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Rules Committee Secretary
and
Chief of the Rules Committee
Support Office

Office of the General Counsel

January 22, 2013

MEMORANDUM

TO: William K. Suter, Clerk, Supreme Court of the United States

FROM: Jonathan C. Rose J Robinson for Jonathan C. Rose

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF PRACTICE AND PROCEDURE

I am attaching 18 copies of the proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence, which were approved by the Judicial Conference at its March and September 2012 sessions. I am also attaching a memorandum briefly summarizing the proposed rules amendments.

I am sending all copies to you for distribution to the Chief Justice, the Associate Justices, the Counselor to the Chief Justice, and anyone else you feel appropriate. For your convenience, I am attaching a flash drive containing the transmittal letters, proposed orders, and clean versions of the proposed amendments formatted in Microsoft Word.

Please call me if I can be of further assistance.

Attachments

cc: Honorable Jeffrey S. Sutton
Honorable Thomas F. Hogan (without enclosures)
Professor Daniel R. Coquillette
Benjamin J. Robinson

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: January 22, 2013

FROM: Benjamin J. Robinson

SUBJECT: Summary of Proposed Amendments to the Federal Rules of Practice and Procedure

This memorandum collects and briefly summarizes the amendments to the federal rules of practice and procedure that will take effect on December 1, 2013, if (1) the Supreme Court adopts and transmits the proposed amendments to Congress no later than May 1, 2013, and (2) Congress does not enact legislation to reject, modify, or defer the proposed amendments. Part I briefly summarizes the proposed amendments of significant interest, including the arguments made on both sides and the reasoning of the rules committees in approving the amendments. Divisions of opinion within the responsible committees and substantial objections to the proposed changes are indicated. Part II briefly summarizes the proposals that generated little or no interest during the public comment period. A more comprehensive explanation of the committees' deliberations with respect to each amendment was submitted to the Judicial Conference of the United States and is attached to this memorandum.

I. Proposed Rule Amendments of Significant Interest

Federal Rules of Appellate Procedure

A. Appellate Rules 28 and 28.1

1. Brief Description

Rule 28 currently requires litigants to include "a statement of the case" and "a statement of facts" in their briefs and specifies the order in which the statements must appear, with the statement of the case coming first. The proposed amendment removes the requirement of separate statements of the case and of the facts and, much like Supreme Court Rule 24, permits the parties to file one "statement of the case," which they may organize in whatever way they wish. Conforming changes revise Rule 28(b)'s discussion of the appellee's brief and Rule 28.1's discussion of briefing on cross-appeals.

2. Arguments in Favor

- Allows attorneys to present the factual and procedural history of a case chronologically.

- Removes redundancy and confusion created by the current requirement of separate statements of the case and facts, particularly when it comes to describing the course of proceedings.

- Roughly follows Supreme Court Rule 24, which does not require separate statements of the case and of the facts.

3. Objections

- Change can be difficult, even change that *eliminates* a briefing requirement, particularly since lawyers have become accustomed to writing both sections separately.

4. Rules Committees' Consideration

The Advisory Committee on Appellate Rules concluded that a single, concise statement of the case setting out the relevant facts, procedural history, and rulings presented for review will provide flexibility and discourage unnecessary detail and redundancy in describing the history of a case. Nearly all public commentators supported the change, particularly once it became clear that the change gives lawyers more flexibility rather than less. One substantive concern was whether the change would make it difficult for judges to determine quickly what is presented for review. There are two answers. First, the still-required "issues presented" section of the brief should provide one easily accessible source for this information. Second, the comment to the rule suggests that advocates may wish to have a separate heading for the course of proceedings, much as advocates currently do in Supreme Court briefs. The Advisory Committee and the Standing Committee both unanimously supported the amendment.

Federal Rules of Bankruptcy Procedure

A. Bankruptcy Rule 1007

1. Brief Description

This is a fairly technical amendment. It will relieve an individual debtor of the obligation to file a statement of completion of a personal financial management course—a precondition for a discharge—if an instructional course provider notifies the court directly that the debtor has completed the course. Conforming proposed amendments to Rules 4004 and 5009 reflect the proposed change to Rule 1007.

2. Arguments in Favor

- Streamlines the filing process for statements of completion of financial management courses by removing the obligation on the debtor to give notification—currently accomplished through Official Form 23—when the course provider provides notification directly to the court.

- Reduces a procedural obstacle to obtaining a discharge, including the possibility that a debtor's case could be closed without an entry of discharge.

3. Objections

- Allowing a financial course management provider to file the statement directly with the court could theoretically lead to a discharge even when it is not in the debtor's interest.

4. Rules Committees' Consideration

Through inadvertence or for other reasons, some debtors do not file the necessary statement of completion from their course provider and thus are not given a discharge before their cases are closed. That in turn requires many cases to be reopened, requiring the payment of an additional fee. The proposed amendment should alleviate this problem in most cases. The Advisory Committee on Bankruptcy Rules determined that the risk is insubstantial that debtors will somehow obtain disadvantageous discharges if financial course management providers begin filing statements directly with the court. Only in rare cases do debtors wish to avoid a discharge. And when those cases arise, debtors may decline to receive a discharge in other ways. The debtor, for example, has the option of waiving the discharge under § 727(a)(10) of the Bankruptcy Code or failing to complete plan payments under chapter 11 or chapter 13. The Advisory Committee and the Standing Committee both unanimously supported the amendment.

Federal Rules of Civil Procedure

A. Civil Rules 45 and 37

1. Brief Description

The Rule 45 subpoena process has been unduly complicated for some time, and this amendment (after years of study) seeks to streamline it. The amendment has four objectives: (1) simplify the rule; (2) address the transfer of subpoena-related motions; (3) resolve conflicting interpretations of the rule to make clear that a subpoena may command a party or party officer to testify only within the geographical limits applicable to all trial witnesses; and (4) more prominently position an existing requirement to notify each party before serving a subpoena that requires document production and add a requirement that the notice include a copy of the subpoena. A conforming amendment to Rule 37, the rule dealing with discovery sanctions, is also needed.

2. Arguments in Favor

- *Simplification*: Eliminates several challenges for lawyers seeking to serve and enforce subpoenas by: (1) making the court where the action is pending the issuing court for all civil subpoenas; (2) permitting service throughout the United States (as is currently authorized under Criminal Rule 17(e)); and (3) combining all

provisions on the place for compliance—often in a district other than the issuing court—under one heading.

- *Transfer of subpoena-related motions*: Recognizes that some subpoena-related matters are better decided by the issuing court; new Rule 45(f) explicitly authorizes transfers from the court where performance is required to the issuing court, including subpoena enforcement and protective order motions, with the consent of the person subject to the subpoena or in exceptional circumstances. The proposed amendment will encourage and facilitate cooperation between the issuing court and the court where performance is required, enabling the two to determine where best to resolve any enforcement motions.

- *Trial subpoenas for distant parties and party officers*: Effectively overrules district court cases that had misinterpreted Rule 45 to permit nationwide trial subpoenas of party officers. The proposed amendment discourages *in terrorem* use of a subpoena to apply inappropriate pressure to the adverse party and saves the resources used to prepare and resolve attendant motions. The proposed amendment also recognizes that, with large organizations, the best trial witnesses often are not officers but other employees.

- *Requiring notice of the contents and service of a "documents" subpoena*: Ensures that the service of a documents subpoena and the information being sought is known to all parties so that each party can determine whether to object to production or to subpoena additional materials.

3. Objections

- The standard for transfers from the enforcement court to the issuing court should be more liberal and flexible.

- The geographical limits for performance of subpoenas are antiquated and the realities of modern life and multidistrict litigation favor the authority to subpoena an officer of a party to attend a trial nationwide.

4. Rules Committees' Consideration

The proposed amendments to Rule 45 are the products of a multi-year study of subpoena practice. The study included canvassing lawyers and bar groups, a conference devoted to subpoena practice, a review of all relevant literature on modern subpoena practice, and public comments on the proposed amendments. Public comments made clear that the vast majority of practitioners, on the defense and plaintiff sides, support the amendments.

To address even the most basic issues of subpoena practice, current Rule 45 requires lawyers and litigants to consult three different categories of provisions: (1) those specifying the court that issues the subpoena; (2) those specifying where subpoenas can be served; and (3) a scattered set of provisions concerning the place of compliance (which often turn on place of service). Judges report that even sophisticated lawyers and law firms often misunderstand these interrelated provisions and reach incorrect conclusions about subpoena practice. The proposed amendments eliminate this complexity by specifying that (1) all subpoenas are issued by the court presiding over the litigation; (2) subpoenas can be served nationwide as in criminal practice; and (3) compliance with subpoenas must occur in the places identified in a single set of provisions in the amended rule – places that largely mirror the current geographical limits in Rule 45. Those who have commented on the proposed amendments have applauded this simplification.

One focus of the Advisory Committee on Civil Rules' work was to preserve the aspiration of resolving subpoena-related litigation, whenever possible, at a location convenient for the nonparty. With respect to the transfer of subpoena-related motions, the Advisory Committee wrestled over the appropriate standard. Whether "exceptional circumstances" must exist, or some lesser measure, was the focus of considerable public comment. Some urged the Advisory Committee to adopt a more flexible standard. Others argued that the protection of the nonparty subject to the subpoena should be paramount. Out of concern that a lower standard might result in too-frequent transfers, forcing nonparties who receive subpoenas to litigate their objections in distant fora, the Advisory Committee concluded that exceptional circumstances must exist for the transfer of a subpoena-related motion when the nonparty does not consent to the transfer.

Considerable attention was also devoted to resolving conflicting interpretations as to whether a party or party officer can be compelled by subpoena to travel beyond the geographical limits of Rule 45 to attend trial. A division in the case law resulted from differing interpretations of the 1991 amendments to Rule 45. One reading is that the geographical limits applicable to other witnesses do not apply to a party or party officer. *See In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d 664 (E.D. La. 2006) (requiring an officer of the defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served within Louisiana under Rule 45(b)(2)). The alternative interpretation is that the rule sets forth the same geographical limits for all trial witnesses. *See Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in Fair Labor Standards Act action could not be compelled to travel long distances from outside the state to attend trial because they were not served with subpoenas within the state as required by Rule 45(b)(2)). The Advisory Committee concluded that the 1991 amendments were not intended to create the expanded subpoena power recognized in the *Vioxx* line of cases, and therefore decided to restore the original meaning of the rule as the better approach. Although some observers argue that the geographical limits in Rule 45 are outdated in this day of modern travel and that witnesses should be required to travel greater distances, the Committee was of the view that modern advances in travel and technology also make it much easier for lawyers to obtain testimony and documents from distant witnesses. Given that the geographical limits in Rule 45 have worked well for decades, and that lawyers have the power to obtain evidence from virtually anywhere in

the country and present it effectively in court, the Committee concluded that the geographical limits of Rule 45 should not be expanded.

The Advisory Committee's study of subpoena practice also revealed that many practitioners fail to comply with current Rule 45(b)(1)'s requirement that notice be given to all parties before service of a subpoena. The Advisory Committee thus moved the notice provision to a more prominent position and gave it a clear heading: "Notice to Other Parties Before Service." The Advisory Committee also added a requirement that the notice include a copy of the subpoena. It concluded that the proposed amendments will result in all parties being made aware of when a subpoena is served—a significant change from actual current practice—and that this awareness will enable parties to protect their interests. The Advisory Committee and the Standing Committee both unanimously supported the amendment.

Federal Rules of Criminal Procedure

A. Criminal Rule 11

1. Brief Description

The proposed amendment expands the colloquy under Rule 11 to require advising a defendant of possible immigration consequences when a judge accepts a guilty plea. The amendment was undertaken in light of the Supreme Court's decision in *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473 (2010). The proposed amendment mandates a generic warning, not specific advice concerning the defendant's individual situation.

2. Arguments in Favor

- Recognizes that the immigration consequences covered by the proposed amendment are qualitatively different from the other collateral consequences that may follow from a guilty plea.
- Makes uniform an admonishment many judges already include in the plea colloquy.
- Aligns judicial notice with the practice of the Department of Justice, which now advises prosecutors to include a discussion of immigration consequences in plea agreements.

3. Objections

- The list of matters that must be addressed in the plea colloquy is already lengthy, and adding immigration consequences may distract defendants from the key factor they must consider—waiving the right to a trial—before entering a guilty plea.
- *Padilla* was based solely on the constitutional duty of defense counsel, and it did not speak to the duty of judges.

- Not all defendants are aliens, and conscientious judges do not need a rule to require them to give warnings in appropriate cases.

