recounts deliberations in which the rules committees considered whether additional rule amendments were necessary, but decided that question in the negative. Part III.A focuses on access to cooperation-related documents in criminal cases. Part III.B discusses the existing privacy rules’ redaction requirements. Part III.C notes other privacy-related proposals considered but not adopted by the rules committees. Part IV concludes.

I. Privacy-Related Rule and Form Amendments Adopted Since 2011

Since 2011, the Rules Committees have considered a number of rule and form amendments that are relevant to privacy issues. This subpart discusses the instances in which those deliberations resulted in amendments: to then-Bankruptcy Forms 9 and 21 in 2012; to Appellate Form 4 in 2013 and 2018; to Bankruptcy Rule 9037 in 2019; and to Appellate Rule 25(a)(5) (this amendment is on track to take effect in 2022 absent contrary action by Congress). The amendments to the Bankruptcy Forms – discussed in Part I.A – implemented, rather than altered, the privacy policies

¹ Future reports will be made in 2024 and every two years thereafter.

set by the Bankruptcy Rules. The amendments to Appellate Form 4 – discussed in Part I.B – did not alter the privacy policies set by Appellate Rule 25(a)(5), but narrowed the scope of sensitive personal information that Form 4 requires an applicant to provide in the first place. The amendments to Bankruptcy Rule 9037 and Appellate Rule 25(a)(5) – discussed in Parts I.C and I.D, respectively – represent modest changes to those privacy rules. Part I.E discusses how privacy concerns shaped the content of Rule 2 in the new set of Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g) (which are on track to take effect in 2022 absent contrary action by Congress).

A. 2012 Amendments to then-Bankruptcy Forms 9 and 21

In 2012 the Bankruptcy Rules Committee considered a suggestion by the Judicial Conference’s Committee on Court Administration and Case Management (“CACM”) for additional Rule and Form amendments to protect the privacy of debtors’ social security numbers. Specifically, CACM proposed that Bankruptcy Rule 2002(a)(1) be amended to remove the requirement that the debtor’s full SSN be included in the notice to creditors.

The Bankruptcy Rules Committee considered this suggestion but concluded – based on studies performed by the Administrative Office of the U.S. Courts (“AO”) – that creditors needed access to debtors’ SSNs and thus that it was not advisable to amend Rule 2002 as suggested by CACM. However, the Committee decided that warnings should be added to two forms: Form 9, which at the time was the form for the notice of meeting of creditors, and Form 21, which at the time was the form for the debtor’s “Statement of Social-Security Number(s).” The amendment to Form 9 warned creditors not to file Form 9 with their proofs of claim. The amendment to Form 21 warned the debtor not to file Form 21 in the public case file, and stated that the form had to be submitted separately and not included in the court’s public electronic records. Those amendments were adopted without publication (because they simply reflected existing policy) and took effect December 1, 2012.

Effective December 1, 2015, Forms 21 and 9 were superseded by Forms 121 (“Statement About Your Social Security Numbers”) and 309 (notice to creditors), which contain similar warnings.

B. 2013 and 2018 Amendments to Appellate Form 4

Appellate Rule 24 requires a party seeking to proceed in forma pauperis (“IFP”) in the court of appeals to provide an affidavit that, inter alia, “shows in the detail prescribed by Form 4 ... the party’s inability to pay or to give security for fees and costs.” (Likewise, a party seeking to proceed IFP in the Supreme Court must use Form 4. See Supreme Court Rule 39.1.) Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis) had previously been amended in 2010 so that it requested only the last four digits of the applicant’s SSN.

In 2013, Form 4 was amended to respond to criticisms that two of its questions sought information (about payments for attorney and non-attorney services) that were unnecessary to the IFP determination. The amendment replaced the two questions at issue with a new, more streamlined question that asked about money spent for expenses or attorney fees in connection with the lawsuit. In 2018 the Form was further amended so that it no longer requests any portion of the applicant's SSN.

C. 2019 Adoption of New Bankruptcy Rule 9037(h)

At the request of CACM, the Bankruptcy Rules Committee studied how to handle documents that were previously filed with a bankruptcy court without first redacting personal information as required by Bankruptcy Rule 9037. The Bankruptcy Rules Committee developed what would ultimately become new Bankruptcy Rule 9037(h), which sets a procedure for seeking redaction of documents after they have been filed. Knowing that there is a value to uniformity across the sets of privacy rules, the other advisory committees considered whether to propose similar amendments to the other privacy rules. They concluded, however, that while there was a need for the proposed new rule in bankruptcy cases, there was no similar need for such a provision in other types of cases. Accordingly, the other advisory committees decided not to propose similar amendments to the other privacy rules. New Bankruptcy Rule 9037(h) became effective in 2019.

D. 2022 Amendment to Appellate Rule 25(a)(5)

In 2018 the General Counsel of the U.S. Railroad Retirement Board proposed that actions for benefits under the Railroad Retirement Act be treated the same, under the privacy rules, as actions for benefits under the Social Security Act. Because benefits actions under the Railroad Retirement Act are filed directly in the federal courts of appeals, the Appellate Rules Committee took up this suggestion. Noting the close parallels between the Social Security and Railroad Retirement systems, the Appellate Rules Committee decided to propose amending Appellate Rule 25(a)(5) to provide that the Civil Rule 5.2(c) provisions limiting remote electronic access to Social Security benefits actions also apply to Railroad Retirement Act benefits review proceedings. That amendment has been reported to Congress and, absent contrary action by Congress, will take effect on December 1, 2022.

E. 2022 Adoption of Rule 2 of the Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g)

Also on track to take effect on December 1, 2022, if Congress takes no contrary action, is the new set of Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g). The Supplemental Rules set a simplified procedure for actions seeking review of benefits decisions by the Commissioner of Social Security. Rule 2(b)(1)(B) requires the complaint in such an action to state "the name and the county of residence of the person for whom benefits are claimed," while Rule 2(b)(1)(C) requires the same information about "the person on whose wage record benefits are claimed." As published for public comment, these rules had also required the complaint to

state the last four digits of the SSN of the relevant person(s). Due to privacy concerns expressed during the public comment period, the latter requirement was deleted, and instead a requirement was added to Rule 2(b)(1)(A) that the complaint include “any identifying designation provided by the Commissioner with the final decision.” The identifying-designation requirement will accommodate the Social Security Administration (“SSA”)’s upcoming implementation of the practice of using unique alphanumeric identifiers for each notice it sends, and will enable the SSA to identify the administrative proceeding to which the complaint refers without the necessity of including a portion of the SSN in the complaint.

II. Potential Privacy-Related Rules Amendments Currently Under Consideration

Currently pending on the rules committees’ dockets are three topics for possible amendments that relate to the balance between privacy and public access to information filed with the court. Two of those topics concern financial information filed by litigants, though one topic – addressed in Part II.A – concerns the treatment of such information after it is filed and the other topic – addressed in Part II.B – concerns the scope of the information required to be provided in the first place. Part II.A discusses the Criminal Rules Committee’s study of Criminal Rule 49.1 and financial affidavits filed by criminal defendants seeking representation pursuant to the Criminal Justice Act (“CJA”). Part II.B discusses ongoing deliberations concerning applications to proceed IFP in civil cases. Part II.C notes proposals to adopt a rule addressing the sealing and/or redaction of court filings.

A. Potential Amendment to Criminal Rule 49.1

The Criminal Rules Committee has begun to evaluate whether any change to Criminal Rule 49.1 is needed to address a reference – in the 2007 Committee Note to that Rule – to CACM’s March 2004 “Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files.” The Committee is evaluating whether the guidance, as outlined in the Note, is consistent with caselaw concerning rights of public access to information contained in criminal defendants’ CJA applications. The Committee’s work on this matter is very preliminary at present. If the Criminal Rules Committee were to conclude that an amendment to Criminal Rule 49.1 is warranted, the other advisory committees would then consider whether parallel amendments to the other privacy rules would be appropriate.