4. Rules Committees' Consideration

Discussion revealed concerns that the proposed amendment shifts a burden that belongs to defense counsel onto the court and that the change could create a slippery slope expanding Rule 11 procedures in ways that distract from the key trial rights being waived. The majority of the Advisory Committee on Criminal Rules viewed deportation as distinctive among the collateral consequences that may follow from a guilty plea, and this was echoed in the public commentary. The Advisory Committee concluded that while the Supreme Court's decision in *Padilla* did not compel the proposed amendment, it established an appropriate basis for a national rule. The Advisory Committee further concluded that the most effective and efficient method of conveying the risk of adverse immigration consequences is to provide the warning to every defendant, without attempting to determine the defendant's citizenship. The Advisory Committee therefore pursued non-technical language so that the proposed amendment could be understood by lay persons, and a generalized warning was crafted (1) to avoid the need to amend the rule further if there are subsequent legislative changes to the immigration laws; and (2) to make clear that the judge need not communicate targeted advice concerning a defendant's individual situation. The Advisory Committee approved the amendment by a nine to three vote, and the Standing Committee unanimously approved the amendment.

Federal Rules of Evidence

A. Evidence Rule 803(10)

1. Brief Description

Rule 803(10) currently allows the government to prove in a criminal case, through the introduction of a certificate, that a public record does not exist. Under *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the certificate would often be "testimonial" within the meaning of the Confrontation Clause. The admission of certificates (in lieu of testimony) thus often violates the accused's right of confrontation. The proposed amendment to Rule 803(10) addresses the Confrontation Clause problem by adding a "notice-and-demand" procedure.

2. Arguments in Favor

- Responds to the Court's approval of a similar notice-and-demand procedure used (by some states) to cure an otherwise unconstitutional use of a testimonial certificate.

- Gives judges flexibility to alter the notice-and-demand time periods (in either direction), consistent with a number of state notice-and-demand procedures.

3. Objections

- In commenting on the draft rule, the National Association of Criminal Defense Lawyers (NACDL) insisted that a fourteen-day pretrial notice period should be the minimum notice tolerated.

4. Rules Committees' Consideration

The Advisory Committee on Evidence Rules concluded that the constitutional infirmity in the current rule could be eliminated by adding a notice-and-demand procedure patterned after the Texas rule approved in *Melendez-Diaz*. The procedure is straightforward and easily implemented. The Advisory Committee built two-way flexibility into the rule by providing that notice should be given at least fourteen days before trial "unless the court sets a different time period for the notice or objection." The Advisory Committee decided that fourteen days provide a reasonable outside limit for pretrial notice, but that case-specific considerations may counsel in favor of earlier notice. There likewise may be situations where the prosecutor has a good reason for not meeting the default deadline but has not prejudiced the defendant. A flexible notice period should deter unnecessary litigation that might otherwise arise from a rigid deadline. The Advisory Committee and the Standing Committee both unanimously supported the amendment.

II. Other Proposed Rule Amendments

Federal Rules of Appellate Procedure

A. Appellate Rules 13, 14, and 24

The proposed amendments to Rules 13, 14, and 24 concern appeals from the United States Tax Court. Current Rules 13 and 14 address only appeals as of right from the Tax Court. The proposed amendments address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). The proposed amendment to Rule 24 reflects the status of the Tax Court as an Article I court and not an agency of the executive branch.

B. Form 4

The proposed amendments to Form 4 concern applications to proceed *in forma pauperis* (IFP) on appeal. Questions 10 and 11 on current Form 4 have been criticized for seeking information unnecessary to IFP determinations. The Advisory Committee on Appellate Rules decided to replace those questions, which might in some circumstances seek disclosure of protected work product, with a new Question 10 that reads: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?" The proposed amendments also include technical amendments that bring Form 4 into conformity with changes approved by the Judicial Conference in Fall 1997 but (due to an oversight) not subsequently transmitted to Congress.

Federal Rules of Bankruptcy Procedure

A. Bankruptcy Rules 4004 and 5009

The proposed amendments to Rule 4004(c)(1) clarify the rule and conform to the simultaneous amendment of Rule 1007(b)(7), which is discussed in greater detail above. One

change makes clear that certain enumerated circumstances prevent the court from entering a discharge. Another change states that the prohibition on entering a discharge under subdivision (c)(1)(K) ceases when a presumption of undue hardship expires or the court concludes a hearing on the presumption. The proposed amendment to Rule 5009(b) also conforms to the simultaneous amendment of Rule 1007(b)(7). Rule 5009(b) currently requires the clerk to send a warning notice to an individual debtor who has not filed Official Form 23 within 45 days after the first date set for the meeting of creditors. The proposed amendment would require the clerk to send the notice only if the course provider has not already notified the court of the debtor's completion of the course and the debtor has failed to file the statement in 45 days.

B. Bankruptcy Rules 9006, 9013, and 9014

The proposed amendment to Rule 9006(d), which prescribes time limits for the service of written motions and responses, draws attention to the rule's default deadlines by amending the title to add a reference to the "time for motion papers." Rules 9013 and 9014 are amended to provide a cross-reference to the time periods in Rule 9006(d).

Federal Rules of Criminal Procedure

A. Criminal Rule 16

The proposed amendment is a technical and conforming amendment to correct what courts have treated as a scrivener's error in the 2002 restyling of Criminal Rule 16 concerning the protection afforded to government work product.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

January 22, 2013

MEMORANDUM

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

From: Judge Thomas F. Hogan Thomas F. Hogan

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 13, 14, 24, 28, and 28.1, and to Form 4 of the Federal Rules of Appellate Procedure, which were approved by the Judicial Conference at its September 2012 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a redline version of the amendments; (ii) an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the Report of the Advisory Committee on the Federal Rules of Appellate Procedure.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

TITLE III. ~~REVIEW OF A DECISION OF~~ APPEALS FROM THE UNITED STATES TAX COURT

Rule 13. ~~Review of a Decision of~~ Appeals from the Tax Court

(a) ~~How Obtained; Time for Filing Notice of Appeal~~ Appeal as of Right.

(1) **How Obtained; Time for Filing a Notice of Appeal.**

~~(1) Review of a decision of~~ (A) An appeal as of right from the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the

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

clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

(~~2~~B) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.

~~(b)~~(2) **Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is

considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

~~(c)~~(3) **Contents of the Notice of Appeal; Service; Effect of Filing and Service.** Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

~~(d)~~(4) **The Record on Appeal; Forwarding; Filing.**

(~~1~~A) Except as otherwise provided under Tax Court rules for the transcript of proceedings, the ~~An~~ appeal ~~from the Tax Court~~ is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and

filing, and the docketing in the court of appeals. ~~References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk.~~

(~~2~~B) If an appeal ~~from a Tax Court decision~~ is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

(b) Appeal by Permission. An appeal by permission is governed by Rule 5.

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Committee Note

Rules 13 and 14 are amended to address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rules 13 and 14 do not currently address such appeals; instead, those Rules address only appeals as of right from the Tax Court. The existing Rule 13 – governing appeals as of right – is revised and becomes Rule 13(a). New subdivision (b) provides that Rule 5 governs appeals by permission. The definition of district court and district clerk in current subdivision (d)(1) is deleted; definitions are now addressed in Rule 14. The caption of Title III is amended to reflect the broadened application of this Title.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Rule 14. Applicability of Other Rules to ~~the Review of a~~ Appeals from the Tax Court ~~Decision~~

All provisions of these rules, except Rules ~~4-9~~4, 6-9, 15-20, and 22-23, apply to ~~the review of a~~appeals from the Tax Court~~decision~~. References in any applicable rule

(other than Rule 24(a)) to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

* * * * *

Committee Note

Rule 13 currently addresses appeals as of right from the Tax Court, and Rule 14 currently addresses the applicability of the Appellate Rules to such appeals. Rule 13 is amended to add a new subdivision (b) treating permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rule 14 is amended to address the applicability of the Appellate Rules to both appeals as of right and appeals by permission. Because the latter are governed by Rule 5, that rule is deleted from Rule 14's list of inapplicable provisions. Rule 14 is amended to define the terms "district court" and "district clerk" in applicable rules (excluding Rule 24(a)) to include the Tax Court and its clerk. Rule 24(a) is excluded from this definition because motions to appeal from the Tax Court in forma pauperis are governed by Rule 24(b), not Rule 24(a).

Changes Made After Publication and Comment

No changes were made after publication and comment.

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and

costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) **Notice of District Court's Denial.** The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) **Motion in the Court of Appeals.** A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of

reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) Leave to Proceed in Forma Pauperis on Appeal from the United States Tax Court or on Appeal or Review of an Administrative-Agency Proceeding. ~~When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a~~A party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1):

(1) in an appeal from the United States Tax Court; and

(2) when an appeal or review of a proceeding before an administrative agency, board, commission, or

officer proceeds directly in the court of appeals.

(c) Leave to Use Original Record. A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

* * * * *

Committee Note

Rule 24(b) currently refers to review of proceedings "before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court)." Experience suggests that Rule 24(b) contributes to confusion by fostering the impression that the Tax Court is an executive branch agency rather than a court. (As a general example of that confusion, appellate courts have returned Tax Court records to the Internal Revenue Service, believing the Tax Court to be part of that agency.) To remove this possible source of confusion, the quoted parenthetical is deleted from subdivision (b) and appeals from the Tax Court are separately listed in subdivision (b)'s heading and in new subdivision (b)(1).

Changes Made After Publication and Comment

No changes were made after publication and comment.

Rule 28. Briefs

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

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

(2) a table of contents, with page references;

(3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to

applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a concise statement of the case ~~briefly indicating the nature of the case, the course of proceedings, and the disposition below;~~

(~~7~~) ~~a statement of~~ setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e));

(~~8~~7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(~~9~~8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may

appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(~~10~~9) a short conclusion stating the precise relief sought; and

(~~11~~10) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(~~9~~8) and (~~11~~10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

~~(4) the statement of the facts;~~and

(~~5~~4)the statement of the standard of review.

Committee Note

Subdivision (a). Rule 28(a) is amended to remove the requirement of separate statements of the case and of the facts. Currently Rule 28(a)(6) provides that the statement of the case must "indicat[e] the nature of the case, the course of proceedings, and the disposition below," and it precedes Rule 28(a)(7)'s requirement that the brief include "a statement of facts." Experience has shown that these requirements have generated confusion and redundancy. Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement," much like Supreme Court Rule 24.1(g) (which requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix. . . ."). This permits but does not require the lawyer to present the factual and procedural history chronologically. Conforming changes are made by renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10).

The statement of the case should describe the nature of the case, which includes (1) the facts relevant to the issues submitted for review; (2) those aspects of the case's procedural history that are necessary to understand the posture of the appeal or are relevant to the issues submitted for review; and (3) the rulings presented for review. The statement should be concise, and can include subheadings, particularly for the purpose of highlighting the rulings presented for review.

Subdivision (b). Rule 28(b) is amended to accord with the amendment to Rule 28(a). Current Rules 28(b)(3) and (4) are consolidated into new Rule 28(b)(3), which refers to "the statement of the case." Rule 28(b)(5) becomes Rule 28(b)(4). And Rule 28(b)'s reference to certain subdivisions of Rule 28(a) is updated to reflect the renumbering of those subdivisions.

Changes Made After Publication and Comment

After publication and comment, the Committee made one change to the text of the proposal and two changes to the Committee Note.

During the comment period, concerns were raised that the deletion of current Rule 28(a)(6)'s reference to "the nature of the case, the course of proceedings, and the disposition below" might lead readers to conclude that those items may no longer be included in the statement of the case. The Committee rejected that concern with respect to the "nature of the case" and the "disposition below," because the Rule as published would naturally be read to permit continued inclusion of those items in the statement of the case. The Committee adhered to its view that the deletion of "course of proceedings" is useful because that phrase tends to elicit unnecessary detail; but to address the commenters' concerns, the Committee added, to the revised Rule text, the phrase "describing the relevant procedural history."

The Committee augmented the Note to Rule 28(a) in two respects. It added a reference to Supreme Court Rule 24.1(g), upon which the proposed revision to Rule 28(a)(6) is modeled. And it added – as a second paragraph in the Note – a discussion of the contents of the statement of the case.

Rule 28.1. Cross-Appeals

* * * * *

(c) Briefs. In a case involving a cross-appeal:

(1) **Appellant's Principal Brief.** The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the

brief need not include a statement of the case ~~or a statement of the facts~~unless the appellee is dissatisfied with the appellant's statement.

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-~~(9)~~(8) and ~~(11)~~(10), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

~~(D) the statement of the facts;~~ and

(~~E~~D) the statement of the standard of review.

(4) **Appellee's Reply Brief.** The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and (~~11~~)(10) and must be limited to the issues presented by the cross-appeal.

* * * * *

Committee Note

Subdivision (c). Subdivision (c) is amended to accord with the amendments to Rule 28(a). Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review. . . ." Rule 28.1(c) is amended to refer to that consolidated "statement of the case," and references to subdivisions of Rule 28(a) are revised to reflect the re-numbering of those subdivisions.

Changes Made After Publication and Comment

No changes were made to the text of the proposed amendment to Rule 28.1 after publication and comment. The

Committee revised a quotation in the Committee Note to Rule 28.1(c) to conform to the changes (described above) to the text of proposed Rule 28(a)(6).

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**
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.)	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 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.
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.*

* New material is underlined and highlighted in yellow; matter to be omitted is lined through

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 a minor (i.e., underage), 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 (including lot rented for mobile home) Are real estate taxes included? [ ] Yes [ ] No Is property insurance included? [ ] Yes [ ] 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 paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form?* [ ] Yes [ ] No~~

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? $ _____
If yes, state the attorney's name, address, and telephone number:

~~11. *Have you paid or will you be paying anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?* [ ] Yes [ ] No~~

~~*If yes, how much?* $ _____~~
~~*If yes, state the person's name, address, and telephone number:*~~

~~12~~11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

~~13~~12. *State the [city and state] of your legal residence.*

Your daytime phone number: (____) _____

Your age: _____ *Your years of schooling*: _____

[Last four digits of] your social-security number: _____

Changes Made After Publication and Comment

No changes were made after publication and comment.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

TITLE III. APPEALS FROM THE UNITED STATES TAX COURT

Rule 13. Appeals from the Tax Court

(a) Appeal as of Right.

(1) **How Obtained; Time for Filing a Notice of Appeal.**

(A) An appeal as of right from the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any

other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

(B) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.

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

(3) **Contents of the Notice of Appeal; Service; Effect of Filing and Service.** Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

(4) **The Record on Appeal; Forwarding; Filing.**

(A) Except as otherwise provided under Tax Court rules for the transcript of proceedings, the appeal is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals.

(B) If an appeal is taken to more than one court of appeals, the original record must be sent

to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

(b) Appeal by Permission. An appeal by permission is governed by Rule 5.

* * * * *

Rule 14. Applicability of Other Rules to Appeals from the Tax Court

All provisions of these rules, except Rules 4, 6-9, 15-20, and 22-23, apply to appeals from the Tax Court. References in any applicable rule (other than Rule 24(a)) to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

* * * * *

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for

fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) **Notice of District Court's Denial.** The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) **Motion in the Court of Appeals.** A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy

of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) Leave to Proceed in Forma Pauperis on Appeal from the United States Tax Court or on Appeal or Review of an Administrative-Agency Proceeding. A party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1):

(1) in an appeal from the United States Tax Court; and

(2) when an appeal or review of a proceeding before an administrative agency, board, commission, or officer proceeds directly in the court of appeals.

(c) **Leave to Use Original Record.** A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

* * * * *

Rule 28. Briefs

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

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

(2) a table of contents, with page references;

(3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e));

(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant

relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(9) a short conclusion stating the precise relief sought; and

(10) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case; and

(4) the statement of the standard of review.

* * * * *

Rule 28.1. Cross-Appeals

* * * * *

(c) Briefs. In a case involving a cross-appeal:

(1) **Appellant's Principal Brief.** The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case

unless the appellee is dissatisfied with the appellant's statement.

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-(8) and (10), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case; and

(D) the statement of the standard of review.

(4) **Appellee's Reply Brief.** The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and (10) and must be limited to the issues presented by the cross-appeal.

* * * * *

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**
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.)	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 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.
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 a minor (i.e., underage), 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 (including lot rented for mobile home) Are real estate taxes included? [ ] Yes [ ] No Is property insurance included? [ ] Yes [ ] 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? $ _____
If yes, state the attorney's name, address, and telephone number:

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: _____

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 13, 14, 24, 28, and 28.1, and to Form 4, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2011.

Rules 13, 14, and 24

The proposed amendments to Rules 13, 14, and 24 concern appeals from the United States Tax Court. The proposed amendments to Rules 13 and 14 revise those rules to address permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). The advisory committee developed the proposals in consultation with the Tax Court and the Tax Division of the Department of Justice. The proposed amendment to Rule 24 more accurately reflects the status of the Tax Court as a court. No comments were received and the advisory committee recommended approval of the proposed amendments to Rules 13, 14, and 24, as published.

Rules 28 and 28.1

The proposed amendment to Rule 28 revises Rule 28(a)'s list of the required contents of an appellant's brief by removing the requirement of separate statements of the case and of the facts. Current Rule 28(a)(6) requires "a statement of the case briefly indicating the nature of the

case, the course of proceedings, and the disposition below." Current Rule 28(a)(7) requires "a statement of facts." Rule 28(a) further requires these items to appear "in the order indicated." The proposed amendment to Rule 28(a) consolidates subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement of the case." It allows a lawyer to present the factual and procedural history of a case chronologically, but also provides flexibility to depart from chronological ordering. Conforming changes renumber Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10), revise Rule 28(b)'s discussion of the appellee's brief, and revise Rule 28.1's discussion of briefing on cross-appeals.

Six sets of comments were received, four of which supported the proposed amendments' goal. Among the supportive comments, two proposed drafting changes to address a concern that deletion of some of the current language of Rule 28(a)(6) could be problematic. The advisory committee carefully reviewed all the comments, including those arguing against the proposed amendments. To address the concerns of the commenters, the advisory committee revised the text of proposed Rule 28(a)(6) and added a new paragraph to the Committee Note.

As published, proposed Rule 28(a)(6) had referred to "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with appropriate references to the record (*see* Rule 28(e))." In response to commenters' concerns that this language did not mention procedural history, the advisory committee revised the proposed rule to refer to "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (*see* Rule 28(e))." The advisory committee added a second paragraph to the proposed Committee

Note that describes the contents of the statement of the case and notes the permissibility of including subheadings. The latter point responds to one commenter's concern that judges and clerks need a way to locate quickly, in the brief, a description of the rulings presented for review. The advisory committee also added a reference in the Committee Note to Supreme Court Rule 24.1(g), on which the amended Rule text is loosely modeled. With these changes, the advisory committee recommended approval of the proposed amendments to Rules 28 and 28.1.

Form 4

The proposed amendments to Form 4 concern applications to proceed *in forma pauperis* (IFP) on appeal. Appellate Rule 24 requires a party seeking to proceed IFP in the court of appeals to provide an affidavit that, among other things, "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.) Questions 10 and 11 on the current Form 4 have been criticized by commentators for seeking information unnecessary to the IFP determination. Some commentators have suggested that Questions 10 and 11 might in some circumstances seek disclosure of information protected by attorney-client privilege and/or work product immunity. Though research by the advisory committee's reporter suggested that the information solicited is relatively unlikely to be subject to privilege, it may sometimes constitute protected work product. Even if not privileged or protected, the advisory committee determined that the disclosure of some information solicited could disadvantage some IFP litigants and may be requesting information not necessary to the IFP determination. Accordingly, the proposed amendment replaces Questions 10 and 11 with a new Question 10 that reads: "Have you spent – or will you be spending – any money for

expenses or attorney fees in connection with this lawsuit? If yes, how much?"

The proposed amendments also include technical amendments to Form 4, to bring the form into conformity with changes approved by the Judicial Conference in Fall 1997, but (apparently due to an oversight) not subsequently transmitted to Congress.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and to Form 4, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

Mark R. Kravitz, Chair

James. M. Cole
Dean C. Colson
Roy T. Englert, Jr.
Gregory G. Garre
Neil M. Gorsuch
Marilyn L. Huff
Wallace B. Jefferson
David F. Levi
Patrick J. Schiltz
James A. Teilborg
Larry D. Thompson
Richard C. Wesley
Diane P. Wood

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
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EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Judge Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules

DATE: May 8, 2012

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 12, 2012, in Washington, DC. The Committee gave final approval to proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1 and to Form 4.

* * * * *

II. Action items for final approval

The Committee presents the following proposals for final approval.

A. Proposed amendments to Rules 13, 14, and 24

The proposed amendments to Rules 13, 14, and 24 concern appeals from the United States Tax Court. The proposed amendments to Rules 13 and 14 revise those rules to address permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). The Committee developed these proposals in consultation with the Tax Court and with the Tax Division of the Department of Justice. The proposed amendment to Rule 24 grows out of a suggestion by the Tax Court that Rule 24(b)'s reference to the Tax Court be revised to remove a possible source of confusion concerning the Tax Court's legal status.

1. Text of proposed amendments and Committee Notes

The Committee recommends final approval of the proposed amendments to Rules 13, 14, and 24, as set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee did not make any changes to the proposed amendments to Rules 13, 14, and 24 after publication. (It received no comments on these proposed amendments.)

B. Proposed amendments to Rules 28 and 28.1

The proposed amendment to Rule 28 revises Rule 28(a)'s list of the contents of the appellant's brief by removing the requirement of separate statements of the case and of the facts, and makes conforming changes to Rule 28(b) (concerning the appellee's brief). The proposed amendment to Rule 28.1 makes conforming changes to Rule 28.1 (concerning cross-appeals).

Current Rule 28(a)(6) requires "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Current Rule 28(a)(7) requires that the brief include "a statement of facts." Rule 28(a) requires these items to appear "in the order indicated." These dual requirements have confused practitioners. It seems intuitively more sensible to permit the appellant to weave those two statements together and present the relevant events in chronological order. As a point of comparison, Supreme Court Rule 24 does not separate the two requirements; rather, Supreme Court Rule 24.1(g) requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, e.g., App. 12, or to the record, e.g., Record 12."

The proposed amendment to Rule 28(a) consolidates subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." The proposed new Rule 28(a)(6) allows the lawyer to present the factual and procedural history chronologically, but also provides flexibility to depart from chronological ordering. Conforming changes renumber Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10), revise Rule 28(b)'s discussion of the appellee's brief, and revise Rule 28.1's discussion of briefing on cross-appeals.

1. Text of proposed amendments and Committee Notes

The Committee recommends final approval of the proposed amendments to Rules 28 and 28.1 as set out in the enclosure to this report.

2. Changes made after publication and comment

The comments that the Committee received on the proposed amendments to Rules 28 and 28.1 are described in the enclosure to this report. Four of the six sets of comments supported the proposed amendments' goal. Among those supportive comments, two sets of comments proposed drafting changes; a number of those proposals sprang from a concern that deletion of some of the current language of Rule 28(a)(6) could be problematic. At its spring meeting, the Committee carefully reviewed both the concerns expressed by the two commenters who argued against the proposed amendments and also the suggestions submitted by the two commenters who proffered alternative language for the amendments. A detailed account of the Committee's discussions can be found in the draft minutes of the Committee meeting. To address the concerns expressed by the commenters, the Committee revised the text of proposed Rule 28(a)(6) and added a new paragraph to the Committee Note.

As published, proposed Rule 28(a)(6) referred to "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." In response to commenters' concerns that this language omitted to mention procedural history, the Committee revised the proposed Rule to refer to "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." The Committee hopes that the amended Rule's reference to "the relevant procedural history" – rather than to "the course of proceedings" – will discourage the unnecessary detail with which some briefs currently describe the procedural history of the case. The Committee added a second paragraph to the Committee Note to Rule 28(a) that describes the contents of the statement of the case and that notes the permissibility of including subheadings. The latter point responds to one commenter's concern that judges and clerks need a way to locate quickly, in the brief, a description of the rulings presented for review. The Committee also added, in the Committee Note, a reference to Supreme Court Rule 24.1(g), on which the amended Rule text is loosely modeled.

C. Proposed amendments to Form 4

The proposed amendments to Form 4 concern applications to proceed IFP on appeal. Appellate Rule 24 requires a party seeking to proceed IFP in the court of appeals to provide an affidavit that, inter alia, "shows in the detail prescribed by Form 4 ... the party's inability to pay or to give security for fees and costs." (Likewise, a party seeking to proceed IFP in the Supreme Court must use Form 4. *See* Supreme Court Rule 39.1.) The proposed amendments would substitute one revised question for two of the questions on the current Form 4: Question 10 – which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments – and Question 11 – which inquires about payments for non-attorney services in connection with the case.