B. Potential Amendments Concerning Applications to Proceed In Forma Pauperis (“IFP”)

The Appellate Rules Committee is considering suggestions to revise Appellate Form 4 (concerning applications to proceed IFP). The basic suggestion is that Form 4 could be substantially simplified while still providing the courts of appeals with enough detail to decide whether to grant IFP status. The Appellate Rules Committee is developing possible amendments to Form 4 but is not yet ready to seek permission to publish them for public comment. The Civil Rules Committee is closely following the Appellate Rules Committee’s work on this topic. The

Civil Rules do not themselves currently include a Rule or Form that addresses IFP applications, and the Civil Rules Committee is also exploring whether other entities, such as CACM, might usefully address the topic instead.

C. Proposals to Adopt a Rule on Sealing of Court Filings

The Civil Rules Committee has before it proposals to adopt a rule setting standards and procedures governing the sealing and/or redaction of court filings. The Committee has referred these proposals to its Discovery Subcommittee for initial evaluation. In the course of its initial consideration, the subcommittee learned that the AO's Court Services Office is undertaking a project to identify the operational issues related to the management of sealed court records. The goals of the project will be to identify guidance, policy, best practices, and other tools to help courts ensure the timely unsealing of court documents as specified by the relevant court order or other applicable law. Input on this new project was sought from the Appellate, District, and Bankruptcy Clerks Advisory Groups and the AO's newly formed Court Administration and Operations Advisory Council. In light of this effort, the subcommittee determined that further consideration of suggestions for a new rule should be deferred to await the result of the AO's work.

III. Potential Privacy-Related Rules Amendments Considered But Not Adopted

The rules committees have considered a number of other potential rule amendments that relate to the balance between privacy and public access. This part summarizes instances in which the rules committees considered potential amendments but, after study, concluded that no rule amendment was warranted. Part III.A discusses work on issues relating to cooperation- and plea-related documents in criminal cases. Part III.B notes the committees' periodic study of compliance with the existing privacy rules and the adequacy of those rules. Part III.C briefly notes other topics considered for rulemaking but ultimately not pursued.

A. Cooperation-Related Documents

For a number of years, the Standing Committee, the Criminal Rules Committee, and other bodies within the federal judiciary worked with other interested parties to consider the problem of the risk of harm to cooperating defendants from disclosure of certain materials and whether procedural protections might alleviate this problem. The Judicial Conference's 2011 privacy rules report highlighted the issue of electronic public access to plea and cooperation agreements as a topic warranting careful study by district courts. A 2016 study by the Federal Judicial Center ("FJC")² found that survey respondents reported a significant number of instances of harm or threats of harm to government cooperators, as well as that court documents (such as plea

² See Margaret S. Williams et al., *Survey of Harm to Cooperators: Final Report Prepared for the Court Administration and Case Management Committee, the Committee on Defender Services, and the Criminal Law Committee of the Judicial Conference of the United States* (FJC 2016).

agreements) and inferences from docket features (such as gaps in the docket or sealed documents) were reported as sources of information about cooperation.

Over the ensuing years, the Criminal Rules Committee and the Standing Committee were closely involved in discussions aimed at balancing the interest in protecting cooperators against retaliation, on one hand, and rights of access to court records, on the other. Relevant access rights that were considered included those of the public and the press as well as those of criminal defense counsel who need information on defendants' cooperation in other cases in order to assess the fairness of a proffered plea deal.

Based in part on the FJC study, CACM recommended in 2016 that the rules committees consider amendments to the Criminal Rules that would address concerns about the availability of cooperation-related information. The Standing Committee referred CACM's suggestion to the Criminal Rules Committee, which appointed a Cooperator Subcommittee and tasked it with studying the FJC's findings and the recommendations by CACM. Meanwhile, the Director of the AO formed a Task Force on Protecting Cooperators to consider changes that could be made apart from amending the Criminal Rules. Those participating in the Task Force's work included members of CACM, the Criminal Rules Committee, and the Standing Committee, representatives from the Bureau of Prisons ("BOP") and the Department of Justice, and a federal defender.