Questions 10 and 11 have been criticized by commentators for seeking information that seems unnecessary to the IFP determination. Some commentators have suggested that Questions 10 and 11 might in some circumstances seek disclosure of information protected by attorney-client privilege and/or work product immunity. Research by the Committee's reporter suggested that though the information solicited by Questions 10 and 11 is relatively unlikely to be subject to attorney-client privilege, it may sometimes constitute protected work product. The Committee also discussed the possibility that even if the information solicited by Questions 10 and 11 is not privileged or protected, its disclosure could as a practical matter disadvantage some IFP litigants. In any event, the function of Form 4 is to provide the information necessary to determine whether the applicant is unable "to pay or to give security for fees and costs," Fed. R. App. P. 24(a)(1)(A). Neither the Committee's own deliberations and research nor informal discussions with the Supreme Court Clerk's Office have disclosed any reason to think that it is necessary to obtain all of the information currently sought by Questions 10 and 11. Accordingly, the proposed amendment would replace Questions 10 and 11 with a new Question 10 that would read: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?"

The proposed amendments would also make certain technical amendments to Form 4, to bring the official Form into conformity with changes that were approved by the Judicial Conference in fall 1997 but were not subsequently transmitted to Congress. The proposed technical amendments would add columns in Question 1 to permit the applicant to list the applicant's spouse's income; would limit the requests for employment history in Questions 2 and 3 to the past two years; and would specify that the requirement for inmate account statements applies to civil appeals.

1. Text of proposed amendments

The Committee recommends final approval of the proposed amendments to Form 4 as set out in the enclosure to this report.

2. Changes made after publication and comment

The single comment received on the proposed amendments to Form 4 is summarized in the enclosure to this report. The comment – from the National Association of Criminal Defense Lawyers ("NACDL") – suggests a revision to the Form's discussion of inmate account statements. The Committee decided not to incorporate this comment into the current proposed amendments, but has added it to the Committee's study agenda as a new item. Further detail on this matter can be found in the draft minutes of the Committee's spring meeting.

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

January 22, 2013

MEMORANDUM

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

From: Judge Thomas F. Hogan Thomas F. Hogan

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 1007, 4004, 5009, 9006, 9013, and 9014 of the Federal Rules of Bankruptcy Procedure, which were approved by the Judicial Conference at its September 2012 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am transmitting: (i) a redline version of the amendments; (ii) an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the Report of the Advisory Committee on the Federal Rules of Bankruptcy Procedure.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits

* * * * *

(b) SCHEDULES, STATEMENTS, AND OTHER DOCUMENTS REQUIRED.

* * * * *

(7) Unless an approved provider of an instructional course concerning personal financial management has notified the court that a debtor has completed the course after filing the petition:

(A) An individual debtor in a chapter 7 or chapter 13 case shall file a statement of completion of thea course ~~concerning personal financial management~~, prepared

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

as prescribed by the appropriate Official Form.; and

(B) An individual debtor in a chapter 11 case shall file the statement ~~in a chapter 11 case in which~~if § 1141(d)(3) applies.

* * * * *

Committee Note

Subdivision (b)(7) is amended to relieve an individual debtor of the obligation to file a statement of completion of a personal financial management course if the course provider notifies the court that the debtor has completed the course. Course providers approved under § 111 of the Code may be permitted to file this notification electronically with the court immediately upon the debtor's completion of the course. If the provider does not notify the court, the debtor must file the statement, prepared as prescribed by the appropriate Official Form, within the time period specified by subdivision (c).

Changes Made After Publication and Comment

No changes were made after publication and comment.

Rule 4004. Grant or Denial of Discharge

* * * * *

(c) GRANT OF DISCHARGE.

(1) In a chapter 7 case, on expiration of the times fixed for objecting to discharge and for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge ~~unless~~, except that the court shall not grant the discharge if:

(A) the debtor is not an individual;

(B) a complaint, or a motion under § 727(a)(8) or (a)(9), objecting to the discharge has been filed and not decided in the debtor's favor;

(C) the debtor has filed a waiver under § 727(a)(10);

(D) a motion to dismiss the case under § 707 is pending;

(E) a motion to extend the time for filing a complaint objecting to the discharge is pending;

(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending;

(G) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code, unless the court has waived the fees under 28 U.S.C. § 1930(f);

(H) the debtor has not filed with the court a statement of completion of a course concerning personal financial management ~~as~~ if required by Rule 1007(b)(7);

(I) a motion to delay or postpone discharge under § 727(a)(12) is pending;

(J) a motion to enlarge the time to file a

reaffirmation agreement under Rule 4008(a) is pending;

(K) a presumption ~~has arisen~~is in effect under § 524(m) that a reaffirmation agreement is an undue hardship and the court has not concluded a hearing on the presumption; or

(L) a motion is pending to delay discharge~~;~~ because the debtor has not filed with the court all tax documents required to be filed under § 521(f).

* * * * *

Committee Note

Subdivision (c)(1) is amended in several respects. The introductory language of paragraph (1) is revised to emphasize that the listed circumstances do not just relieve the court of the obligation to enter the discharge promptly but that they prevent the court from entering a discharge.

Subdivision (c)(1)(H) is amended to reflect the simultaneous amendment of Rule 1007(b)(7). The amendment of the latter rule relieves a debtor of the

obligation to file a statement of completion of a course concerning personal financial management if the course provider notifies the court directly that the debtor has completed the course. Subparagraph (H) now requires postponement of the discharge when a debtor fails to file a statement of course completion only if the debtor has an obligation to file the statement.

Subdivision (c)(1)(K) is amended to make clear that the prohibition on entering a discharge due to a presumption of undue hardship under § 524(m) of the Code ceases when the presumption expires or the court concludes a hearing on the presumption.

Changes Made After Publication and Comment

Because this amendment is being made to conform to a simultaneous amendment of Rule 1007(b)(7) and is otherwise technical in nature, final approval is sought without publication.

Rule 5009. Closing Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, Chapter 13 Individual's Debt Adjustment, and Chapter 15 Ancillary and Cross-Border Cases

* * * * *

(b) NOTICE OF FAILURE TO FILE RULE 1007(b)(7) STATEMENT. If an individual debtor in a chapter 7 or 13 case is required to ~~has not~~ filed ~~the~~ a statement under ~~required by~~ Rule 1007(b)(7) and fails to do so within 45 days after the first date set for the meeting of creditors under § 341(a) of the Code, the clerk shall promptly notify the debtor that the case will be closed without entry of a discharge unless the required statement is filed within the applicable time limit under Rule 1007(c).

* * * * *

Committee Note

Subdivision (b) is amended to conform to the amendment of Rule 1007(b)(7). Rule 1007(b)(7) relieves an

individual debtor of the obligation to file a statement of completion of a personal financial management course if the course provider notifies the court that the debtor has completed the course. The clerk's duty under subdivision (b) to notify the debtor of the possible closure of the case without discharge if the statement is not timely filed therefore applies only if the course provider has not already notified the court of the debtor's completion of the course.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) ~~FOR~~ MOTION~~S~~ PAPERS~~; AFFIDAVITS~~. A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than seven days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte

application. When a motion is supported by affidavit, the affidavit shall be served with the motion. ~~and, e~~Except as otherwise provided in Rule 9023, ~~opposing affidavits~~any written response shall ~~may~~be served not later than one day before the hearing, unless the court permits otherwise~~them to be served at some other time~~.

* * * * *

Committee Note

The title of this rule is amended to draw attention to the fact that it prescribes time limits for the service of motion papers. These time periods apply unless another Bankruptcy Rule or a court order, including a local rule, prescribes different time periods. Rules 9013 and 9014 should also be consulted regarding motion practice. Rule 9013 governs the form of motions and the parties who must be served. Rule 9014 prescribes the procedures applicable to contested matters, including the method of serving motions commencing contested matters and subsequent papers. Subdivision (d) is amended to apply to any written response to a motion, rather than just to opposing affidavits. The caption of the subdivision is amended to reflect this change. Other changes are stylistic.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Rule 9013. Motions: Form and Service

A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion, other than one which may be considered ex parte, shall be served by the moving party within the time determined under Rule 9006(d). The moving party shall serve the motion on:

(a) the trustee or debtor in possession and on those entities specified by these rules; or

(b) the entities the court directs if these rules do not

require service or specify the entities to be served ~~if service is not required or the entities to be served are not specified by these rules, the moving party shall serve the entities the court directs~~.

* * * * *

Committee Note

A cross-reference to Rule 9006(d) is added to this rule to call attention to the time limits for the service of motions, supporting affidavits, and written responses to motions. Rule 9006(d) prescribes time limits that apply unless other limits are fixed by these rules, a court order, or a local rule. The other changes are stylistic.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Rule 9014. Contested Matters

* * * * *

(b) SERVICE. The motion shall be served in the

manner provided for service of a summons and complaint by Rule 7004 and within the time determined under Rule 9006(d). Any written response to the motion shall be served within the time determined under Rule 9006(d). Any paper served after the motion shall be served in the manner provided by Rule 5(b) F.R. Civ. P.

* * * * *

Committee Note

A cross-reference to Rule 9006(d) is added to subdivision (b) to call attention to the time limits for the service of motions, supporting affidavits, and written responses to motions. Rule 9006(d) prescribes time limits that apply unless other limits are fixed by these rules, a court order, or a local rule.

Changes Made After Publication and Comment

No changes were made after publication and comment.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits

* * * * *

(b) SCHEDULES, STATEMENTS, AND OTHER DOCUMENTS REQUIRED.

* * * * *

(7) Unless an approved provider of an instructional course concerning personal financial management has notified the court that a debtor has completed the course after filing the petition:

(A) An individual debtor in a chapter 7 or chapter 13 case shall file a statement of completion of the course, prepared as prescribed by the appropriate Official Form; and

(B) An individual debtor in a chapter 11 case shall file the statement if § 1141(d)(3) applies.

* * * * *

Rule 4004. Grant or Denial of Discharge

* * * * *

(c) GRANT OF DISCHARGE.

(1) In a chapter 7 case, on expiration of the times fixed for objecting to discharge and for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge, except that the court shall not grant the discharge if:

(A) the debtor is not an individual;

(B) a complaint, or a motion under § 727(a)(8) or (a)(9), objecting to the discharge has been filed and not decided in the debtor's favor;

(C) the debtor has filed a waiver under § 727(a)(10);

(D) a motion to dismiss the case under § 707 is pending;

(E) a motion to extend the time for filing a complaint objecting to the discharge is pending;

(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending;

(G) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code, unless the court has waived the fees under 28 U.S.C. § 1930(f);

(H) the debtor has not filed with the court a statement of completion of a course concerning personal financial management if required by Rule 1007(b)(7);

(I) a motion to delay or postpone discharge under § 727(a)(12) is pending;

(J) a motion to enlarge the time to file a reaffirmation agreement under Rule 4008(a) is pending;

(K) a presumption is in effect under § 524(m) that a reaffirmation agreement is an undue hardship and the court has not concluded a hearing on the presumption; or

(L) a motion is pending to delay discharge because the debtor has not filed with the court all tax documents required to be filed under § 521(f).

* * * * *

Rule 5009. Closing Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, Chapter 13 Individual's Debt Adjustment, and Chapter 15 Ancillary and Cross-Border Cases

* * * * *

(b) NOTICE OF FAILURE TO FILE RULE 1007(b)(7) STATEMENT. If an individual debtor in a chapter 7 or 13 case is required to 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).

* * * * *

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

(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.

* * * * *

Rule 9013. Motions: Form and Service

A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion, other than one which may be considered ex parte, shall be served by the moving party within the time determined under Rule 9006(d). The moving party shall serve the motion on:

(a) the trustee or debtor in possession and on those entities specified by these rules; or

(b) the entities the court directs if these rules do not require service or specify the entities to be served.

* * * * *

Rule 9014. Contested Matters

* * * * *

(b) SERVICE. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004 and within the time determined under Rule 9006(d). Any written response to the motion shall be served within the time determined under Rule 9006(d). Any paper served after the motion shall be served in the manner provided by Rule 5(b) F.R. Civ. P.

* * * * *

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1007(b), 4004(c)(1), 5009(b), 9006, 9013, and 9014, [. . .] with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed changes were circulated to the bench, bar, and public for comment in August 2011. In all, 15 comments were submitted and the advisory committee received testimony telephonically from one interested bar association. The comments and testimony were considered by the appropriate subcommittees and in discussions at the advisory committee's Spring 2012 meeting.

Rules 1007 and 5009

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 conditioned the receipt of a discharge for individual debtors on their completing a personal financial management course, with some exceptions. Rule 1007(b) requires individual debtors to file a statement with the court certifying that they have completed the course. Official Form 23 is prescribed for this purpose. The proposed amendment to Rule 1007(b)(7) would relieve individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course.

The proposed amendment to Rule 5009(b) reflects the proposed amendment of Rule 1007(b)(7). Rule 5009(b) currently requires the clerk to send a warning notice to an individual debtor who has not filed Official Form 23 within 45 days after the first date set for the meeting of creditors. The proposed amendment would require the clerk to send the notice only if the course provider has not already notified the court of the debtor's completion of the course and the debtor has failed to file the statement in 45 days.