The Criminal Rules Committee's Cooperator Subcommittee took up the Standing Committee's charge of drafting potential amendments to the Criminal Rules that would implement CACM's suggestions, and formulated such a set of possible amendments to Criminal Rules 11, 32, 35, 47, and 49. The Cooperator Subcommittee also drafted a possible new Criminal Rule 49.2 that would have limited remote electronic access to criminal case files. After thorough discussion, however, the Cooperator Subcommittee, and in turn the Criminal Rules Committee and the Standing Committee, decided not to propose these rule amendments for adoption. All participants shared the serious concern over the need to address the threat of harm to cooperators. However, the rules committees determined that rule amendments were not the best way to do so. Some participants expressed concern that the potential rule amendments would decrease the transparency of judicial proceedings; and some participants suggested that the changes wrought by such amendments would be broader than necessary. Participants also noted that recommendations by the Task Force held the promise of addressing the problem of cooperation-related information through other means, such as through actions by the BOP and through changes to the case management/electronic case filing ("CM/ECF") system.

In 2018 the Task Force rendered an interim report recommending changes that BOP could make to diminish retaliation against cooperators housed in BOP facilities, and a final report that recommended changes in filing and docketing practices in CM/ECF, changes to the amended judgment form, and training for justice-system participants in how to handle cooperator information. The Task Force noted that these changes did not require any changes to the Criminal Rules, and it did not recommend any rule amendments. After the Task Force provided its recommendations to the Director of the AO, the AO Director asked CACM and the Criminal Law

Committee, as appropriate, as well as the BOP, to review the Task Force’s recommendations for potential implementation. The AO Director also circulated the report to the judges and district and circuit clerks of all federal district courts and courts of appeals.

B. Evaluation of Existing Redaction Requirements

The privacy rules’ redaction requirements have been reviewed by the rules committees on a number of occasions since the 2011 privacy rules report. A 2015 study by the FJC provided one occasion for review of the rules’ operation. Subsequent proposals for amendments to the Civil and Appellate privacy rules were considered in 2015-2016 and 2018. These deliberations, however, did not result in proposals for amendments to the privacy rules.

As noted in the 2011 privacy rules report, the FJC in 2010 conducted a survey of federal court filings to ascertain how often unredacted SSNs appeared in those filings.³ In 2015, the FJC reported the results of its follow-up study on the same topic.⁴ The follow-up study searched 3,900,841 documents filed during a one-month period in late 2013 and found that 5,437 (or less than 0.14 percent of the documents) included one or more unredacted SSNs. This is a greater percentage than was found in the 2010 study; but the 2015 study explained that the difference was due to an improvement in search methodology. In the 2015 study (unlike in the 2010 study), the researchers reprocessed the documents using optical character recognition (“OCR”), which enabled them to spot SSNs in documents that were originally filed in non-text-searchable format. The researchers noted that, because OCR had not been used for the 2010 study, that study had failed to reflect the full incidence of unredacted SSNs. They observed that a comparison of the two studies’ findings, taking into account the difference in methodologies, “suggests that the federal courts have made progress in recent years in reducing the incidence of unredacted Social Security numbers in federal court documents, especially in bankruptcy court documents.”⁵ The Standing Committee discussed the FJC’s findings at its January 2016 meeting; it concluded that no amendments to the privacy rules were warranted, but that the rules committees would stand ready to consult with CACM in the latter’s ongoing efforts to implement the existing privacy rules.

In 2015-2016, the Bankruptcy, Civil, Criminal, and Appellate Rules Committees considered a proposal that the privacy rules be amended so as to direct the redaction of the entirety of an individual’s SSN or taxpayer-identification number. The proponent argued that for many SSNs, the portion of the SSN other than the last four digits can be deduced from other sources of data. In considering this suggestion, participants noted that the rules committee had considered this particular question when formulating the existing privacy rules, and that the rules committees

³ See Memorandum from George Cort & Joe Cecil, Research Division, FJC, to the Privacy Subcommittee of the Judicial Conference Committee on Rules of Practice and Procedure, Social Security Numbers in Federal Court Documents (April 5, 2010).

⁴ See Joe S. Cecil et al., Unredacted Social Security Numbers in Federal Court PACER Documents (FJC 2015).

⁵ Id. at 11.

had decided not to direct redaction of the last four digits because of the need for that information in bankruptcy proceedings and the value of a uniform approach across all the privacy rules. Based on continued agreement with that analysis, the advisory committees decided not to propose amendments to the privacy rules. The Appellate Rules Committee did, however, proceed with what would become the 2018 amendment to Appellate Form 4 (discussed in Part I.B, above).