The advisory committee received five comments, three expressing support for the amendments, and two opposing them. The advisory committee carefully considered the comments and concluded that the concerns raised by the negative comments did not justify modifications to the published amendments.

Rule 4004

The proposed amendments to Rule 4004(c)(1) conform to the simultaneous amendment of Rule 1007(b)(7) and to state in more precise language other provisions of subdivision (c)(1). Rule 4004(c)(1)(H) would be amended to provide that the court must delay entering a discharge for a debtor who has not filed a certificate of completion only if the debtor was in fact required to do so under Rule 1007(b)(7).

The other two changes to Rule 4004(c)(1) are clarifications. One makes clear that the circumstances listed in the paragraph prevent the court from entering a discharge. The other specifically states that the prohibition on entering a discharge under subdivision (c)(1)(K) ceases when a presumption of undue hardship expires or the court concludes a hearing on the presumption.

Because the latter amendments would simply state more precisely the existing meaning of

the provision and because the first is a conforming amendment, publication for public comment was unnecessary.

Rules 9006, 9013, and 9014

Rule 9006(d) prescribes time limits for the service of written motions and responses. The proposed amendments to this subsection draw attention to the rule's default deadlines for the service of motions and written responses by amending the title to add a reference to the "time for motion papers." This change is consistent with Civil Rule 6 and should make it easier to find the provision governing motion practice. Rule 9006(d) currently covers only the timing of serving opposing affidavits. The proposed amendments would expand the coverage of subdivision (d) to address the timing of the service of any written response to a motion. The change would make the provision as inclusive as possible to make local motion practice more consistent.

Rule 9013, which addresses the form and service of motions, is amended to provide a cross-reference to the time periods in Rule 9006(d). The amendment also calls greater attention to the default deadlines for motion practice. In addition, stylistic changes are made to Rule 9013 to add greater clarity. Rule 9014, which addresses contested matters in bankruptcy, is similarly amended to provide a cross-reference to the times under Rule 9006(d) for serving motions and responses. No comments were submitted on these amendments.

* * * * *

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference–

a. Approve the proposed amendments to Bankruptcy Rules 1007(b)(7), 4004(c)(1), 5009(b), 9006(d), 9013, and 9014, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the

law; and

* * * * *

Respectfully submitted,

Mark R. Kravitz, Chair

James. M. Cole
Dean C. Colson
Roy T. Englert, Jr.
Gregory G. Garre
Neil M. Gorsuch
Marilyn L. Huff
Wallace B. Jefferson
David F. Levi
Patrick J. Schiltz
James A. Teilborg
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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

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

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 14, 2012

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 29 and 30, 2012, in Phoenix, Arizona.

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II. Action Items

A. Items for Final Approval

1. Amendments Published for Comment in August 2011. **The Advisory Committee recommends that the proposed rule and form amendments that are summarized below be approved and forwarded to the Judicial Conference. It recommends that the amended form take effect on December 1, 2012.** The texts of the amended rules and form are set out in Appendix A.

Action Item 1. Rules 1007(b)(7) and 5009(b) involve the obligation of individual debtors in chapters 7, 11, and 13 to complete a personal financial management course as a condition of receiving a discharge in bankruptcy. Rule 1007(b)(7) currently requires the debtor to file a "statement of completion of a course concerning personal financial management, prepared as prescribed by the appropriate Official Form." That form is Official Form 23, which requires the debtor to certify completion of an instructional course in personal financial management. Accordingly, Rule 5009(b) now requires the clerk to send notice to an individual debtor who has not filed Official Form 23 within 45 days after the first date set for the meeting of creditors. Debtors who do not file the necessary statement of completion from their course provider are not given a discharge before their cases are closed. Many of these cases are reopened later, necessitating the payment of an additional fee.

The Advisory Committee sought publication of amendments that would streamline the process of filing statements of the completion of financial management courses. The amendments remove the obligation of the debtor to file Official Form 23 if the financial management course provider has notified the court of the debtor's successful completion of the course. Rule 1007(b)(7) would be amended to authorize providers to file course completion statements directly with the court. Rule 5009(b) would be amended to direct the clerk to send notice to the debtor only if the debtor is required to file the statement and the provider has not already done so. At its June 2011 meeting, the Standing Committee approved the request for publication.

Upon publication, the Advisory Committee received five comments. Three comments expressed support for the amendments. They were submitted by Michael Shklar, Phillip Dy, and Ganna Gudkova. Two comments opposed the amendments. Jeanne E. Hovenden, an attorney in Virginia, urged that the debtor's attorney should be required to file the statement of completion. She expressed concern that allowing a financial course management provider to file the statement directly with the court may lead to a discharge even when it is not in the debtor's best interest. Because the provider is not familiar with all the circumstances of a case, the provider will not know if a particular debtor would be better served by not receiving a discharge. Raymond P. Bell, Jr., of Pennsylvania submitted a comment agreeing with Ms. Hovenden and emphasizing that the debtor's attorney or the debtor should bear responsibility for filing the statement of completion.

The Advisory Committee did not view the concern raised by the negative comments as a substantial one. As Ms. Hovenden's comment recognized, only in rare cases would a debtor want to avoid a discharge. When those cases do arise, the debtor may decline to receive a discharge in other ways. The debtor has the option of waiving the discharge under § 727(a)(10) of the Code or failing to complete plan payments under chapter 11 or 13, which would result in denial of a discharge despite the filing of a notification of course completion by the provider.

Accordingly, the Advisory Committee voted unanimously to recommend approval of the amended rules as published.

Action Item 2. Rules 9006, 9013, and 9014 would be amended to highlight the default deadlines for the service of motions and written responses. Rule 9006, based on Civil Rule 6, contains a subsection regarding the time for service of motions. Rule 9006(d) regulates timing for any motions not addressed elsewhere in the Bankruptcy Rules or by order of the court. Unlike the civil rule, however, Rule 9006 does not indicate in its title that it addresses time periods for motions. Nor is it followed by a rule that addresses the form of motions, as is the case with the civil rule.

The Advisory Committee proposed several amendments to highlight the existence of Rule 9006(d). The title of Rule 9006 would be amended to add a reference to the "time for motion papers." This change, which is consistent with Civil Rule 6, should make it easier to find the provision governing motion practice. Coverage of subdivision (d) would be expanded to address the timing of the service of any written response to a motion (rather than only opposing affidavits as the rule currently states). This change would make the provision as inclusive as possible in order to capture differences in local motion practice. Rule 9013, which addresses the form and service of motions, would be amended to provide a cross-reference to the time periods in Rule 9006(d). This amendment is also intended to call greater attention to the default deadlines for motion practice. In addition, stylistic changes would be made to Rule 9013 to add greater clarity. Rule 9014, which addresses contested matters in bankruptcy, would similarly be amended to provide a cross-reference to the times under Rule 9006(d) for serving motions and responses.

No comment was received on these amendments. The Advisory Committee voted unanimously to recommend approval of the proposed amendments to Rules 9006, 9013, and 9014 as published.

* * * * *

2. *Amendments for Which Final Approval Is Sought Without Publication.* **The Advisory Committee recommends that the proposed amendments that are summarized below be approved and forwarded to the Judicial Conference. It recommends that the amended forms become effective on December 1, 2012.** Because the proposed amendments are technical

or conforming in nature, the Committee concluded that publication for comment is not required. The texts of the amended rules and forms are set out in Appendix A.

Action Item 4. Rule 4004(c)(1) would be amended to conform to the simultaneous amendment of Rule 1007(b)(7) and to state in more precise language other provisions of the subdivision.

As discussed above, the Advisory Committee is recommending that the Standing Committee forward to the Judicial Conference an amendment to Rule 1007(b)(7) that would allow providers of courses on personal financial management to notify a bankruptcy court directly that a debtor had completed the course. Notification by the provider would relieve the debtor of the obligation to file a certificate of completion. Consistent with that change, Rule 4004(c)(1)(H) would be amended to provide that the court must delay entering a discharge for a debtor who has not filed a certificate of completion only if the debtor was in fact required to do so under Rule 1007(b)(7).

The other two changes to Rule 4004(c)(1) are clarifications. One makes clear that the circumstances listed in the paragraph prevent the court from entering a discharge. The other states specifically that the prohibition on entering a discharge under subdivision (c)(1)(K) ceases when a presumption of undue hardship expires or the court concludes a hearing on the presumption.

Because the latter amendments would simply state more precisely the existing meaning of the provision and because the first one is conforming, the Committee voted unanimously to recommend that they be approved without publication.

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JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

January 22, 2013

MEMORANDUM

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

From: Judge Thomas F. Hogan Thomas F. Hogan

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 37 and 45 of the Federal Rules of Civil Procedure, which were approved by the Judicial Conference at its September 2012 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am transmitting: (i) a redline version of the amendments; (ii) an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the Report of the Advisory Committee on the Federal Rules of Civil Procedure.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

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

* * * * *

(b) Failure to Comply with a Court Order.

(1) ***Sanctions Sought in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure

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

may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) ***Sanctions Sought in the District Where the Action Is Pending.***

* * * * *

Committee Note

Rule 37(b) is amended to conform to amendments made to Rule 45, particularly the addition of Rule 45(f) providing for transfer of a subpoena-related motion to the court where the action is pending. A second sentence is added to Rule 37(b)(1) to deal with contempt of orders entered after such a transfer. The Rule 45(f) transfer provision is explained in the Committee Note to Rule 45.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Rule 45. Subpoena

(a) In General.

(1) ***Form and Contents.***

(A) *Requirements — In General.* Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action~~, the court in which it is pending,~~ and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or

permit the inspection of premises; and

(iv) set out the text of Rule 45(d~~e~~) and (e~~d~~).

(B) *Command to Attend a Deposition — Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify

the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding personparty to permit inspection, copying, testing, or sampling of the materials.

(2) ***IssuingIssued from Which Court.*** A subpoena must issue from the court where the action is pending. as follows:

~~(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;~~

~~(B) for attendance at a deposition, from the court for the district where the deposition is to be~~

~~taken; and~~

~~(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.~~

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court. ~~as an officer of:~~

~~(A) a court in which the attorney is authorized to practice; or~~

~~(B) a court for a district where a deposition is to be taken or production is to be made, if the~~

~~attorney is authorized to practice in the court where the action is pending.~~

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

(b) Service.

(1) ***By Whom and How; Tendering Fees; ~~Serving a Copy of Certain Subpoenas.~~*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the

fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. ~~If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.~~

(2) ***Service in the United States.*** A subpoena may be served at any place within the United States. ~~Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:~~

~~(A) within the district of the issuing court;~~

~~(B) outside that district but within 100 miles of the place specified for the deposition;~~

~~hearing, trial, production, or inspection;~~

~~(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or~~

~~(D) that the court authorizes on motion and for good cause, if a federal statute so provides.~~

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service

and the names of the persons served. The statement must be certified by the server.

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(dc) **Protecting a Person Subject to a Subpoena; Enforcement.**

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The ~~issuing~~ court for the district where compliance is required must enforce this duty and impose an appropriate

sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney

designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the ~~issuing~~ court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the ~~issuing~~court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c); ~~who is neither a party nor a party's officer to travel more than 100~~

~~miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;~~

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the ~~issuing~~ court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.; or

~~**(iii)** a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.~~

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(de)(3)(B), the court may, instead of quashing or modifying a subpoena, order

appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(ed) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary

course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not

provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making

the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required~~under seal~~ for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Transferring a Subpoena-Related Motion. When the

court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(ge) Contempt. The court for the district where compliance is required — and also, after a motion is transferred, the issuing court — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it. ~~A nonparty's failure to obey must be excused if the~~

~~subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).~~

Committee Note

Rule 45 was extensively amended in 1991. The goal of the present amendments is to clarify and simplify the rule. The amendments recognize the court where the action is pending as the issuing court, permit nationwide service of a subpoena, and collect in a new subdivision (c) the previously scattered provisions regarding place of compliance. These changes resolve a conflict that arose after the 1991 amendment about a court's authority to compel a party or party officer to travel long distances to testify at trial; such testimony may now be required only as specified in new Rule 45(c). In addition, the amendments introduce authority in new Rule 45(f) for the court where compliance is required to transfer a subpoena-related motion to the court where the action is pending on consent of the person subject to the subpoena or in exceptional circumstances.

Subdivision (a). This subdivision is amended to provide that a subpoena issues from the court where the action is pending. Subdivision (a)(3) specifies that an attorney authorized to practice in that court may issue a subpoena, which is consistent with current practice.

In Rule 45(a)(1)(D), "person" is substituted for "party"

because the subpoena may be directed to a nonparty.

Rule 45(a)(4) is added to highlight and slightly modify a notice requirement first included in the rule in 1991. Under the 1991 amendments, Rule 45(b)(1) required prior notice of the service of a "documents only" subpoena to the other parties. Rule 45(b)(1) was clarified in 2007 to specify that this notice must be served before the subpoena is served on the witness.

The Committee has been informed that parties serving subpoenas frequently fail to give the required notice to the other parties. The amendment moves the notice requirement to a new provision in Rule 45(a) and requires that the notice include a copy of the subpoena. The amendments are intended to achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials.

Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving it or the person served to obtain such access. The rule does not limit the court's authority to order notice of receipt of produced materials or access to them. The party serving the subpoena should in any event make reasonable provision for prompt access.

Subdivision (b). The former notice requirement in Rule 45(b)(1) has been moved to new Rule 45(a)(4).

Rule 45(b)(2) is amended to provide that a subpoena

may be served at any place within the United States, removing the complexities prescribed in prior versions.

Subdivision (c). Subdivision (c) is new. It collects the various provisions on where compliance can be required and simplifies them. Unlike the prior rule, place of service is not critical to place of compliance. Although Rule 45(a)(1)(A)(iii) permits the subpoena to direct a place of compliance, that place must be selected under Rule 45(c).

Rule 45(c)(1) addresses a subpoena to testify at a trial, hearing, or deposition. Rule 45(c)(1)(A) provides that compliance may be required within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. For parties and party officers, Rule 45(c)(1)(B)(i) provides that compliance may be required anywhere in the state where the person resides, is employed, or regularly conducts business in person. When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1).

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

Because Rule 45(c) directs that compliance may be commanded only as it provides, these amendments resolve a split in interpreting Rule 45's provisions for subpoenaing parties and party officers. *Compare In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006) (finding authority to compel a party officer from New Jersey to testify at trial in New Orleans), with *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that Rule 45 did not require attendance of plaintiffs at trial in New Orleans when they would have to travel more than 100 miles from outside the state). Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts business in person in the state.

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

For other discovery, Rule 45(c)(2) directs that inspection of premises occur at those premises, and that production of documents, tangible things, and electronically stored information may be commanded to occur at a place within

100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. Under the current rule, parties often agree that production, particularly of electronically stored information, be transmitted by electronic means. Such arrangements facilitate discovery, and nothing in these amendments limits the ability of parties to make such arrangements.

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

Subdivision (d). Subdivision (d) contains the provisions formerly in subdivision (c). It is revised to recognize the court where the action is pending as the issuing court, and to take account of the addition of Rule 45(c) to specify where compliance with a subpoena is required.

Subdivision (f). Subdivision (f) is new. Under Rules 45(d)(2)(B), 45(d)(3), and 45(e)(2)(B), subpoena-related motions and applications are to be made to the court where compliance is required under Rule 45(c). Rule 45(f) provides authority for that court to transfer the motion to the court where the action is pending. It applies to all motions under this rule, including an application under Rule 45(e)(2)(B) for a privilege determination.

Subpoenas are essential to obtain discovery from nonparties. To protect local nonparties, local resolution of disputes about subpoenas is assured by the limitations of Rule 45(c) and the requirements in Rules 45(d) and (e) that

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

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

If the motion is transferred, judges are encouraged to permit telecommunications methods to minimize the burden a transfer imposes on nonparties, if it is necessary for attorneys admitted in the court where the motion is made to appear in the court in which the action is pending. The rule provides that if these attorneys are authorized to practice in the court where the motion is made, they may file papers and appear in the court in which the action is pending in relation

to the motion as officers of that court.

After transfer, the court where the action is pending will decide the motion. If the court rules that discovery is not justified, that should end the matter. If the court orders further discovery, it is possible that retransfer may be important to enforce the order. One consequence of failure to obey such an order is contempt, addressed in Rule 45(g). Rule 45(g) and Rule 37(b)(1) are both amended to provide that disobedience of an order enforcing a subpoena after transfer is contempt of the issuing court and the court where compliance is required under Rule 45(c). In some instances, however, there may be a question about whether the issuing court can impose contempt sanctions on a distant nonparty. If such circumstances arise, or if it is better to supervise compliance in the court where compliance is required, the rule provides authority for retransfer for enforcement. Although changed circumstances may prompt a modification of such an order, it is not expected that the compliance court will reexamine the resolution of the underlying motion.

Subdivision (g). Subdivision (g) carries forward the authority of former subdivision (e) to punish disobedience of subpoenas as contempt. It is amended to make clear that, in the event of transfer of a subpoena-related motion, such disobedience constitutes contempt of both the court where compliance is required under Rule 45(c) and the court where the action is pending. If necessary for effective enforcement, Rule 45(f) authorizes the issuing court to transfer its order after the motion is resolved.

The rule is also amended to clarify that contempt sanctions may be applied to a person who disobeys a subpoena-related order, as well as one who fails entirely to obey a subpoena. In civil litigation, it would be rare for a court to use contempt sanctions without first ordering compliance with a subpoena, and the order might not require all the compliance sought by the subpoena. Often contempt proceedings will be initiated by an order to show cause, and an order to comply or be held in contempt may modify the subpoena's command. Disobedience of such an order may be treated as contempt.

The second sentence of former subdivision (e) is deleted as unnecessary.

Changes Made After Publication and Comment

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

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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

* * * * *

(b) Failure to Comply with a Court Order.

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is taken or the court where the action is pending.

(2) ***Sanctions Sought in the District Where the Action Is Pending.***

* * * * *

Rule 45. Subpoena

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(1) ***Form and Contents.***

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(i) state the court from which it issued;

(ii) state the title of the action and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents,

electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d) and (e).

(B) *Command to Attend a Deposition – Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit

the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

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

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

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

(b) Service.

(1) ***By Whom and How; Tendering Fees.*** Any person who is at least 18 years old and not a

party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

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

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a

statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

The court for the district where compliance is required must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney's fees – on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to

produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises – or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district

where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's

opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person

will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the

person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding

must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld

documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the

claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Transferring a Subpoena-Related Motion. When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the

court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(g) Contempt. The court for the district where compliance is required – and also, after a motion is transferred, the issuing court – may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 45, the subpoena rule, and a conforming amendment to Rule 37, the rule dealing with failure to cooperate in discovery, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2011. Three public hearings were scheduled, but all were cancelled because the two parties who asked to testify opted instead to submit written comments.

The advisory committee received 25 written comments. Its discovery subcommittee met by conference call to consider them and, based on that discussion, suggested some modifications to the proposed amendments. At the advisory committee's Spring 2012 meeting, those modifications were reviewed, and a few topics were identified for additional consideration. A revised Rule 45 package was then circulated to the full advisory committee and received unanimous support. The changes recommended to the Rule 45 package since publication are minor and are summarized below. The modified version of the amendment package also includes style changes recommended by the Committee's style consultant.

The proposed amendments to Rule 45 result from a multi-year study of subpoena practice culminating in a decision by the advisory committee to adopt the most modest form of rule

simplification considered and to adopt some but not all of the specific rule amendments proposed during the study of the rule. Four specific changes are being proposed.

First, the amendments seek to simplify Rule 45 by making the court where an action is pending the issuing court, permitting service throughout the United States (as is currently authorized under Criminal Rule 17(e)), and combining all provisions on the place of compliance into a new Rule 45(c). It preserves the various place-of-compliance provisions of the current rule except its reference to state law. The "*Vioxx* issue" is addressed separately below.

The simplification proposals received broad support in the public commentary, and only one change was made following publication. Proposed Rule 45(c)(2)(A) was changed to call for production "within 100 miles of where the person [subject to the subpoena] resides, is employed, or regularly transacts business in person." This change should ensure that if litigation about a subpoena is necessary it will occur at a location convenient for the nonparty being subpoenaed. Recognizing that agreement on the place of production is desirable, the proposed Committee Note was modified to recognize that the amendments do not limit the ability of parties to make such agreements.

A clarifying amendment to the proposed Committee Note on Rule 45(c) addresses concerns expressed in the comments that the amended rule might be read to require a subpoena for all depositions, even of parties or party officers, directors, or managing agents. The proposed Committee Note was clarified to remind readers that no subpoena is required for depositions of these witnesses, and that the geographical limitations applicable to subpoenas do not apply when such depositions are simply noticed. Another Committee Note clarification confirms that, when the issuing court has made an order for remote testimony under Rule 43(a), a subpoena may be

used to command the distant witness to attend and testify within the geographical limits of Rule 45(c).

Second, the proposed amendments address the transfer of subpoena-related motions. New Rule 45(c) essentially retains the existing rule requirement that motions to quash or enforce a subpoena be made in the district where compliance with the subpoena is required. The result is that the "enforcement court" may often be different from the "issuing court." Existing authority has recognized that some disputes over subpoena enforcement are better decided by the issuing court. The proposed amendments therefore add Rule 45(f), which explicitly authorizes transfer of subpoena-related motions from the enforcement court to the issuing court, including not only motions for a protective order but also motions to enforce the subpoena.

The published draft had permitted transfer only upon consent of the nonparty and the parties, or in "exceptional circumstances." After public comment, the advisory committee concluded that party consent should not be required. If the person subject to the subpoena consents to transfer, the enforcement court may transfer it. Whether the "exceptional circumstances" standard should be retained when the nonparty witness does not consent was the focus of considerable public comment. After considering all of the comments, the advisory committee decided to retain the "exceptional circumstances" standard.

The proposed Committee Note was revised to clarify that the prime concern should be avoiding undue burdens on the local nonparty. It also identifies considerations that might still warrant transfer, emphasizing that those considerations warrant transfer only if they outweigh the interests of the local nonparty in local resolution of the motion. The proposed Committee Note also suggests that the judge in the compliance court might consult with the judge in the issuing

court, and encourages the use of telecommunications to minimize the burden on the nonparty when transfer does occur.

Third, the proposed amendments resolve conflicting interpretations of the current rule as to whether a party or party officer can be compelled by subpoena to travel more than 100 miles to attend trial. One interpretation is that the geographical limits applicable to other witnesses do not apply to a party or party officer. *See In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006) (requiring an officer of the defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served within Louisiana under Rule 45(b)(2)). The alternative interpretation is that the rule sets forth the same geographical limits for all trial witnesses. *See Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in Fair Labor Standards Act action could not be compelled to travel long distances from outside the state to attend trial because they were not served with subpoenas within the state as required by Rule 45(b)(2)).

The division in the caselaw resulted from differing interpretations of the 1991 amendments to Rule 45. The advisory committee concluded that those amendments were not intended to create the expanded subpoena power recognized in the *Vioxx* line of cases, and it decided to restore the original meaning of the rule. The proposed new amendments therefore provide in Rule 45(c)(1) that a subpoena may command any person to testify only within the limits that apply to all witnesses. As noted above, proposed Committee Note language was added to recognize that this provision does not affect existing law on the location for a deposition of a party or party's officer, director, or managing agent, for which a subpoena is not needed.

Finally, the 1991 amendments introduced the "documents only" subpoena, and added a

requirement in Rule 45(b)(1) that each party be given notice of a subpoena that requires document production. In the 2007 restyling of the Civil Rules, the rule was clarified to direct that notice be provided before service of the subpoena, but experience has shown that many lawyers do not comply with the notice requirement. Therefore, the proposed amendments move the notice provision to a more prominent position, and also require that the notice include a copy of the subpoena. As published for public comment, the preliminary draft proposed to extend the notice requirement to trial subpoenas by removing the phrase "before trial" from the rule.

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

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

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 37 and 45, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

Mark R. Kravitz, Chair

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

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REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

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

DATE: May 8, 2012

RE: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the University of Michigan Law School in Ann Arbor on March 22 and 23, 2012. Draft Minutes of this meeting are attached.

* * * * *

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

* * * * *

I. RULES 45 & 37: ACTION TO RECOMMEND ADOPTION OF REVISED RULES 45 & 37

ACTION ITEM: RULE 45

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

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

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

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

The amendment package sought to eliminate this three-ring circus by making the court where the action is pending the issuing court, permitting service throughout the United States (as is currently authorized under Fed. R. Crim. P. 17(e)), and combining all provisions on place of compliance in a new Rule 45(c). New Rule 45(c) preserves the various place-of-compliance

provisions of the current rule (except that the reference to state law is eliminated and the "*Vioxx*" issue is addressed as discussed below).

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

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

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

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

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

deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending."