In 2018, CACM raised a privacy concern regarding sensitive personal information made public in judicial opinions in Social Security and immigration cases. Noting that judicial opinions are not subject to Civil Rule 5.2(c)'s limits on remote electronic access, see Civil Rule 5.2(c)(1)(B), CACM's chair wrote to the chief judges and circuit and district clerks of the federal district courts and courts of appeals to suggest that courts consider redacting all but the first name and last initial of any nongovernment parties when writing opinions in such cases. In addition, CACM asked the Standing Committee to consider whether to adopt amendments to the privacy rules to address this issue. The Standing Committee referred this suggestion to the Civil and Appellate Rules Committees. Those committees discussed CACM's suggestion at their fall 2018 meetings and decided not to propose a rule amendment. Participants in the committee discussions expressed hesitation at the prospect of drafting rules that would tell courts how to write their opinions, and noted that the problem might be effectively addressed by changes in local court practices in response to CACM's suggestion.

C. Other Proposals

It remains to briefly mention four other items, relevant to the privacy rules, that did not result in proposals to amend the rules.

In 2012 and again in 2015-2016, the Bankruptcy Rules Committee decided not to amend Bankruptcy Rule 2002's requirement that the notice to creditors include the debtor's SSN. The Bankruptcy Rules Committee concluded in 2012 that creditors needed the full SSN in order to identify debtors. In response to a 2015 suggestion on the same topic, the Bankruptcy Rules Committee engaged in further study to gauge whether creditors were still reliant on having full SSNs. These inquiries confirmed the need to retain the full SSN on the notice to creditors. However, the form for the notice to creditors was amended in 2012 to feature a warning that the notice to creditors should not be filed with the court.⁶

In 2016-2017, the Civil, Criminal, and Appellate Rules Committees considered whether to adopt a provision similar to new Bankruptcy Rule 9037(h) that would address the process for seeking redactions in previously-filed documents; but the advisory committees concluded there was no need to adopt such a provision outside the bankruptcy context. Bankruptcy Rule 9037(h) took effect in 2019.⁷

⁶ See Part I.A.

⁷ See Part I.C.

In 2015-2016, the advisory committees considered a proposal that the rules be amended to provide that affidavits in support of applications to proceed IFP should be presumptively filed under seal. None of the advisory committees felt that rulemaking action on this topic was warranted. However, the Appellate Rules Committee did proceed with an amendment that narrowed the information requested by Appellate Form 4.⁸ And a subsequent project to study the scope of disclosures required for IFP applications is ongoing in the Civil and Appellate Rules Committees.⁹

In 2018, the Civil and Criminal Rules Committees considered a suggestion by the National Association of Professional Background Screeners that the Civil and Criminal Rules be amended to require that parties who are natural persons file a “confidential disclosure statement” (containing the person’s full name and date of birth) with the court clerk. The suggestion was that this information, once filed, could be input into the court’s Public Access to Court Electronic Records (“PACER”) system so that PACER users could search by a party’s name and birth date. The Civil and Criminal Rules Committees decided not to proceed with such an amendment. Participants in the committees’ discussions observed that the proposed amendment did not seem to serve any purpose that lay within the scope of the rules.

IV. Conclusion

In the years since the Judicial Conference’s second report to Congress on the adequacy of the privacy rules, the rules committees have included considerations about the privacy and security of personal information in their study of multiple proposals to revise the privacy rules and other rules. As noted in Part I, a number of those proposals have borne fruit in amendments to particular rules or forms. Part II surveyed pending proposals that may touch upon privacy-related issues. As evidenced in Part III’s discussion of deliberations that did not result in proposals to amend the rules, it is often the case that goals relating to the privacy and security of information filed with the court may be served through non-rules-based approaches that work together with the existing privacy rules. The rules committees will continue to work with other entities within and outside the judicial branch to monitor and address issues of privacy and security in the light of modern access to electronically-filed court documents.

⁸ See Part I.B.

⁹ See Part II.B.