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

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

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

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

Trial subpoenas for distant parties and party officers: There is a distinct split in existing authority about whether a subpoena may command a distant party or party officer to testify at trial. One view is that the geographical limits that apply to other witnesses do not apply to such witnesses. See *In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D. La. 2006) (requiring an officer of the defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served within Louisiana under Rule 45(b)(2)). The alternative view is that the rule sets forth the same geographical limits for all trial witnesses. See *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in Fair Labor Standards Act action could not be compelled to travel long distances from

outside the state to attend trial because they were not served with subpoenas within the state as required by Rule 45(b)(2)).

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

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

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

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

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

The amendment package attempts to solve these problems by moving the existing provision to become a new Rule 45(a)(4) with a heading that calls attention to the requirement -- "Notice to Other Parties Before Service." The relocated provision also slightly modifies the existing provision by directing that a copy of the subpoena be provided along with the notice.

That should assist the other parties in knowing what is being sought and determining whether they have objections to production of any of the materials sought or wish to subpoena additional materials.

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

At the same time, it appeared that the value of notice of trial subpoenas (the concern that led to the proposal for removal of the phrase in the first place) was limited or nonexistent because usually any such documents would be listed in the Rule 26(a)(3) disclosures or otherwise identified during pretrial preparations. Indeed, the parties may often cooperate to subpoena needed exhibits for trial. After considering alternatives, the solution adopted was to restore the phrase "before trial" to the rule. The Committee Note explanation for removal of "before trial" has been removed.

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

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

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

The Committee believes that this change will result in all parties being made aware when a subpoena is served -- a marked change from actual current practice -- and that this awareness will enable parties adequately to protect their interests. The Committee is concerned that requiring notice of receipt of documents could create new complications. Production of

documents in response to a subpoena often occurs on a "rolling" basis, with documents being produced over time as they are found. Requiring a new notice every time additional documents are received could be burdensome, especially in large document cases, and failure to give notice on one or more occasions of a rolling production would likely spawn satellite litigation on the effect of the missed notice, with parties asking that documents not noticed be excluded from use in the litigation. As one member of the Advisory Committee noted during the Committee's Spring meeting: "Less compliance with more rules breeds satellite litigation." The "gotcha" possibilities of additional requirements can be considerable. Because we believe that clarifying the notice requirement will resolve most of the notice problems presently occurring under Rule 45, we have concluded that additional notice requirements, with their potential problems, should not be included.

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

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

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

January 22, 2013

MEMORANDUM

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

From: Judge Thomas F. Hogan Thomas F. Hogan

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 11 and 16 of the Federal Rules of Criminal Procedure, which were approved by the Judicial Conference at its September and March 2012 sessions, respectively. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am transmitting: (i) a redline version of the amendments; (ii) excerpts from the Reports of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) excerpts from the Reports of the Advisory Committee on the Federal Rules of Criminal Procedure.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 11. Pleas

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's

---

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

obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); ~~and~~

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and~~:~~

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

* * * * *

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

Changes Made After Publication and Comment

The Committee Note was revised to make it clear that the court is to give a general statement that there may be immigration consequences, not specific advice concerning a defendant's individual situation.

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

* * * * *

(2) ***Information Not Subject to Disclosure.*** Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G) ~~Except as Rule 16(a)(1) provides otherwise~~, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in

connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

* * * * *

Committee Note

Subdivision (a). Paragraph (a)(2) is amended to clarify that the 2002 restyling of Rule 16 did not change the protection afforded to government work product.

Prior to restyling in 2002, Rule 16(a)(1)(C) required the government to allow the defendant to inspect and copy "books, papers, [and] documents" material to his defense. Rule 16(a)(2), however, stated that except as provided by certain enumerated subparagraphs–not including Rule 16(a)(1)(C)–Rule 16(a) did not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government. Reading these two provisions together, the Supreme Court concluded that "a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product." *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

With one exception not relevant here, the 2002 restyling of Rule 16 was intended to work no substantive change. Nevertheless, because restyled Rule 16(a)(2) eliminated the enumerated subparagraphs of its successor and contained no express exception for the materials previously covered by Rule 16(a)(1)(C) (redesignated as subparagraph (a)(1)(E)), some courts have been urged to construe the restyled rule as eliminating protection for government work product.

Courts have uniformly declined to construe the restyling changes to Rule 16(a)(2) to effect a substantive alteration in the scope of protection previously afforded to government work product by that rule. Correctly recognizing that restyling was intended to effect no substantive change, courts have invoked the doctrine of the scrivener's error to excuse confusion caused by the elimination of the enumerated subparagraphs from the restyled rules. *See, e.g.*, *United States v. Rudolph*, 224 F.R.D. 503, 504-11 (N.D. Ala. 2004), and *United States v. Fort*, 472 F.3d 1106, 1110 n.2 (9th Cir. 2007) (adopting the *Rudolph* court's analysis).

By restoring the enumerated subparagraphs, the amendment makes it clear that a defendant's pretrial access to books, papers, and documents under Rule 16(a)(1)(E) remains subject to the limitations imposed by Rule 16(a)(2).

Changes Made After Publication and Comment

No changes were made after publication and comment.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable

sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

* * * * *

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

* * * * *

(2) ***Information Not Subject to Disclosure.*** Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

* * * * *

EXCERPT FROM THE SEPTEMBER 2012 REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted a proposed amendment to Rule 11, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was circulated to the bench, bar, and public for comment in August 2011.

The proposed amendment expands the colloquy under Rule 11 to require advising a defendant of possible immigration consequences when a judge accepts a guilty plea. The amendment was undertaken in light of the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that a defense attorney's failure to advise the defendant concerning the risk of removal fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment. In light of *Padilla*, the advisory committee concluded that a judicial warning regarding possible immigration consequences should be required as a uniform practice at the plea allocution.

In the advisory committee's initial deliberations, a minority of members opposed the amendment on the grounds that it was unwise and unnecessary to add further requirements to the already lengthy plea colloquy now required under Rule 11. A majority of the advisory committee concluded, however, that deportation is qualitatively different from the other collateral

consequences that may follow from a guilty plea, and it therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy. Although *Padilla* speaks only to the duty of defense counsel to warn a defendant about immigration consequences, the Supreme Court's recognition of the distinctive nature of those consequences also supports requiring a judicial warning. The warning would be consistent with the practice of the Department of Justice, which now advises prosecutors to include a discussion of those consequences in plea agreements.

The proposed amendment mandates a generic warning rather than specific advice concerning the defendant's individual situation. The advisory committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship. In drafting its proposal, the advisory committee was cognizant of the complexity of immigration law, which likely will be subject to legislative changes. Accordingly, its proposal uses non-technical language designed to be understood by lay persons and will avoid the need to amend the rule further if there are legislative changes.

Six written comments were received. Only one disagreed with the decision to add advice concerning possible immigration consequences to the plea colloquy. After publication and receipt of written comments, both the Rule 11 subcommittee and the advisory committee reconsidered the foundational question of whether Rule 11 should be amended to require advice concerning immigration consequences in all plea colloquies. Members considered prior concerns about lengthening the plea colloquy, as well as the argument that not all defendants are aliens and the notion that conscientious judges do not need a rule to require them to give warnings in appropriate cases.

After hearing the report of its Rule 11 subcommittee and full discussion, the advisory committee reiterated its support for adding immigration consequences to the plea colloquy. A majority of the advisory committee agreed that the immigration consequences covered by the proposed amendment–removal from the U.S. and denial of citizenship and reentry–are qualitatively different from other collateral consequences, and warrant inclusion in the plea colloquy. As the Supreme Court noted in *Padilla*, "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S. Ct. at 1480 (footnote omitted). Although the Court's decision does not require the proposed amendment, it does provide an appropriate basis for distinguishing advice concerning immigration consequences from other collateral consequences.

The advisory committee accepted the Rule 11 subcommittee's recommendation to make several small modifications in the proposed Committee Note to address concerns raised in the public comments. The changes emphasize that the court should provide only a general statement that there may be immigration consequences of conviction, and not seek to give specific advice concerning a defendant's individual situation. With these changes, the advisory committee recommended approval of the proposed amendment to Rule 11.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendment to Criminal Rule 11, and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

Mark R. Kravitz, Chair

James. M. Cole
Dean C. Colson
Roy T. Englert, Jr.
Gregory G. Garre
Neil M. Gorsuch
Marilyn L. Huff
Wallace B. Jefferson
David F. Levi
Patrick J. Schiltz
James A. Teilborg
Larry D. Thompson
Richard C. Wesley
Diane P. Wood

EXCERPT FROM THE MARCH 2012 REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted a proposed amendment to Rule 16, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment is a technical and conforming amendment to correct what courts have treated as "scrivener's error" in the 2002 restyling of Criminal Rule 16 concerning the protection afforded to government work product. Because this is a technical and conforming amendment, publication for public comment was unnecessary.

In 2011, a district judge brought the decision in *United States v. Rudolph*, 224 F.R.D. 503 (N.D. Ala. 2004), to the advisory committee's attention. The *Rudolph* court identified what it characterized as a "scrivener's error" in the restyling of Rule 16. Prior to restyling in 2002, Rule 16(a)(1)(C) required the government to allow the defendant to inspect and copy "books, papers, [and] documents" material to his defense. Rule 16(a)(2), however, stated that except as provided by certain enumerated subparagraphs — not including Rule 16(a)(1)(C) — Rule 16(a) did not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government. Reading these two provisions together, the Supreme Court concluded that "a defendant may examine documents material to his defense, but,

under Rule 16(a)(2), he may not examine Government work product in connection with his case." *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

With one exception not relevant to this issue, the 2002 restyling of Rule 16 was intended to work no substantive change. Nevertheless, because restyled Rule 16(a)(2) eliminated the enumerated subparagraphs of its successor and contained no express exception for the materials previously covered by Rule 16(a)(1)(C) (redesignated as subparagraph (a)(1)(E)), some courts have been urged to construe the restyled rule as eliminating protection for government work product.

Courts have uniformly declined to construe the restyling changes to Rule 16(a)(2) to effect a substantive alteration in the scope of protection previously afforded to government work product. Correctly recognizing that restyling was intended to effect no substantive change, courts have invoked the doctrine of the scrivener's error to excuse confusion caused by the elimination of the enumerated subparagraphs from the restyled rules.

Although the courts have employed the doctrine of the scrivener's error to read Rule 16 to avoid an unintended change in the protection afforded to work product, the advisory committee concluded that the Rule itself should be amended so that courts do not have to resort to a doctrine that is invoked only to correct drafting errors. By restoring the enumerated subparagraphs, the amendment makes clear that a defendant's pretrial access to books, papers, and documents under Rule 16(a)(1)(E) remains subject to the limitations imposed by Rule 16(a)(2).

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

* * * * *

Respectfully submitted,

Mark R. Kravitz, Chair

James M. Cole
Dean C. Colson
Roy T. Englert, Jr.
Gregory G. Garre
Neil M. Gorsuch
Marilyn L. Huff
Wallace B. Jefferson
David F. Levi
Patrick J. Schiltz
James A. Teilborg
Larry D. Thompson
Richard C. Wesley
Diane P. Wood

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Hon. Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Reena Raggi, Chair
Advisory Committee on Federal Rules of Criminal Procedure

DATE: May 17, 2012

RE: Report of the Advisory Committee on Criminal Rules

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on April 22-23, 2012, in San Francisco, California, and took action on a number of proposals.

* * * * *

II. Action Items

A. Rule 11 (advice re immigration consequences of guilty plea)

Following publication, the Advisory Committee decided to maintain the language of the proposed amendment to Rule 11 as drafted, but adopted several changes in the Committee Note that respond to issues raised in the public comments. The Advisory Committee now recommends that the Standing Committee approve the amendment to Rule 11 and transmit it to the Judicial Conference.

1. The purpose of the proposed amendment

In light of the Supreme Court's ineffective assistance of counsel decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Advisory Committee concluded that a judicial warning regarding possible immigration consequences should be required as a uniform practice at the plea allocution. *Padilla* held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment. The Court stated that in light of changes in immigration law "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S.Ct. at 1480 (footnote omitted). It also noted that "because of its close connection to the criminal process," deportation as a consequence of conviction is "uniquely difficult to classify as either a direct or a collateral consequence" of a plea. *Id.* at 1482. The Committee concluded that the Supreme Court's decision provides an appropriate basis for adding advice concerning immigration consequences to the required colloquy under Rule 11, leaving the question whether to provide advice concerning other adverse collateral consequences to the discretion of the district courts.

In the Committee's initial deliberations, a minority of members opposed the amendment on the grounds that it was unwise and unnecessary to add further requirements to the already lengthy plea colloquy now required under Rule 11. *Padilla* was based solely on the constitutional duty of defense counsel, and it did not speak to the duty of judges. The list of matters that must be addressed in the plea colloquy is already lengthy, and these members expressed concern that adding immigration consequences would open the door to future amendments. This could eventually turn a plea colloquy into a minefield for a judge and expand litigation challenges to pleas despite the rule's harmless error provision.

A majority of the Committee concluded, however, that deportation is qualitatively different from the other collateral consequences that may follow from a guilty plea, and it therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy. Although *Padilla* speaks only to the duty of defense counsel to warn a defendant about immigration consequences, the Supreme Court's recognition of the distinctive nature of such consequences also supports requiring a judicial warning. This would be consistent with the practice of the Department of Justice, which now advises prosecutors to include a discussion of those consequences in plea agreements. Thus, judges should warn a defendant who pleads guilty that the plea could implicate his or her right to remain in the United States or to become a U.S. citizen.

The proposed amendment mandates a generic warning rather than specific advice concerning the defendant's individual situation. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship. In drafting its proposal, the Committee was cognizant of the complexity of immigration law, which likely will be subject to legislative changes. Accordingly, the Committee's proposal uses non-technical language that is designed to be understood by lay persons and will avoid the need to amend the rule if there are legislative changes altering more specific terms of art.

2. The public comments

Six written comments were received. Only one comment disagreed with the decision to add advice concerning possible immigration consequences to the plea colloquy; it recommended that the amendment be withdrawn or at least substantially narrowed.

The remaining comments–which came from immigration specialists, a federal defender, and the National Association of Criminal Defense Lawyers–agreed with the concept of amending Rule 11 to add advice concerning immigration consequences. Two comments supported the amendment as published. Two other comments suggested modifications to the Committee Note. The final comment, from the National Association of Criminal Defense Lawyers, urged the Advisory Committee to withdraw the amendment and pursue a different strategy, placing the burden of providing warnings and advice at the plea colloquy upon the prosecution, rather than the court.

3. The Advisory Committee's recommendation

After publication, the Rule 11 Subcommittee and the Advisory Committee both reconsidered the foundational question whether Rule 11 should be amended to require advice concerning immigration consequences in all plea colloquies. Members considered prior concerns about lengthening the plea colloquy, as well as the argument that not all defendants are aliens and conscientious judges do not need a rule to require them to give warnings in appropriate cases. After hearing the report of the Rule 11 Subcommittee and full discussion, the Advisory Committee reiterated its support for adding immigration consequences to the plea colloquy. A majority of the Committee agreed that the immigration consequences covered by the proposed amendment–removal from the U.S. and denial of citizenship and reentry–are qualitatively different than other collateral consequences, and that they warrant inclusion in the plea colloquy. As the Supreme Court noted in *Padilla*, "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S.Ct. at 1480 (footnote omitted). Although the Supreme Court's decision does not require the proposed amendment, it does provide an appropriate basis for distinguishing advice concerning immigration consequences from other collateral consequences.

There was also support for the requirement that the court provide the general statement of possible immigration consequences in every case. Members emphasized that immigration consequences are an issue in nearly one half of all criminal cases. In fiscal year 2011, 48% of defendants for whom sentencing data were available were non-citizens.[1] Moreover, as emphasized in several of the public comments, attempts to determine the immigration status of individual defendants could raise self-incrimination issues.

The Advisory Committee accepted the Rule 11 Subcommittee's recommendation to make several small modifications in the Committee Note to address concerns raised in the public comments. The changes emphasize that the court should provide only a general statement that there may be immigration consequences of conviction, and not seek to give specific advice concerning a defendant's individual situation. The National Immigration Project argued persuasively that it is neither appropriate nor feasible for judges to give individualized advice, and it provided examples of cases in which courts gave erroneous advice. See 11-CR-005 at 2 n.2. Moreover, attempts to elicit information that would provide the basis for individual advice could raise self-incrimination concerns.

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[1]U. S. Sentencing Commission, 2011 Sourcebook of Federal Sentencing Statistics, Table 9, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table09.pdf .

The Committee Note as published and the changes recommended by the Subcommittee are shown below:

> **Subdivision (b)(1)(O).** The amendment requires the court to include a general statement ~~concerning the potential~~ that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.
>
> For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.
>
> The amendment mandates a generic warning, ~~and does not require the judge to provide~~ not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without ~~first~~ attempting to determine the defendant's citizenship.

By a vote of nine in favor and three opposed, the Advisory Committee agreed to adopt the proposed changes in the Committee Note, and to transmit the proposed amendment to the Standing Committee with the recommendation that it be approved and sent to the Judicial Conference.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 11 be approved as amended and transmitted to the Judicial Conference.

* * * * *

MEMORANDUM

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

From: **Hon. Reena Raggi, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **December 12, 2011**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on October 31, 2011, in St. Louis, Missouri, and took action on a number of proposals. The Draft Minutes are attached.

This report presents one action item: the Committee's recommendation that a proposed amendment to Rule 16 (discovery and inspection) be approved and transmitted to the Judicial Conference as a technical and conforming amendment.

* * * * *

II. Action Item—Rule 16

Earlier this year, Judge Lee Rosenthal brought the decision in *United States v. Rudolph,* 224 F.R.D. 503 (N.D. Ala. 2004), to the Committee's attention. The *Rudolph* court identified what it characterized as a "scrivener's error" in the restyling of Rule 16 concerning the protection afforded to government work product. The purpose of the proposed amendment is to clarify that the 2002 restyling of the rule made no change in the protection afforded to government work product.

Prior to restyling in 2002, Rule 16(a)(1)(C) required the government to allow the defendant to inspect and copy "books, papers, [and] documents" material to his defense. Rule 16(a)(2), however, stated that except as provided by certain enumerated subparagraphs–not including Rule 16(a)(1)(C)–Rule 16(a) did not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government. Reading these two provisions together, the Supreme Court concluded that "a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product." *United States v. Armstrong,* 517 U.S. 456, 463 (1996).

With one exception not relevant here, the 2002 restyling of Rule 16 was intended to work no substantive change. Nevertheless, because restyled Rule 16(a)(2) eliminated the enumerated subparagraphs of its successor and contained no express exception for the materials previously covered by Rule 16(a)(1)(C) (redesignated as subparagraph (a)(1)(E)), some courts have been urged to construe the restyled rule as eliminating protection for government work product.

Courts have uniformly declined to construe the restyling changes to Rule 16(a)(2) to effect a substantive alteration in the scope of protection previously afforded to government work product by that Rule. Correctly recognizing that restyling was intended to effect no substantive change, courts have invoked the doctrine of the scrivener's error to excuse confusion caused by the elimination of the enumerated subparagraphs from the restyled rules. *See, e.g.*, *United States v. Rudolph*, 224 F.R.D. 503, 504-11 (N.D. Ala. 2004), and *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007) (adopting the *Rudolph* court's analysis).

Although the courts have employed the doctrine of the scrivener's error to read Rule 16 to avoid an unintended change in the protection afforded to work product, the Advisory Committee concluded that the Rule itself should be amended so that courts do not have to resort to a doctrine that is invoked only to correct drafting errors. By restoring the enumerated subparagraphs, the amendment makes it clear that a defendant's pretrial access to books, papers, and documents under Rule 16(a)(1)(E) remains subject to the limitations imposed by Rule 16(a)(2).

The Committee voted unanimously to approve the proposed amendment,[1] and agreed to review and vote on proposed note language by email. Note language proposed by the chair and reporters was subsequently approved by the Committee in an email vote.

The Committee discussed the question whether the proposed amendment could be treated as a technical and conforming change, which would not require publication for public comment. Members generally agreed that the expedited procedure for technical amendments would be appropriate because the change was of a technical nature, merely correcting what courts have correctly treated as a "scrivener's error." But one member expressed concern that without the opportunity for a full notice and comment period there might be a mistaken view that the change was depriving defendants of a right to disclosure under the present rule. Finally, members acknowledged that whether a rule change is technical and conforming, or sufficiently substantive to require a full public comment period, would be determined by the Standing Committee.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 16 be approved as a technical and conforming amendment and submitted to the Judicial Conference.

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[1] Following the meeting, at the suggestion of the Advisory Committee's style consultant, Professor Kimble, the cross reference to "Rule 16(a)(1)(A), (B), (C), (D), (F), and (G)" was revised to read "Rule 16(a)(1)(A)-(D), (F), and (G)."

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

January 22, 2013

MEMORANDUM

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

From: Judge Thomas F. Hogan Thomas F. Hogan

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court a proposed amendment to Rule 803 of the Federal Rules of Evidence, which was approved by the Judicial Conference at its September 2012 session. The Judicial Conference recommends that the amendment be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendment, I am transmitting: (i) a redline version of the amendment; (ii) an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the Report of the Advisory Committee on the Federal Rules of Evidence.

Attachments

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

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

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

* * * * *

(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~i) the record or statement does not

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

exist; or

(~~B~~ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

* * * * *

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. *See* Tex. Code Crim. P. Ann., art. 38.41.

Changes Made After Publication and Comment

No changes were made after publication and comment.

AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

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

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

* * * * *

(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

* * * * *

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted a proposed amendment to Rule 803(10), with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was circulated to the bench, bar, and public for comment in August 2011. Scheduled public hearings on the amendment were canceled because no one asked to testify.

The proposed amendment revises the hearsay exception for the absence of a public record or entry to avoid a constitutional infirmity in the current rule in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). Rule 803(10) currently allows the government to prove in a criminal case, through the introduction of a certificate, that a public record does not exist. Under *Melendez-Diaz*, the certificate would often be "testimonial" within the meaning of the Confrontation Clause, as construed by *Crawford v. Washington*, 541 U.S. 36 (2004). Therefore, the admission of certificates (in lieu of testimony) violates the accused's right of confrontation. The proposed amendment to Rule 803(10) addresses the Confrontation Clause problem in the current rule by adding a "notice-and-demand" procedure.

In *Melendez-Diaz*, the Court stated that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise

unconstitutional use of testimonial certificates. As amended, Rule 803(10) would permit a prosecutor who intends to offer a certification to provide written notice of that intent at least 14 days before trial. If the defendant does not object in writing within seven days of receiving the notice, the prosecutor would be permitted to introduce a certification that a diligent search failed to disclose a public record or statement and would not have to produce a witness to so testify. The amended rule would allow the court to set a different time for the notice or the objection. After considering the two public comments it received, the advisory committee recommended approval of the proposed amendment as published.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendment to Evidence Rule 803(10), and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

Mark R. Kravitz, Chair

James. M. Cole	David F. Levi
Dean C. Colson	Patrick J. Schiltz
Roy T. Englert, Jr.	James A. Teilborg
Gregory G. Garre	Larry D. Thompson
Neil M. Gorsuch	Richard C. Wesley
Marilyn L. Huff	Diane P. Wood
Wallace B. Jefferson	

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

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CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Sidney A. Fitzwater, Chair
Advisory Committee on Evidence Rules

DATE: May 3, 2012

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 4, 2012 in Dallas at the SMU Dedman School of Law.

The Committee seeks final Standing Committee approval and transmittal to the Judicial Conference of the United States of one proposal: an amendment to Evidence Rule 803(10)—the hearsay exception for absence of public record or entry—to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*.

* * * * *

II. Action Items

A. Proposed Amendment to Evidence Rule 803(10)

At its June 2011 meeting, the Standing Committee approved releasing for public comment an amendment to Rule 803(10). Rule 803(10) currently allows the government to prove in a criminal case, through the introduction of a certificate, that a public record does not exist. Under *Melendez-Diaz v. Massachusetts* such a certificate would be "testimonial" within the meaning of the Confrontation Clause, as construed by *Crawford v. Washington.* Therefore, the admission of such certificates (in lieu of testimony) violates the accused's right of confrontation. The proposed amendment to Rule 803(10) addresses the Confrontation Clause problem in the current rule by adding a "notice-and-demand" procedure. In *Melendez-Diaz* the Court stated that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. As amended, Rule 803(10) would permit a prosecutor who intends to offer a certification to provide written notice of that intent at least 14 days before trial. If the defendant does not object in writing within 7 days of receiving the notice, the prosecutor would be permitted to introduce a certification that a diligent search failed to disclose a public record or statement rather than produce a witness to so testify. The amended Rule would allow the court to set a different time for the notice or the objection.

At its Spring 2012 meeting, the Committee considered the two comments received on the proposed amendment. The Magistrate Judges' Association favors the proposal. The National Association of Criminal Defense Lawyers ("NACDL") agrees in principle with a notice-and-demand solution, but it has several objections to the proposed amendment. The Committee unanimously voted to amend Rule 803(10) by adopting the language published for public comment, and to transmit the proposed rule to the Standing Committee with the recommendation that it be approved and sent to the Judicial Conference. The proposed Rule and Committee Note are set out in an appendix to this Report.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 803(10) be approved and transmitted to the Judicial Conference of the United States.

* * * * *